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Case Number 265,2023D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NGL ENERGY PARTNERS LP and **NGL ENERGY HOLDINGS LLC**,	:	
Appellants/Defendants-Below/Cross-Appellees,	:	
v.	:	No. 265, 2023
LCT CAPITAL, LLC,	:	On Appeal from the Superior Court of the State of Delaware,
Appellee/Plaintiff-Below/Cross-Appellant.	:	C.A. No. N15C-08-109 JJC-CCLD

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

John L. Reed (I.D. No. 3023)
Peter H. Kyle (I.D. No. 5918)
Daniel P. Klusman (I.D. No. 6839)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com
peter.kyle@us.dlapiper.com
daniel.klusman@us.dlapiper.com

Attorneys for Appellee/Plaintiff-Below /Cross-Appellant LCT Capital, LLC

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NATURE OF PROCEEDING

For nearly ten years, Appellee/Plaintiff-Below/Cross-Appellant LCT Capital, LLC ("LCT"), a merchant banking firm, has been deprived of the compensation it deserves for rendering "extraordinary," "unique" and "unusually valuable services." *LCT Capital v. NGL Energy Partners*, 249 A.3d 77, 100-101 (Del. 2021) ("*LCT-I*"). Those services were the "but for" that enabled Appellants/Defendants-Below/Cross-Appellees NGL Energy Partners LP ("LP") and NGL Energy Holdings LLC ("GP") (collectively, "NGL") to acquire TransMontaigne Inc. ("TransMontaigne") from Morgan Stanley for just $200 million when TransMontaigne and its assets were worth more than $1 billion the day the transaction closed on July 1, 2014 (the "Transaction"). Since 2014, NGL has enjoyed the benefits of this valuable Transaction, while LCT has received nothing for making it happen.

This Court reviewed this case on an interlocutory basis in *LCT-I* after a jury awarded LCT $33 million ($4 million for *quantum meruit* and $29 million for fraud) and held that LCT could not recover benefit-of-the-bargain damages for fraud. *Id*. at 90-96. However, the Court recognized that "LCT provided unusually valuable services," that produced "a large gain on a $200 million acquisition," *id*. at 100, and affirmed the trial court's decision to retry LCT's *quantum meruit* claim because of jury confusion, reasoning:

> The record supports the court's conclusion that the jury could have found that LCT provided services worth more than the standard investment banking fee but inferred that it was supposed to spread that single award across the two different damage lines. Thus, the *quantum meruit* damages award may have compensated LCT for the baseline value of its investment banking services, and the fraudulent misrepresentation damages award may have compensated LCT for the extraordinary services that it provided unique to the TransMontaigne acquisition. If this occurred, it would be necessary to add both awards [for a total of $33 million] to capture the full value that the jury placed on LCT's uncompensated work.

Id. at 101. A second jury awarded LCT $36 million.

As shown herein, NGL ignores the relevant record to raise meritless arguments. The re-trial did not involve camouflaged "fraud and contract claims," as NGL disingenuously states on the first page of its Opening Brief ("OB"). The trial judge conducted the re-trial exactly as this Court contemplated in *LCT-I*, and NGL should stop the hyperbole. Two Delaware juries have now awarded LCT damages in excess of $30 million. "Under Delaware law, *enormous deference* is given to jury verdicts" and "factual findings of a jury will not be disturbed if there is *any* competent evidence upon which the verdict could reasonably be based." *Young v. Frase*, 702 A.2d 1234, 1236-1237 (Del. 1997) (emphasis added). The amount of the second jury verdict is exactly what this Court anticipated in *LCT-I* and it is time for NGL to pay what it owes.

Here, the verdict is supported by overwhelming evidence that LCT:

- found TransMontaigne for NGL;
- brought years of experience with pipelines and energy transactions;
- had a team that included the former Managing Director of Morgan Stanley who built and ran the TransMontaigne business and had unparalleled insight into its operations/value;
- secured NGL's invitation to Morgan Stanley's sale process;
- led the due diligence process;
- educated NGL on the "full perimeter" of TransMontaigne's assets;
- developed the critical and extensive financial modeling for the Transaction;
- was the negotiator between NGL and Morgan Stanley;
- was the only advisor that understood Morgan Stanley's regulatory problems and need to sell the "full perimeter" of TransMontaigne quickly;
- drafted the successful bid; and
- identified, solved and negotiated a working capital issue that resulted in a $140 million cash windfall to NGL.

This is why NGL's CEO, Michael Krimbill ("Krimbill"), admitted in a letter to his investors, dated October 24, 2014 ("2014 Letter"), that NGL "*never* would have had this opportunity at our price *without* LCT" (A280 (emphasis added)) and later admitted his letter was accurate. (B3050-3058.)

As to fair compensation, *quantum meruit* means "as much as he has deserved." Del. P.J.I. Civ. § 19.27 (2000). On this, the evidence was equally overwhelming. LCT acted as a merchant bank and the testimony from *every* witness confirmed the parties never discussed LCT receiving anything other than equity as a fee. In a fee proposal, dated May 14, 2014, LCT requested stock in TransMontaigne. (A260-262.) The next day, NGL countered with a 2% interest in the NGL GP, saying it would be worth $66.8 million in a year, $100 million in four years, and that LCT would benefit through NGL's ownership of TransMontaigne. (A264-265.) LCT then reviewed/discussed information on NGL and agreed to accept: 2% of the GP; a tax "gross up"; and an option to purchase 3% of the GP at a discounted entity valuation of $700 million. The value LCT placed on its services was $43.8 million and it is undisputed that the parties *never* discussed LCT receiving anything other than equity valued far in excess of what the jury awarded.

Unfortunately, the Transaction closed before an agreement was executed. But then, in his 2014 Letter—vetted by two NGL directors involved in the discussions—NGL's CEO sought to purchase from his GP investors 5% of the GP (worth $50 million) so NGL could sell the interests to LCT for just $21 million for a net fee of $29 million. Krimbill explained why this fee was "fair":

> The *value created* for NGL General Partner [50% of LP] from this transaction is approximately *$500 million*. …

> … We are asking for a compensation arrangement for LCT as *we would never have had the opportunity* to purchase TransMontaigne Inc. for $200 million or a 3.0x multiple of EBITDA without them. We are proposing that LCT acquire 5% [of] our NGL General Partner for a $21 million purchase price.
>
> We would like to have the NGL General Partner purchase this 5% for $50 million so there is no dilution *($1 billion enterprise value*), and then sell it to LCT.
>
> This equates to a *$29 million success fee* which appears to be high compared to a typical 1%-2% investment banker success fee. We are looking at the fee from the perspective of the value created to the NGL General Partner and the very attractive purchase price of $200 million.
>
> … I feel this is a *fair arrangement*, although seemingly expensive, as we *never* would have had this opportunity at our price *without* LCT bringing it to us.

(A279-280 (emphasis added).)

Sophisticated executives/directors, with experience in complex transactions and the engagement of advisors, do not negotiate and represent as "fair" to their investors, terms that are not "fair" or "market." Yet, in the face of the undisputed record that the parties *never* discussed LCT receiving a so-called "typical" advisor fee of 1-2% of the $200 million price NGL paid for TransMontaigne, NGL continues to argue that such a fee is the only thing that is "reasonable." Of course, NGL made that argument, and the jury rejected it. Ironically, NGL wants a third trial so it can again try to sell to a jury something the parties *never* discussed, but this time preclude evidence of what the parties *actually* discussed.

Respectfully, NGL's counter-factual approach should be rejected for several independent reasons. First, it contradicts NGL's CEO, who admitted in his 2014 Letter that a $29 million fee was "fair," explained why, and disavowed a "typical" fee for LCT. Second, NGL Director John Raymond ("Raymond"), who was heavily involved in the discussions and was a first-hand witness to LCT's services, admitted that "what was being discussed between LCT and NGL wasn't the typical investment banking fee" and "this wasn't the typical investment banking deal." (B2308; B2358.) Third, LCT's expert opined that there is no "typical" buy-side investment banking fee, that fees are negotiated based on the unique details of a transaction and many factors, including the financial result achieved because the goal on the buy-side is to get the best value for the lowest price and the "quantum" for services that create $1 is less than for services that create $1 billion. Fourth, what NGL is proposing is inconsistent with this Court's precedent. *See Marta v. Nepa*, 385 A.2d 727, 730 (Del. 1978) ("However, evidence of a standard commission is neither equivalent to nor commensurate with the evidence required for determining a recovery based on *quantum meruit*.").

Moreover, NGL's argument that the parties' fee discussions are irrelevant and inadmissible ignores *LCT-I* and the law of the case. *See LCT-I*, 249 A.3d at 85 (quoting trial court when affirming new trial: "If the CEO of NGL made representations that he believed the compensation package suggested by LCT was

fair and appropriate and was working toward accomplishing it, those comments are relevant to the *quantum meruit* claim."). NGL's position is also contrary to consistent precedent from this Court. *See Bellanca Corp. v. Bellanca*, 169 A.2d 620, 626 (Del. 1961) (holding that, where a contract claim fails, a plaintiff is "at liberty to sue on a *quantum meruit* theory and prove the express contract as evidence of the value of his services"); *Pike Creek Professional Center v. Eastern Elec. & Heating, Inc.*, 540 A.2d 1088 (Table), 1988 WL 32028, at *2 (Del. 1988) (contractual discussions are "'evidence of an admission by the parties of [the] value'" of a plaintiff's services for purposes of *quantum meruit*) (quoting *Emerson v. Universal Prods. Co.*, 162 A. 779, 781 (Del. Super. 1932) ("In [*quantum meruit*] cases the contract price has always been admitted as evidence of an admission by the parties of value and the only discussion has been as to whether the contract alone fixes the price or whether it is only to be considered together with other testimony of value")).

NGL also lost the credibility battle. NGL was entitled to take its chances with a jury, but not the way it chose to proceed. Whether one uses the legal term "perjury," or the colloquial term "liar," NGL made a mockery of the oath and our judicial system, and the jury saw through it. After the first trial, the presiding judge said the following to NGL: "Any reasonable review of the jury's decision found that they believe your client was a $44 million liar. … That was a statement concerning the credibility of your client … you have a client that I have very little

respect for." (B1282-1283.) Learning nothing, NGL kept it up during the second trial. For example:

- NGL told the jury "the evidence will show LCT never … never acted as a merchant bank" (B1774), when it admitted "LCT is an investment and merchant banking firm" (B628; B637; B639) and every witness confirmed the parties never discussed LCT receiving anything other than equity as its fee, like a merchant bank (B2781);

- Krimbill testified that LCT "added no value" (B2948-2950) and TransMontaigne was only worth $200 million (B3053), directly contradicting both his 2014 Letter, representing that the "value created for the NGL GP [50% of NGL LP] was approximately $500 million" (A278), and his own voice caught on tape saying: "I was scared to think how—how good this deal was" (B571);

- Krimbill testified at deposition that LCT's "role was providing [an] introduction … and some limited recommendations on how we would cut costs" and that he had no recollection of LCT's founder, Louis C. Talarico ("Talarico") "participat[ing] in any negotiations with Morgan Stanley" (B719), despite saying in his 2014 Letter that Talarico "was able to initiate negotiations with MS" and finally admitted at trial that LCT "talked with Morgan Stanley on our behalf" (B2978; B2985);

- Krimbill claimed that the NGL team figured out and negotiated the working capital issue, but was confronted with a recording between he and Talarico about the $140 million Morgan Stanley put into the Transaction, in which Krimbill said: "You did that … You talked them into that" (B571); and

- Perhaps thinking they could finally get away with a lie that could not be exposed, Krimbill and a former NGL executive testified that the NGL team prepared the critical financial modelling for the Transaction, but unbeknownst to NGL and its counsel, the native excel spreadsheet for the model used to approve the Transaction had hidden comments that became unhidden with a click on the computer screen, which showed that LCT was the source of all the inputs (B216-220), leading to what was truly a "Perry Mason" moment.

In sum, LCT demonstrated the falsity of NGL's narratives with documents and cross-examination of NGL's witnesses, and the jury properly awarded LCT reasonable compensation. Seeking to avoid its financial responsibility, NGL has asserted baseless evidentiary arguments.

NGL's first argument—that the value created by LCT's services is inadmissible—is not the law, *see Pike Creek*, 1988 WL 32028 at *2 (affirming trial court's *quantum meruit* award based on "value of the benefit conferred" on defaulting party), and would make a *quantum meruit* determination unworkable. Investment/merchant banking services are not valued like the painting of a house, where a court can take the price of paint and a reasonable hourly rate to calculate reasonable compensation. As noted, LCT's expert testified that a variety of factors go into valuing investment banking services, and one cannot determine the "quantum" for services without knowing whether the services produced $1 or $1 billion. The "quantum" of services is inextricably linked to the result achieved, and therefore, evidence of the value delivered to NGL at closing is neither irrelevant nor prejudicial to a *quantum meruit* analysis. Indeed, Krimbill's representation in his 2014 Letter that a fee of $29 million for LCT was "fair" was based, in part, on "the value created to the NGL General Partner" (A279), because that was one important purpose of LCT's services.

Furthermore, all three trial judges made clear that evidence of value creation was only inadmissible to the extent it referred to *post*-closing value. Here, LCT did *not* present any value unrelated to its services or value created by independent events occurring after the closing, did *not* ask for a portion of the value it created, and *only* presented evidence of value delivered to NGL *as of the July 1, 2014, closing date*.

NGL's second argument—that LCT sought and received "benefit-of-the-bargain" damages—is disingenuous. Putting aside the evidentiary distinction between arguing that a party agreed something is "fair" versus arguing the party agreed to terms forming an enforceable contract, LCT was not even allowed to argue the former, was precluded from using a litany of terms, including "agreement," "agreed to," "promised," "our deal," etc., and iterations thereof, and had to redact any such terms from admitted documents. Thus, NGL's argument that LCT presented a camouflaged "contract" claim and obtained "benefit-of-the-bargain" damages is not supported by the record. All LCT did was present the parties' discussions regarding compensation and all three trial judges agreed that such evidence was relevant and admissible. *See also LCT-I*, 249 A.3d at 85 (quoting trial court: "If the CEO of NGL made representations that he believed the compensation package suggested by LCT was fair and appropriate and was working toward accomplishing it, those comments are relevant to the *quantum meruit* claim.").

NGL also conflates this Court's prior ruling on LCT's fraud claim with LCT's *quantum meruit* claim and overlooks that *quantum meruit* is not a *tort* (like fraud) but is instead "a quasi-*contract* claim." *Petrosky v. Peterson*, 859 A.2d 77, 79 (Del. 2004) (emphasis added). This Court held in *LCT-I* that the evidence that formed the first jury's verdict for fraud could be part of a *quantum meruit* award. 249 A.3d at 101 ("[I]t would be necessary to add both awards to capture the full value that the jury placed on LCT's uncompensated work"). In any event, the jury did *not* award LCT an amount tied to any specific contract terms, which would be the expected result of "benefit-of-the-bargain" damages, but rather chose a number above what NGL claimed LCT's services were worth ($1.5-4 million) and *below* what LCT claimed its services were worth ($43.8 million).

NGL's primary focus appears to be that it received some favorable rulings on motions *in limine*, the case was re-assigned by the president judge, and the new judge clarified some "minor rubs" to those rulings *to keep the trial in line with* this Court's decision in *LCT-I* and the law of the case. (A775.) LCT did not "Sow[] Chaos" (OB at 9) and this appeal does not turn on a disqualification issue under Rule 2.11(A)(4) of the Delaware Judge's Code of Judicial Conduct. The critical pleading on that issue (B1433-1466) remains under seal and, *if* necessary, should be left for another day and another forum. What is important here is that NGL has presented no basis to challenge the president judge's decision to re-assign the case. *See* Super. Ct. Civ.

R. 40(a); *In re Petition of McLeod*, 99 A.3d 227 (Table), 2014 WL 2927411, *2 (Del. 2014) (absent arbitrary action, president judge controls assignments and court's docket).

Relatedly, NGL has no grounds to complain about changes to *in limine* rulings. *See Dawson v. State*, 581 A.2d 1078, 1087 (Del. 1990) ("*[I]n limine*" is defined as "[o]n or at the threshold; at the very beginning; [or] preliminarily" and "an *in limine* ruling is subject to change when the case unfolds […] 'even if nothing unexpected happens at trial, the [trial] judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.'") (citations omitted).

On cross-appeal, LCT's position is that the jury's verdict should be respected, even though it was LCT's case that was hampered by evidentiary rulings. In that regard, LCT raises three issues. LCT first challenges the trial court's refusal to include pre-judgment interest in its post-judgment interest calculation, which deprived LCT of the full benefit of its judgment. LCT's second and third issues only require resolution if the Court remands the case for a third trial. If that occurs, LCT seeks to ensure that it can present its entire case and therefore appeals the trial court's summary judgment dismissal of its breach of contract and unjust enrichment claims in 2018 (not part of the interlocutory review). This was reversible error because genuine disputes of material fact existed as to whether the parties agreed on material compensation terms and therefore formed an enforceable oral contract or contract

by performance. The trial court also held that LCT had an adequate remedy with its *quantum meruit* claim, but that would be in error if this Court concludes that unjust enrichment entitles LCT to remedies and evidence not available under a *quantum meruit* theory.

Respectfully, there is no need for a third trial.

SUMMARY OF ARGUMENT ON APPEAL

1. DENIED. Evidence of the value created by LCT's services was properly admitted. LCT originated the Transaction and made it possible for NGL to acquire TransMontaigne for $200 million when it was worth more than $1 billion at closing. An investment/merchant banker's job on the buy-side is to produce the highest value for the lowest price. Therefore, evidence of the value delivered to NGL at closing is neither irrelevant nor prejudicial to a *quantum meruit* analysis.

NGL cites inapposite cases standing for the principle that *quantum meruit* damages may not be calculated as a piece of the benefit conferred on a defendant, but LCT made no such argument. Such evidence was presented to show the quality of LCT's services. This case was tried consistent with this Court's prior review. *LCT-I*, 249 A.3d at 100 ("LCT provided unusually valuable services" that produced "a large gain on a $200 million acquisition").

2. DENIED. The parties' discussions about LCT's compensation were properly admitted. Such evidence is relevant to the parties' contemporaneous understanding of the value of LCT's services. Furthermore, the trial court gave limiting instructions to the jury that it was not being asked to find the existence of a contract, and that the evidence of the parties' compensation discussions should only be considered for the limited purpose of valuing LCT's services. LCT neither asked for, nor was it awarded, benefit-of-the-bargain damages.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

I. The trial court erred in its June 20, 2023 Memorandum Opinion (Ex. "B") when it calculated post-judgment interest on the jury award of $36,000,000 rather than a combination of the jury award and the then-accrued pre-judgment interest of $19,945,726.02. A final judgment is what is entered by a trial court, not what is ultimately determined following appeal. Absent an appeal, the prevailing party has the immediate benefit of a judgment, which includes pre-judgment interest, and can invest the award. That is why this Court requires a bond to protect a judgment pending appeal. Sup. Ct. R. 32. Here, LCT would have been entitled to $56 million as of June 30, 2023. But now, LCT is being deprived of the full benefit of its judgment because NGL keeps the interest on the $19 million that is already owed to LCT. This issue is governed by 6 *Del. C.* § 2301, which applies to all judgments, and clarification is needed so that the statute is consistently applied.

II. The trial court erred in its July 19, 2018 Memorandum Opinion on Defendants' Motion for Partial Summary Judgment (Ex. "C") when it dismissed LCT's breach of contract and unjust enrichment claims. A genuine dispute of material fact existed as to whether the parties had agreed on material compensation terms. To the extent this Court concludes that unjust enrichment entitles LCT to remedies and evidence not available under a *quantum meruit* theory, the Court should reinstate LCT's unjust enrichment claim.

STATEMENT OF FACTS

LCT avoids repeating background recited by NGL, Sup. Ct. R. 14(b)(v), however, NGL's statement of facts takes snippets of the record out of context and ignores critical evidence supporting the jury's verdict. Consequently, LCT filed an Appendix with complete transcripts and, in addition to the facts discussed herein, LCT directs the Court's attention to the facts discussed in *LCT-I*, 249 A.3d at 81-89, and the PowerPoint used during LCT's closing statement, which contains screen captures of the relevant testimony and exhibits. (B3857-3987.)

A. LCT Enables NGL To Acquire TransMontaigne For Just $200 Million

1. LCT's Founding And Purpose

After successful careers at JPMorgan and Goldman Sachs, where he gained invaluable experience with energy transactions and the Colonial Pipeline, Talarico founded LCT in 2008 as a merchant banking firm. (B1830-1834.) LCT identifies and facilitates unique acquisition opportunities by assembling bespoke teams of industry and subject-matter experts. (B1835-1836.)

In 2009, TransMontaigne was owned by Morgan Stanley. TransMontaigne owns fuel storage tanks (physical assets) and has rights to sell fuel on the Colonial Pipeline (marketing business), which runs from Texas to New York. (B1837-1840.) Talarico knew that when Morgan Stanley converted from an investment bank to a commercial bank, the regulations for commercial banks would require Morgan

Stanley to sell TransMontaigne in what is commonly known as a "regulatory divestiture." (B1827-1830.) Talarico also knew (i) this sale would not be easy because Morgan Stanley had to sell both the physical assets and the marketing business ("full perimeter") to satisfy the regulators and (ii) the need to sell the "full perimeter" quickly and with certainty would allow a lower bid to trump a partial sale at a higher price. (*Id.*; B1838-1846.)

LCT's team consisted of: Talarico; Karl Kurz, a senior energy executive with contacts throughout the industry; Olav Refvik, a retired Managing Director from Morgan Stanley who built and headed the TransMontaigne operations; and Christina Scalzo, a former Goldman Sachs analyst with extensive due diligence and financial modeling experience for energy companies. (B1939-1942.)

2. LCT Finds TransMontaigne For NGL

On March 6, 2014, LCT contacted Raymond, a Director of NGL and the CEO of Energy Minerals Group ("EMG"), which owns a significant interest in NGL. (B1936; B1.) Raymond was very interested, and LCT secured an invitation for EMG to Morgan Stanley's sale process. (B11-12.) Patrick Wade, an NGL Director and EMG principal, was also involved. NGL was brought into the process and EMG dropped out, but Raymond and Wade remained involved in their capacities as NGL Directors.

3. LCT Creates Extensive Financial Models To Educate NGL On TransMontaigne

Ordinarily, a seller has internal financial models for potential buyers, but Morgan Stanley had integrated TransMontaigne into its financials, so no such models existed for TransMontaigne. (B1843-1846; B3 ("this kind of file does not exist to our knowledge").) This required LCT to create "as educated a model as possible" based on thousands of documents in the data room. (B2-10; B1823; B1953.)

LCT ultimately created more than 40 versions of the financial model, which informed the parties' understanding of TransMontaigne's value. (S*ee, e.g.*, B216-520.)[1] At trial, NGL claimed that it created its own financial models and did not rely on LCT's work, but on cross-examination, after hidden comments were revealed in an excel spreadsheet, NGL was forced to concede that NGL used LCT's model. (B3377-3383; B3907-3915.) Former *NGL employee* Travis Huey, a key member of NGL's acquisition team, confirmed LCT's work and testified that NGL would never have been able to understand the TransMontaigne business without LCT. (B3668.)

[1] LCT only included one model in its Appendix because including others would require thousands of pages. LCT's expert, Kevin D. McQuilkin ("McQuilkin"), said this about LCT's work: "I saw the model they built. It's really, really crazy, and not what bankers usually do." (B2815.)

4. LCT Drafts The Successful Bid And Negotiates With Morgan Stanley

After considerable analysis and discussion, LCT recommended a purchase price and drafted the bid submitted by NGL on May 16, 2014. (B34-172.) Morgan Stanley expressed disappointment but did not reject it. (B1963-1964.) During negotiations, Talarico "talked with Morgan Stanley on [NGL's] behalf." (B2985.)

5. LCT Solves A Working Capital Issue, Resulting In A $140 Million Windfall To NGL

During due diligence, Morgan Stanley indicated that TransMontaigne had *negative* $70 million in working capital. (B173-174.) Talarico then "waded through more than eight years" of TransMontaigne SEC filings to figure out that Morgan Stanley was wrong and that the capital needed to run the business was on Morgan Stanley's books. (B1998-2002; B2975; B175-213.)

Talarico discussed his conclusions with Morgan Stanley and convinced them to remedy the problem. (B215 ("On working capital, they understand our perspective and working capital is not an issue anymore. He said, 'that box is checked.'").) Talarico's work and negotiations resulted in Morgan Stanley putting $140 million back into the business. (B2005-2007.) During a telephone call with Talarico, Krimbill praised Talarico's efforts, saying: "You did that. … You talked them into that." (B571.) Krimbill also conceded this issue at trial. (B2975-2976.)

6. LCT Closes The Deal For NGL

NGL attempted to insert new terms into the deal—against LCT's advice—and nearly scuttled it. (B1992-1993; B213 (Wade suggesting to Raymond on May 27, 2014 that they take action on a related matter "before NGL Holdings loses the TransMontaigne deal").) LCT then saved the Transaction by pushing the issue up to Morgan Stanley's CEO. (B521-524.) On May 28, 2014, after reporting to Krimbill, Raymond, and Wade that the Transaction was moving forward, Raymond responded to Talarico: "That's a pleasant surprise! Don't know what you told them but whatever it was…well done!!" (*Id.*)

NGL signed a Purchase Agreement on June 8, 2014, and the Transaction closed on July 1, 2014. (B526-527; B2047.) The value of TransMontaigne and its assets *at closing* was more than $1 billion. (B1927; B3856.)

B. The Parties Discuss LCT's Compensation But NGL Refuses To Pay For LCT's Extraordinary Services

1. The Parties Have Consistent Compensation Discussions

As a merchant bank, LCT expected to be compensated with equity in TransMontaigne. (B1834-1835.) On May 14, 2014, Talarico sent Raymond the "LCT Capital Fee Proposal," seeking a 15% stake in TransMontaigne with an option to purchase an additional 10%. (A259-262; B2105-2112.)

The next day, Raymond (after speaking with Krimbill) proposed that LCT take 2% of the NGL GP instead, indicating it would be worth $66.8 million by December 2014 and $100 million in four years. (B2122; A269-271.) Being familiar with TransMontaigne's value but not NGL's, Talarico did his own assessment, talked to Krimbill, and Krimbill proposed that LCT receive 2% of the GP with an option to purchase another 3% at a discounted valuation, net of taxes. (A277.) Raymond memorialized this understanding: "no tax effect net to [LCT]." (A267-268.) From May 17, 2014 to the closing of the Transaction, no other compensation terms were discussed. (B2138; B3078-3079 (Krimbill: "Q. We haven't seen one E-mail talking about a cash payment or any other fee other than the 3 percent and the 2 percent and the tax, correct? A. Correct").)

On June 4, 2014, Talarico and Krimbill met with NGL's attorney, Bruce Toth, to discuss memorializing the fee discussions. Toth asked Talarico to send him an email confirming the terms Krimbill dictated to Toth. (B2139-2140.) Talarico sent an email stating: "We will receive 2% of GP at $700 million valuation; NGL to pay taxes. We will have the opportunity to purchase up to 3% of the GP at a $700 million valuation." (*Id.*; B525.) LCT valued its services at $43.8 million. (B2140-2141.) *See* 5 A.L.R.3d 947 (1966).

Because the parties were focused on finalizing the Transaction, a fee agreement was never executed, and the Transaction closed on July 1, 2014.

2. NGL Confirms The Extraordinary Nature Of LCT's Services, And Explains Why A Fee For LCT Equating To $29 Million Is "Fair," But Pays Nothing

On October 24, 2014, Krimbill wrote to his GP partners to try to purchase 5% of the GP (worth $50 million) so NGL could sell the interests to LCT for just $21 million for a net fee of $29 million. This 2014 Letter offers clear insight into NGL's contemporaneous views of LCT's performance and the value of its services:

> The genesis of the 'Morgan Stanley' transaction began with the Dodd Frank legislation that required MS to divest of TransMontaigne. It appeared that MS conducted an auction with refiners that was not successful. *At this point the firm of LCT Capital, LLC (LCT) (Lou Talarico) was able to initiate negotiations with MS and propose a purchase price in the $200-$250 million range that was not rejected.*
>
> The *value created* for the NGL General Partner [half of the NGL LP] from this transaction is approximately *$500 million*. …
>
> … We are asking for a compensation arrangement for LCT as *we never would have had the opportunity* to purchase TransMontaigne Inc. for $200 million or a 3.0x multiple of EBITDA without them. We are proposing that LCT acquire 5% [of] our NGL General Partner for a $21 million purchase price.
>
> We would like to have the NGL General Partner purchase this 5% for $50 million so there is no dilution (*$1 billion enterprise value*), and then sell it to LCT.
>
> This equates to a *$29 million success fee* which *appears* to be high compared to a typical 1%-2% investment banker success fee. We are looking at the fee from the perspective of *the value created to the NGL General Partner* and the

> very attractive purchase price of $200 million. LCT was able to get MS to deal directly with NGL outside of an auction process *which may have saved us tens of millions of dollars*. Other potential buyers such as Buckeye Partners were estimated to be offering *$450 million*, per the Wall Street Journal.
>
> … I feel this is a *fair arrangement*, although *seemingly* expensive, as *we never would have had this opportunity at our price without LCT bringing it to us*.

(A279-280 (emphasis added).) This 2014 Letter was vetted by Raymond and Wade (B625-626), and Krimbill admitted that it was accurate. (B3050-3058.)

Krimbill's 2014 Letter refers to 5% of the GP (conflating the 2% and an option on 3%), but his $29 million calculation comports with the only terms the parties discussed from May 17, 2014 to the closing: 2% of the GP at a billion-dollar valuation is $20 million and 3% at a $700 million valuation is $9 million ($30M minus $21M) for a total of $29 million. Although this 2014 Letter does not mention the tax gross-up, the taxes would be paid by NGL and would not be expected to be discussed in a letter to investors focused on purchasing their GP interests.

Despite the parties consistent discussions and the admissions in NGL's 2014 Letter, NGL never offered the 5% of the GP, never paid LCT anything, and Krimbill told Talarico: "If you want your fee, you have to sue me." *LCT-I*, 249 A.3d at 84.

After an extensive procedural history, and a retirement and reassignment, a third judge conducted a second jury trial between February 6 and February 15, 2023. The jury entered a $36 million verdict. (A1085.)

ARGUMENT ON APPEAL

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF BOTH THE VALUE CREATED BY THE TRANSACTION AND THE PARTIES' COMPENSATION DISCUSSIONS

A. Question Presented

Did the trial court err in allowing the jury to consider evidence of both the value created by the Transaction and the parties' compensation discussions? (Preserved at B1409-1432.)

B. Scope of Review

The standard of review for evidentiary issues on appeal is abuse of discretion. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 535 (Del. 2006). "[T]o find reversible error in an evidentiary ruling, [the Court] must find not only error in the ruling, but that a 'substantial right of the party is affected.'" *Mercedes-Benz of N. Am., Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1365 (Del. 1991) (quoting D.R.E. 103(a)). If the Court finds a "clear abuse of discretion," it then determines "whether the error rises to the level of significant prejudice which would act to deny the defendant a fair trial." *Harper v. State*, 970 A.2d 199, 201 (Del. 2009).

C. Merits of Argument

1. Evidence Of The Value Created As Of The Closing Date Was Properly Admitted For The Limited Purpose Of Assessing The Quality/Value Of LCT's Services

In arguing that the trial court erred by admitting "value-created/benefit-conferred evidence" (OB at 16), NGL attempts a "bait and switch." NGL presents cases standing for the unremarkable proposition that *quantum meruit* damages cannot be all or a piece of the benefit conferred on a defendant. That is, if a defendant received $1 billion, the plaintiff cannot claim *quantum meruit* damages of $1 billion. *But that is not what LCT sought*, *nor what the jury awarded*. LCT offered evidence of what its services produced for the sole purpose of demonstrating the quality/value of its services. NGL can point to no instance in which LCT asked the jury to award all or part of what NGL received. Nor does the jury's verdict correlate to any percentage of that value. Thus, NGL's argument is a strawman.

Moreover, the case law NGL cites (OB at 20-21) supports LCT's position. For example, in *Farrell v. Whiteman*, the plaintiff's high-quality architecture work left the defendant with "a significant net profit." 268 P.3d 458, 463 (Idaho 2012). The defendant argued on appeal that what the plaintiff's work produced should not have been considered in assessing *quantum meruit* damages, but the Idaho Supreme Court disagreed:

> While it is true that the valuation should not be the *amount* of the benefit received by the other party, it is appropriate to consider the quality of the work in order to adequately determine the value of the services rendered. *For example, the reasonable value of high-quality architectural services will be greater than the reasonable value of mediocre quality or subpar architectural services*.

Id. (emphasis added). Because LCT's job was to get the best deal possible for NGL, the value LCT created demonstrates the high quality of its services. Krimbill's 2014 Letter recognized this.

NGL is pushing an interpretation of *quantum meruit* whereby every investment banking fee would fall within the same *de minimis* range. NGL's approach would penalize advisors for adding value. For example, if a "typical" investment banker deserves 2% of a transaction's *purchase* price, a banker helping a company acquire a billion-dollar target for $800 million would receive a fee four times larger than a banker closing the deal for $200 million ($16M v. $4M). That defies common sense and industry practice, which may be why the jury rejected it. NGL also overlooks that—according to NGL Director Raymond— "what was being discussed between LCT and NGL wasn't the *typical* investment banking fee" and "this wasn't the *typical* investment banking deal." (B2308; B2358 (emphasis added).) Clearly, evidence of value creation was properly admitted to show the quality and therefore value of LCT's services.

a. Evidence Of Value Creation Was Necessary To Assess The Quality/Value Of LCT's "Unique" And "Extraordinary" Services

The trial court articulated exactly why evidence of what LCT produced for NGL was required to determine the value of LCT's services:

> *[I]n this case, we're not dealing with obtaining a fence at $10 an hour*. We're not dealing with a situation where we're having a car worked on. We're dealing with a very specialized and particular service, and that – the purpose of that service is to increase value for the customer – in this case, NGL. And when that entire scope and purpose of that is to increase value for the customer, I don't – it's very difficult for me to parse out how one party is not able to provide testimony with an opinion as to what that – the value of that service is.

(A774 (emphasis added).) This Court likewise observed that "LCT played an unusually valuable role in the transaction," and described LCT's services as "extraordinary" and "unique." *LCT-I*, 249 A.3d at 80, 101. Where services are unique and their value cannot be easily ascertained with objective data, broader evidence of what the services produced is vital to determine the value of the services.

This Court has recognized that the benefit conferred upon a defaulting party is a factor to be considered for *quantum meruit* purposes. *Pike Creek*, 1988 WL 32028 at *2 (affirming trial court's *quantum meruit* award, which involved consideration of "value of the benefit conferred" on defaulting party). Indeed, this Court noted that LCT's services resulted in "a *large gain* on a $200 million acquisition," and held that if a jury "found that LCT provided services worth more

than the standard investment banking fee" and that LCT should be compensated "for the *extraordinary* services that it provided *unique* to the TransMontaigne acquisition," it "would be necessary to add both awards [for a total of $33 million] to capture the full value [a jury could place] on LCT's uncompensated work." *LCT-I*, 249 A.3d at 100-101 (emphasis added).

On the buy-side, an investment banker's assignment is to get the best deal at the lowest price, and the value of the services is inextricably tied to the value the services produced. NGL's position directly contradicts its CEO: "We are looking at the fee from the perspective of the value created to the NGL General Partner and the very attractive purchase price of $200 million." (A279.) Krimbill said that because value creation was a significant purpose of LCT's services.

b. NGL's Case Law Is Inapposite

As noted, NGL cites inapposite opinions from trial courts and foreign jurisdictions. In *Hynansky v. 1492 Hospitality Grp., Inc.*, the plaintiff sought "to recover the *long-term value* of the benefits conferred upon Defendants by Plaintiff's efforts." 2007 WL 2319191 at *1 (Del. Super. Aug. 15, 2007) (emphasis added). Again, LCT never sought "to recover the … value of the benefits conferred" on NGL. LCT never suggested it was entitled to all or even part of what its services produced for NGL. Nor did LCT seek credit for any "long-term value" created *after* the Transaction closed. Rather, LCT only provided evidence of the non-speculative

value (known and susceptible to proof) created for NGL as of the July 1, 2014 closing date (B3693-3698; B3856), which the jury was free to consider as evidence of the exceptional job LCT performed.[2]

NGL's citation to *Middle States Drywall, Inc. v. DMS Properties-First, Inc.*, 1996 WL 453418 (Del. Super. May 28, 1996), is ironic because *Middle States* supports LCT's position. There, the court found no agreement, and for *quantum meruit*, the parties disagreed about the amount of value provided by the plaintiff. *Id.* at *10-11. The court held that "[*q*]*uantum meruit* is a retrospective remedy which looks at what was <u>*actually received by the defendant*</u>." *Id.* at *11 (emphasis added).[3]

[2] NGL claims that LCT's value creation numbers were "speculative figures … based on events that never occurred" (OB at 14), but that is wrong, and the jury weighed and rejected NGL's competing evidence. Talarico testified that TransMontaigne and its assets were worth approximately $1.09 billion <u>*as of July 1, 2014*</u>, that his calculation had nothing to do with future value or future plans NGL may have had, and that LCT was not claiming credit for any value created by events that occurred after the closing. (B3693-3698; B3856.) Simply put, LCT's evidence of the value created for NGL was based entirely on information "known [and] susceptible to proof" as of the closing date. *Cf. Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 300 (Del. 1996).

[3] In *Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, the court found there was no right to recovery under a quasi-contract theory, and therefore never reached the calculation of *quantum meruit* damages. 2009 WL 2231716, at *31-34 (Del. Super. May 29, 2009). *McKenna v. Singer*, 2017 WL 3500241 (Del. Ch. July 31, 2017), never mentions *quantum meruit* at all.

NGL's foreign citations fare no better. As previously discussed, the Idaho Supreme Court's opinion in *Farrell* supports the trial court's conclusion that evidence of what LCT's services produced was admissible to properly assess the quality of LCT's services. 268 P.3d at 463. NGL's quote from *ConFold Pac., Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 958 (7th Cir. 2006), is an out-of-context hypothetical, explaining that, if a hypothetical physician saved a patient's life, the "value" of that benefit would far exceed the value of the services. But again, LCT did not seek $1 billion from NGL (the equivalent of the patient's life).[4]

c. NGL Suffered No Prejudice Because The Court Gave Limiting Instructions And NGL Offered Its Own Evidence That The Jury Rejected

"The determination of unfair prejudice under D.R.E. 403 is 'within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion.'" *Green v. St. Francis Hospital, Inc.*, 791 A.2d 731, 738 (Del. 2002) (quoting *Mercedes-Benz*, 596 A.2d at 1366). Moreover, trial judges have discretion to alleviate the danger of possible prejudice with limiting instructions. *Id.*

[4] Likewise, *Maglica v. Maglica* acknowledges that evidence of the benefit to a defendant is admissible ("The idea that one must be *benefited* by the goods and services bestowed is thus integral to recovery in *quantum meruit*") and says only that the factfinder cannot "measure" the award by the amount of that benefit. 66 Cal. App. 4th 442, 450-51 (Cal. Ct. App. 1998) (emphasis added). In *Baer v. Chase*, the court expressly declined to rule on the admissibility of value creation evidence, noting "the admissibility of evidence relating to … the financial success of The Sopranos is a question best left for another day." 2007 WL 1237850, *6 (D.N.J. Apr. 27, 2007).

In *Green*, a patient accused a hospital of negligence after he allegedly collapsed on the floor when left without a call button, but the jury sided with the hospital. 791 A.2d at 734. On appeal, the patient argued that the court abused its discretion by admitting photographs of the hospital room that showed a call button in a disputed location. *Id.* at 737. The court recognized that the photographs could be prejudicial and gave a brief limiting instruction that the photograph "is not being admitted as evidence of where the call bell was at the time of the incident in question." *Id.* at 738. This Court affirmed the jury verdict, holding that the trial court properly exercised its discretion by admitting the evidence with a clear limiting instruction. *Id.*

Here, the trial court did far more. During the January 25, 2023 pre-trial conference, the court invited NGL to propose limiting instructions. Before and during Talarico's testimony, the court and counsel repeatedly discussed the content and timing for limiting instructions. (B1913-1915; B1918-1920; B2079-2081.) Pursuant to the parties' agreement, the court admitted value creation evidence during Talarico's direct testimony and informed the jury that the evidence "will be subject to a limiting instruction that the Court will give the jury later." (B2125; B2134; B2137.) Immediately following Talarico's direct, the trial court spent more than an *hour* working with counsel to craft an appropriate limiting instruction "with some teeth." (B2142.) NGL offered several revisions that were accepted, and LCT

offered several revisions that were *not* accepted. (B2144-2164.) In rejecting LCT's arguments, the court stated: "*I'm coming down more in their favor on this limiting instruction than on your end*." (B2164 (emphasis added).)

The instruction was lengthy and thorough. Among other things, the court instructed the jury that value-creation evidence "was admitted only for the limited purpose of demonstrating the reasonable value of LCT's services," that the jury was "not to assume or make a direct correlation between the dollar value references in the TransMontaigne acquisition and what the fee should be in this case," and that the jury should consider the evidence "only [for] the limited purpose for which [it was] offered." (B2169-2170.) The instruction was considerably more detailed than the instruction in *Green*, which this Court deemed sufficient. 791 A.2d at 738.

After the close of evidence, the trial court again instructed the jury that "[t]he value of LCT's services under *quantum meruit* is not measured by reference to any value created after NGL's acquisition of TransMontaigne." (B3728.) There was no jury confusion regarding value-creation evidence or the purposes for which the jury could consider such evidence, and therefore, no unfair prejudice occurred.[5]

[5] NGL cites *U.S. v. Prescott*, 581 F.2d 1343, 1352 (9th Cir. 1978), for the proposition that a limiting instruction is "of dubious value" where facts are "readily subject to misinterpretation by a jury." But *Prescott* addressed a criminal defendant's refusal to allow a police search without a warrant, which has been found inadmissible many times over, and has no bearing on the limiting instruction here.

Moreover, NGL was not prejudiced because it was free to put on evidence to counter LCT's evidence. NGL cross-examined Talarico regarding the value that NGL received at the closing and offered its own witnesses. The problem for NGL was that Krimbill was confronted with the inconsistencies in his 2014 documents, 2017 deposition, and 2018 testimony, and claimed he merely "corrected" certain answers. (B2942-2950.) In trying to reconcile NGL's litigation positions with his various inconsistent statements and his 2014 Letter, Krimbill took the bizarre position that he gave LCT "credit" for its work but that it added "no value." (B2948-2950.) That directly contradicted everything in his 2014 Letter, and the jury appropriately sized him up.[6] When NGL tried to claim that it created its own financial models and did not rely on LCT's work, exposure of the hidden comments in an excel spreadsheet showing the inputs all came from LCT (B3377-3383; B3907-3915) further tanked NGL's credibility.

The fact that the jury was unconvinced by NGL's presentation of evidence on what LCT's services delivered does not constitute reversible error.

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[6] While testifying about an October 20, 2014 email from Wade, Raymond agreed with Wade's sentiment that the GP and LP "benefit from the *tremendous accretion* in the TransMontaigne transaction as well." (B2322-2323.) When asked what "accretion" means, Raymond responded: "*Value created*." (*Id*.)

d. The Trial Court Did Not Violate the Law-Of-The-Case Doctrine

NGL argues that the trial court's January 30, 2023 Order (Ex. "E") improperly reversed the prior judge's December 22, 2022 Opinion (Ex. "D") in violation of the law-of-the-case doctrine. (OB at 25-26.) NGL is wrong factually and legally.

First, the December 22 Opinion did *not* "exclud[e] the majority of the October Letter … as legally irrelevant on multiple grounds." (OB at 41.) Rather, the Opinion includes the narrow holding that LCT's *expert* could not testify to opinions derived from *portions* of the 2014 Letter. (E at 22-23 ("below are the excerpts from the October 2014 Letter that the parties' *experts* are precluded from testifying to") (emphasis added).)[7] If it had excluded the "$29 million" is "fair" and "value creation" admissions, such a ruling would be contrary to this Court's decision in

[7] This was the result of NGL misleading the trial court with a slight-of-hand from its rebuttal expert, Lori A. Lancaster ("Lancaster"), who said this about NGL's expert: "… data establishes that, at the very high end, the value of services provided by investment bankers in energy and materials M&A transactions is only around 2 percent of the *deal value*, far from the 20-30 percent of *deal value* McQuilkin claims is reasonable." (B1389 (emphasis added).) Lancaster's 20-20% calculation was based on the *purchase* price, not the "deal value," as her report states. Of course, McQuilkin opined that percentages were the wrong way to derive a reasonable fee and, as explained in more detail *infra*, the evidence demonstrated that the value LCT placed on its services (and supported by McQuilkin) was only 3-5.8% of the respective "deal value" and total purchase price. McQuilkin testified that it is "Investment Banker 101" that you calculate a "fee run" using the transaction/enterprise value and you would "*never*" use the $200 million purchase price. (B2815-2817.) This sleight-of-hand was all part of NGL's disturbing pattern of misleading the new judges about the evidence. (A616-631; A632-639.)

LCT-I, which quoted liberally from the 2014 Letter and never suggested that it was inadmissible on remand. 249 A.3d at 82, 84, 95 and 100.

Second, the January 30 Order does not reverse or overturn the December 22 Opinion. Rather, the new judge, in the "interest of justice," merely clarified what the court characterized as "some *minor rubs*" between *LCT-I* and the December 22 Opinion. (A775 (emphasis added).) The court was careful to consider the law of the case, which it articulated as (a) "the Superior Court's undisturbed rulings before, during, and after the first trial," (b) "the Delaware Supreme Court's decision on an interlocutory appeal," and (c) "the Superior Court's recent decision regarding the parties' motions *in limine*, issued on December 22, 2022." (E at 1-2.) The trial court correctly held that this Court's decision in *LCT-I* "commands primacy regarding the issues it either explicitly or implicitly decided." (*Id.*)

The "rubs" between the December 22 Opinion and *LCT-I* related to the treatment of value-creation evidence and clarification on the admissibility of the 2014 Letter. In its January 30 Order, the court recognized the distinction between *calculating* damages based on value creation (*i.e.*, LCT receiving a piece of what it produced for NGL) and assessing the quality/value of LCT's services based on value creation. The court relied heavily on *LCT-I* and emphasized that "for such unique, or one-of-a-kind, services, LCT should not be precluded from presenting evidence or argument that the reasonable value of its services cannot be ascertained without

understanding the value it added to NGL's acquisition." (E at 4.) Regarding the 2014 Letter, the court concluded:

> The reasonable value of LCT's services *may*, in large part, depend on the value that LCT brought to NGL. When offered for that purpose, the letter is a *highly relevant admission by a party opponent* that the value of LCT's services was equivalent to $29 million. Accordingly, it would be manifestly unfair to exclude important portions of the letter from evidence because those portions directly address what is in controversy.

(*Id.* at 5 (emphasis added) (footnote omitted).)[8]

From a legal standpoint, NGL's complaints have no merit because alterations to *in limine* rulings are an accepted—almost expected—element of any trial and certainly not grounds for reversal.[9] Unsurprisingly, none of the cases cited by NGL on the law-of-the-case doctrine (OB at 25-26) involve evidentiary or *in limine*

[8] The trial court held that "[a]ll other aspects of the case remain controlled by the December decision, with only these minor adjustments," and invited NGL to propose appropriate limiting instructions for both the trial and the final charge. (E at 6.) Given that, NGL's "Countermand" label is an overstatement.

[9] "*[I]n limine*" is defined as "[o]n or at the threshold; at the very beginning; [or] preliminarily." *Dawson*, 581 A.2d at 1087. The Court in *Dawson* explained very clearly that "an *in limine* ruling is subject to change when the case unfolds […] 'even if nothing unexpected happens at trial, the [trial] judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.'" *Id*. (quoting *Luce v. United States*, 469 U.S. 38, 41 (1984). *See also State v. Reyes*, 155 A.3d 331, 344 (Del. 2017) (same); *Estate of Rae v. Murphy*, 956 A.2d 1266, 1272 (Del. 2008) (same); *Fennell v. State*, 691 A.2d 624, 626 (Del. 1997) (same).

decisions.[10] Moreover, nothing in the law-of-the-case doctrine states that a court's prior decision may *never* be reconsidered. To the contrary, Delaware courts are clear that the doctrine is not absolute, but rather provides that earlier decisions may be reconsidered. *Zirn v. VLI Corp.*, 681 A.2d 1050, 1062 n.7 (Del. 1996); *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181 (Del. 2000).

Ironically, if the law-of-the-case doctrine operated the way NGL claims, it would be the December 22 Opinion, not the January 30 Order, that violated the doctrine. The 2014 Letter was admitted in the first trial and the court held that evidence of value creation was relevant to the *quantum meruit* determination. This Court quoted liberally from the 2014 Letter, noting that "LCT provided unusually valuable services" that produced "a large gain on a $200 million acquisition," and never suggested that value-creation evidence should be inadmissible in the second trial. *LCT-I*, 249 A.3d at 100. To the extent the December 22 Opinion barred such evidence, it did so in contravention of the law of the case.

[10] *See May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003) (relitigating summary judgment ruling); *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718 (Del. 1983) (discussing contradictory opinions on substantive issue of marital property); *State v. Madison*, 2015 WL 1119540, at *6 (Del. Super. Mar 10, 2015) (declining to remove counsel); *State v. Wright*, 131 A.3d 310, 321 (Del. 2016) (reconsidering pretrial order from *25 years previous* that was never challenged on appeal).

In sum, NGL's argument against value creation evidence is truly a "tempest in a teapot." LCT did *not* seek *quantum meruit* damages measured by the amount of value created for NGL, the new judge did *not* overturn prior rulings, and the jury was *not* confused. The trial court not only minimized any potential prejudice through extensive limiting instructions, it resolved any differences *in NGL's favor*. NGL's gamesmanship is obvious: NGL recognizes that any jury that hears about what a great deal LCT got for NGL will award LCT compensation far in excess of $1.5-4 million.

Respectfully, NGL should not be given a third trial so it can again try to sell to a jury a fee the parties *never* discussed, while precluding evidence of what LCT produced and what NGL's CEO actually said about the "value created" by LCT and why LCT deserved far more than a so-called "typical" fee.

2. Evidence Of The Parties' Fee Discussions Was Properly Admitted

NGL, again, criticizes the trial court for something that did not happen. LCT did not seek, and the jury did not award, "benefit-of-the-bargain" damages. The trial court permitted evidence of the parties' discussions regarding LCT's fee because that is precisely what was contemplated by the law of the case:

> By ruling that the contract claim is not supported, the Court wants to be clear that it is in no way implying that the conversations, discussions, communications and emails between the parties and their representatives are no longer relevant. *They are*. *If the CEO of NGL made*

> *representations that he believed the compensation package suggested by LCT was fair and appropriate and was working toward accomplishing it, those comments are relevant to the quantum meruit claim*. …

(C at 23-24 (emphasis added);[11] *see also LCT-I*, 249 A.3d at 85 (quoting trial court's ruling when affirming new trial).

The purpose of *quantum meruit* is to determine the reasonable value of services rendered. The best evidence of the value of services is what the party who received the benefit of those services believed they were worth at the time. *In re Del. Public Schools Litig.*, 239 A.3d 451, 477 (Del. Ch. 2020) (fair market value is "the price which would be agreed upon by a willing seller and a willing buyer, under ordinary circumstances"). This is also a credibility issue: NGL cannot claim in litigation that the only reasonable value of LCT's services is $1.5-4 million (which the parties never discussed) and exclude the fact that NGL proposed a fee in the form of equity valued at $66.8 million (in a year) and its CEO (governed by fiduciary duties) represented to his investors that a fee for LCT of at least $29 million is "fair."

[11] After the court's holding, NGL continued to argue that this evidence is irrelevant, and the court rejected it each time, with well-reasoned explanations. (B4223; B4427-4428.) NGL claims the court "previously admitted evidence of the parties' failed negotiations (albeit at a time when that evidence was integral to LCT's then-extant fraud claim and admissible on those grounds)" (OB at 30), but that argument is *belied* by the clear rulings that the evidence was admissible for, and relevant to, *quantum meruit*.

There is nothing in the record suggesting that LCT presented evidence of the parties' discussions "to enforce a bargain the parties never entered." (OB at 29.) To the contrary, LCT diligently followed the December 22 Opinion to exclude from testimony and exhibits all references to "promised," "verbal contract," "agreement," "agreed to," "our deal," and the like. (D at 35.) Both LCT and the trial court repeatedly instructed the jury that there was no contract, and that the jury was to make its own determination of the value of LCT's services.[12]

NGL bootstraps the parties' fee discussions to this Court's ruling in *LCT-I* that benefit-of-the-bargain damages are unavailable for fraud, but that ruling was wholly separate from the ruling on *quantum meruit*. 249 A.3d at 90-97. The relevance of the parties' fee discussions to LCT's *quantum meruit* claim was not even challenged in *LCT-I*. NGL argues that this Court "specifically rejected LCT's attempt [to] obtain such damages on its now-defunct fraud claim, and the logic underlying that holding applies with equal or greater force in the *quantum meruit* context" (OB at 32), but that argument misreads *LCT-I* and the law:

[12] (*See, e.g.*, B1718 (LCT Opening Statement: "Now, another thing you may all be wondering is whether there's a contract here between the parties for the fee. *The answer is no*."); B3074 ("Ladies and gentlemen, at this point I want to give you an instruction, there was never a fee agreement between the parties in this case. Your job is to determine what the reasonable value of the services were in this case."); (B3728 (Jury Instructions: "The Court instructs you that the parties here never reached an agreement as to the proper amount to compensate LCT for its services.").)

> We think that LCT draws a false parallel between promissory estoppel and fraud. Promissory estoppel is a *quasi-contract* doctrine that protects different interests than common law fraud. It is therefore unremarkable that a plaintiff might be entitled to different remedies for these difference causes of action.

249 A.3d at 96 (emphasis added). This Court's ruling maintained the separate spheres of tort and contract law. Like promissory estoppel, *quantum meruit* is not a tort, but is instead "a quasi-*contract* claim," *Petrosky*, 859 A.2d at 79 (emphasis added), and this Court held that the evidence that formed the first jury's verdict for fraud could be part of a *quantum meruit* award. 249 A.3d at 101 ("[I]t would be necessary to add both awards to capture the full value that the jury placed on LCT's uncompensated work"). In any event, because LCT neither sought nor received benefit-of-the-bargain damages, NGL's argument should be rejected.

a. NGL Waived Its Argument

As noted, the trial court repeatedly ruled in 2018 that the parties' fee discussions were relevant to the *quantum meruit* determination. In the first appeal, NGL could have but did not challenge the court's evidentiary rulings. *LCT-I*, 249 A.3d at 98-102. It is axiomatic that an argument not raised on appeal is waived. Sup. Ct. R. 14(b)(vi)(A)(3).

Other appellate courts have held that if a party has the ability to raise an issue in a prior appeal and fails to do so, that issue is waived for future proceedings.[13] The first appeal involved the nature and scope of a new trial on *quantum meruit*, and NGL waived its right to challenge the trial court's 2018 rulings on the admissibility of the parties' fee discussions by not raising it in *LCT-I*.

b. Delaware Law Permits Consideration Of Unenforceable Contract Terms For *Quantum Meruit* Purposes

Contrary to NGL's position, Delaware courts have consistently held that, even where a contract claim fails, a plaintiff is "at liberty to sue on a *quantum meruit* theory and prove the express contract as evidence of the value of his services." *Bellanca*, 169 A.2d at 626; *see also Pike Creek*, 1988 WL 32028, at *2 (contractual discussions are "'evidence of an admission by the parties of [the] value'" of a plaintiff's services for purposes of *quantum meruit*) (quoting *Emerson v. Universal Prods. Co.*, 162 A. 779, 781 (Del. Super. 1932) ("In [*quantum meruit*] cases the contract price has always been admitted as evidence of an admission by the parties of value and the only discussion has been as to whether the contract alone fixes the

[13] *See, e.g.*, *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) ("We have several times said that appellate courts are precluded from revisiting … those prior rulings of the trial court that could have been but were not challenged on an earlier appeal."); *Wisniewski v. Johns-Manvillle Corp.*, 812 F.2d 81, 88 (3rd Cir. 1987); *Munoz v. Imperial County*, 667 F.2d 811, 817 (9th Cir. 1982); 1 A.L.R. 725 (1919).

price or whether it is only to be considered together with other testimony of value")). In *Bellanca*, this Court upheld a *quantum meruit* award based on "[plaintiff's] testimony that he had been promised a 5% commission." 169 A.2d at 626. LCT did not even go that far, and offered no testimony that it was "promised" anything.

NGL attempts to distinguish *Pike Creek* and *Bellanca* by stating those cases involved "*valid*" contracts and no contract was executed here. (OB at 35-36.) But the contracts in both cases were unenforceable, which is why *quantum meruit* was being sought, and the issue was whether the evidence supported the *quantum meruit* awards. Regardless, NGL's compensation proposals are admissions of its contemporaneous view of the value of LCT's services whether an agreement was reached or not. Again, sophisticated executives/directors, with experience in engaging investment bankers, do not offer and represent as "fair" to their investors, terms that are not "fair" or "market."

NGL attempts to undercut this Court's cases by overstating Justice Ridgely's decision in *Cheeseman v. Grover*, 490 A.2d 175 (Del. Super. 1985). NGL first claims that *Cheeseman* holds that "*quantum meruit* damages are measured based on their objective reasonable value rather than any purported negotiations/expectations between the parties." (OB at 33.) However, the word "objective" appears *nowhere* in *Cheeseman* and the decision says nothing about the methodology for calculating *quantum meruit* damages.

Second, *Cheeseman* is very different from this case. *Cheeseman* involved an "oral will," governed by a special area of the law mandating a "writing." 12 *Del. C.* § 202; 6 *Del. C.* § 2715. A decedent's son and daughter-in-law claimed to have spent over 10,000 hours rendering personal services to the decedent and sought to enforce an alleged "promise" that, upon her death, the plaintiffs would receive her home in Claymont, Delaware "in addition to whatever other assets she possessed at her death." 490 A.2d at 176. The court held that the alleged oral promise could only be admitted to rebut the presumption that the services were not rendered gratuitously. *Id.* at 177. This was not surprising given the statutory requirements governing wills and the fact that the counterparty to the alleged "promise" was deceased and unavailable to rebut the alleged "promise." Here, there is <u>*undisputed*</u> documentary and testimonial evidence of what LCT and NGL discussed.

Finally, there was no suggestion in *Cheeseman* that the "promise"—the decedent's home/estate—bore any relation to the <u>*value*</u> of the plaintiffs' services, and the plaintiffs only made a claim for $20,160. *Id.* at 176. Thus, there was no argument for the independent relevance of the contract discussions other than to rebut the presumption that the services were gratuitous. The situation in *Cheeseman* is in stark contrast to this case. Again, LCT did not put on evidence of a "promise" and Krimbill told his investors that compensation for LCT of $29 million was "fair." As the trial court repeatedly held, the evidence of those discussions is relevant <u>*not*</u>

to prove the existence of a contract or enforce its terms, but as contemporaneous evidence of the parties' understanding of the value of LCT's services.[14]

In short, Delaware courts are more flexible than NGL would like them to be regarding what evidence a jury may consider in determining the value of services for *quantum meruit* purposes. This Court and all three trial judges acknowledged that evidence of the parties' contemporaneous fee discussions was relevant to that determination, and NGL presents nothing suggesting reversible error.

c. Evidence Of "Standard" Or "Typical" Fees Is Not Commensurate With *Quantum Meruit*

NGL argues that *quantum meruit* damages must be based on "the objective market value of a given service in the community where that service was rendered" (OB at 36) and that the proper calculation here is the 1-2% "typical" investment banker fee pushed by NGL's experts. This argument fails for several reasons.

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[14] NGL's assertion that affirmance here would require overturning *Cheeseman* and other Delaware law (OB at 34 and 37) is more hyperbole, and its reliance on *Somerville v. Epps* is even more attenuated. (OB at 35.) There, the plaintiff sued because the defendant promised him a one-quarter interest in a property but then conveyed it to another. 419 A.2d 909, 910 (Conn. Super. 1980). As with *Cheeseman*, there was no suggestion that the one-quarter property interest had anything to do with the value of the goods/services provided, and the opinion made no substantive ruling on the *quantum meruit* claim but merely denied a motion to dismiss. *Id.* at 911. NGL also cites to trial court opinions in which the *quantum meruit* claims were dismissed, and thus, the courts never reached the question of calculating damages. *See, e.g., Caldera*, 2009 WL 2231716; *United Health Alliance, LLC v. United Med., LLC*, 2014 WL 6488659 (Del. Ch. Nov. 20, 2014) (sustaining plaintiff's contract claim but dismissing *quantum meruit* claim for failure to allege that defendant conferred benefit on plaintiff).

First, NGL presented two experts—Lancaster and Peter Keller—to support the contention that 1-2% of the purchase price is a "typical" or "standard" fee for investment bankers based on "fee run" data from a small pool of publicly-available sources. (B3435-3439; B3580-3581; B3574-3575.) In contrast, LCT's experts—McQuilkin and David Adler—testified that fee run data accounts for less than 5% of deals (B2783), there is no "typical" investment banker fee, that every transaction is different, and every fee is separately negotiated. (B2777-2778; B3655.) Also, while NGL's experts opined that 1-2% was "typical," Keller's fee run data showed fees ranging from a fraction of a percent to 6.36%. (B3588-3593.)

Second, NGL uses the phrase "objective market evidence" seven times (OB at 20, 22, 26, 27, 31, 36) but never in a quote from a Delaware *quantum meruit* case. Even the December 22 Opinion—that NGL praises—recognized that "objective" evidence presented by NGL was insufficient to give the jury a complete picture:

> *Considering, however, that the publicly available fee run data includes as little as 5% of all mergers and acquisitions transactions*, the Court finds that the jury should not be solely confined to hearing this evidence, but should have the opportunity to weigh this evidence against the parties' discussions of the appropriate fee for Plaintiff's services.

(D at 36-37 (emphasis added).)

Importantly, this Court expressly rejected NGL's "typical" or "standard" fee approach in *Marta v. Nepa*, 385 A.2d 727 (Del. 1978) (cited in the pattern jury instructions for *quantum meruit*, Del. P.J.I. Civ. § 19.27 (2000)). In *Marta*, the estate of a deceased real estate broker sought to recover unpaid commissions arising from the broker's services in obtaining a tenant for the defendant's commercial property. 385 A.2d at 728. The trial court held that no formal agreement was reached but the plaintiff was entitled to recover in quasi-contract on a *quantum meruit* basis. *Id.* at 729. The court awarded the estate 4% of the minimum annual rental, and this Court reversed:

> There was expert testimony in the original trial to establish that the standard commission for procuring a commercial lease was either 4 or 5%; and, apparently, the Superior Court based its award on the lower figure. However, *evidence of a standard commission is neither equivalent to nor commensurate with the evidence required for determining a recovery based on quantum meruit*. A standard commission, which is agreed upon before services are commenced, is an *arbitrary figure* which may or may not reflect *quantum meruit*, i.e., how much the service is worth or how much compensation is deserved therefor. We hold, therefore, that the Superior Court erred in making an award on the basis of a standard commission.

Id. at 730 (emphasis added) (holding that the proceeding on remand should elicit evidence "based upon the particular facts of this case"). In other words, evidence of a "standard" or "typical" fee for a particular type of service is not commensurate with evidence of the value of *specific* services performed under *specific*

circumstances for purposes of the fact-finder's determination. Regardless, NGL offered two expert witnesses to present its theory, and the jury rejected it.

Third, NGL's position of 1-2% of the $200 million purchase price is contrary to NGL's own contemporaneous understanding of the value of LCT's services. It is undisputed the parties never discussed such a fee, Krimbill told his investors that a fee for LCT of $29 million was "fair" while disavowing a "typical" fee, and the parties *never* discussed LCT receiving anything other than equity valued far in excess of what the jury awarded.

Fourth, NGL's own expert was forced to concede that, when viewed correctly, the fee amounts discussed by the parties were within the range of percentages found in the "fee run" data. While NGL's experts focused on the $200 million *purchase* price, the *transaction/enterprise value* is what is used to calculate a fee run. (B2817.) Further, the acquisition here included approximately $550 million of inventory, so NGL actually paid $750 million for TransMontaigne, its assets and its inventory for a total value of $1.64 billion. (B1925-1927; B3856.) Even using the purchase price (instead of the enterprise value) to calculate a fee run (as championed by NGL's experts), the proper figure would be $750 million, not $200 million. NGL Director Wade recognized this back in 2014: "I know that $29mm seems high on a $200mm deal, but if you include the dollar amount of the inventory, that would make a total transaction size of $700mm or $800mm. That would then make the fee closer to 3.5

to 4%, which I have seen in the market before." (B622-624.) On this, NGL's expert admitted the following:

> Q. So you'd agree with me that the value that Mr. Talarico testified to, which is $43.8 million, would be 5.8 percent of $750 million; you agree with that math?
>
> A. It's arithmetic. Yes.
>
> Q. Okay. And that 5.8 percent is still less than the 6.36 percent fee that appeared on your fee run; is that right?
>
> A. You can always pick an outlier, yes.

(B3596.) Given this Court's recognition of LCT's "unique" and "extraordinary" services, and the "large gain," 249 A.3d at 100, the Transaction here is not so much an "outlier" as it is an example of the high end of the very range NGL's experts presented as "objective market evidence."[15]

[15] The jury's verdict of $36 million represents 4.8% of the total $750 million purchase price, even more securely within the range advocated by NGL's experts, and just 2.2% of the transaction/enterprise value. NGL tries to discredit LCT's expert McQuilkin by arguing that "he could not identify a single instance in his lengthy investment banking career where *any* fee fell above the customary market maximum of 2% established by NGL's experts" (OB at 37), but that is inaccurate. McQuilkin testified that he had not *personally* worked on a deal with a higher percentage, but that members of his team received fees as high as *10%* of the transaction value. (B2817-2818; B2935.)

Finally, NGL advances a series of misleading claims about the financial information presented (OB at 38-47), mostly its own information/documents. NGL's most egregious claim relates to the May 15, 2014 spreadsheet sent to LCT to convince LCT to take interests in the GP as a fee, stating that 2% of the GP would be worth $66.8 million by December 2015 and more than $100 million in four years. (A270-271.) NGL argues that the calculations in that document were based on speculative "long-range projections" related to the TransMontaigne acquisition that never occurred. That is *demonstrably false*. NGL Director Raymond was also the CEO of EMG, which has a large stake in NGL, and those calculations were based on stand-alone NGL financial data already prepared and disclosed to investors on April 17, 2014 (*compare* A270-271 *with* B33), a month *before* NGL even submitted its bid for TransMontaigne. Thus, the figures were not based on speculative events related to the TransMontaigne acquisition.[16]

Incredibly, NGL complains about the first paragraph of the 2014 Letter, in which Krimbill tells investors that the acquisition was "on track to produce EBITDA of about $50 million annually with new projects … which will result in EBITDA increasing to $70 million in year 2 or 3." (OB at 40.) This is odd because the trial

[16] NGL's counsel spent a lot of time attempting to exclude this exhibit by making the same argument it makes here. (B1546-1562.) The trial court initially ruled in NGL's favor based on those misrepresentations (B1577-1578) but corrected the ruling before trial for other reasons. (B1646-1652.) To this day, the trial court has no idea it was misled.

court offered to redact that paragraph, and *NGL declined*. (B1610; A942 ("The Court reiterates that it offered the Defendant the opportunity to request redactions [to the 2014 Letter] but the Defendant has declined.").) NGL claims that Krimbill's "value created" representations were based on future events, but that is belied by the language used. Krimbill did not say "to be created" or "expected" and, as observed by McQuilkin, a "success fee" is for a successful closing, not future events or future services. (B2814.)

NGL also claims that Raymond was "not purporting to speak for NGL." (OB at 42-43.) This is another stretcher. First, the counter fee-proposal came just one day before NGL submitted its bid to Morgan Stanley as the *sole* bidder. (B34-172.)[17] Second, with EMG out of the process, Raymond could not have been negotiating on behalf of EMG and was offering 2% of *NGL* (not EMG) as compensation for LCT's services. Third, Krimbill discussed the same terms with LCT at the same time. (A277.) NGL cannot deny that the sole purpose of the document was to communicate a fee proposal to LCT that NGL viewed as reasonable.

[17] NGL admitted that as of *May 15, 2014*, EMG was out and NGL was the sole buyer for TransMontaigne. (B648.) Furthermore, the fact that Raymond used his EMG email makes no difference because he testified that he does not have an NGL e-mail account and uses his EMG e-mail when acting as a Director of NGL. (B2356.) This is typical for non-officer directors. *See Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.*, 2019 WL 479082, at *17 (Del. Ch. Jan. 25, 2019).

The Court should not credit NGL's hyperbolic framing of the trial and its evidentiary rulings. LCT never sought to recover damages based on its dismissed breach of contract claim, because LCT was not permitted to make such an argument. The trial court correctly concluded that the jury needed to hear about the parties' contemporaneous fee discussions to make a determination on the value of LCT's services. The trial court was especially careful to mitigate any potential prejudice, through limiting instructions, redactions of exhibits, and general monitoring of the proceedings. NGL put on its own case and attempted to minimize its own documents with two experts advocating a value theory that NGL concedes was never discussed. The jury absorbed the evidence from both sides and concluded that the reasonable value of LCT's services was $36 million. Importantly, NGL conceded that it never discussed LCT receiving anything other than equity valued far in excess of what the jury awarded.

This Court should respect the jury's verdict and affirm.

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT ERRED BY NOT AWARDING POST-JUDGMENT INTEREST ON THE FULL JUDGMENT

A. Question Presented

Did the trial court err when it ordered post-judgment interest on just the jury award and not on a combination of the award plus accrued pre-judgment interest? (Preserved at B3988-3995.)

B. Scope of Review

When a trial court's interest award involves questions of law, it is subject to *de novo* review. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 42 (Del. 2005).

C. Merits of Argument

The trial court drew a distinction between Court of Chancery and Superior Court cases (B at 15), but 6 *Del. C.* § 2301(a) applies equally to judgments in all Delaware courts. This *statutory* right should be consistently applied.

Judge (now Justice) LeGrow recently noted that, "subject to a court's discretion to order *otherwise*, 'a party is [] entitled to post-judgment interest until the date of payment on an amount that includes both the amount of the judgment *and the amount of prejudgment interest*.'" *Fortis Advisors, LLC v. Dematis Corp.*, 2023 WL 2967781, at *2 (Del. Super. Apr. 13, 2023) (emphasis added) (citation omitted).

In *Brandin v. Gottlieb*, former Chief Justice Strine, then a vice chancellor, correctly held that, "[w]ithout an award of post-judgment interest on the full award, the obvious purpose of awarding pre-judgment interest—to ensure that [plaintiff] is fully compensated for the loss of the time value of her money—would be undercut." 2000 WL 1005954, at *30 (Del. Ch. July 13, 2000); *see also id*. at n.93.

This reasoning applies with equal force here.

II. THE TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT ON LCT'S BREACH OF CONTRACT AND UNJUST ENRICHMENT CLAIMS

A. Question Presented

Did the trial court err when it granted summary judgment in NGL's favor on LCT's breach of contract and unjust enrichment claims? (Preserved at B1091-1140.)

B. Scope of Review

This Court reviews a trial court's summary judgment ruling *de novo*, "applying the same standard as the trial court." *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009). "If there are material facts in dispute, it is inappropriate to grant summary judgment and the case should be submitted to the fact-finder to determine the disposition of the matter." *Id.*

C. Merits of Argument

If the jury's verdict is set aside, LCT requests that a third trial include its wrongfully dismissed breach of contract and unjust enrichment claims.

1. Genuine Disputes of Material Fact Precluded Summary Judgment on LCT's Contract Claim

The trial court erred in concluding that no contract existed on the basis that the material terms were "unclear." (C at 22.) To the contrary, significant disputes of material fact existed regarding whether the parties agreed on the material terms of LCT's compensation.

In fairness to the trial court, NGL convinced the court that no agreement existed through false deposition testimony,[18] but Krimbill changed his story in the 2018 trial: "[W]e try to honor our word, so even though we [LCT and NGL] didn't have a complete understanding, *we certainly had 5 percent for 21 million*." (B1195 (emphasis added).) This testimony contradicted Krimbill's deposition testimony and was an admission that the parties had agreed on material terms. Krimbill also testified that, "I don't think [the terms] ever changed – but it was 3 percent for 21 million, and then 2 percent that he did not have to pay the GP for," and that he had "been very consistent" about those terms. (B1165; B1171.) Indeed, Krimbill admitted that "the crux of this whole dispute is who is paying [LCT's] taxes." (B4344.)

This testimony alone is enough to find a dispute of material fact to present to a jury. *See, e.g.*, *Cole v. State*, 922 A.2d 534 n.11 (Del. 2005) (disputes of fact regarding oral contracts are not appropriate for resolution at summary judgment); *Lockwood v. Capano*, 105 A.3d 989 (Table), 2014 WL 7009737, at *1 (Del. 2014) (same).

[18] (B939 (Krimbill: "Q. Do you recall any conversation that you had with Mr. Talarico in which you told him that you had agreement to buy in 2 percent from the existing GP owners and that you were going to dilute the other 3 percent to get the plaintiff 5 percent GP interest? A. Not that I recall, no.").)

The test for a valid oral contract is whether a "reasonable negotiator" in the position of one asserting the existence of a contract "would have concluded, in that setting, that the agreement reached constituted agreement on all the terms that the parties themselves regarded as essential and thus that agreement concluded the negotiations and formed a contract." *Iacono v. Estate of Capano*, 2020 WL 3495327, at *9 (Del. Ch. June 29, 2020). That evidence must be construed "in the light most favorable to the non-moving party" (here, LCT). *Id.* at *8. An oral agreement constitutes "contract formation if the evidence reveals 'manifestations of assent that are in themselves sufficient to conclude a contract.'" *Sarissa Capital Domestic Fund LP v. Innoviva, Inc.*, 2017 WL 6209597, at *21 (Del. Ch. Dec. 8, 2017).

Here, the material terms—2% of the NGL GP, an option on 3% for $21 million, and a tax catch-up—remained consistent throughout the discussions. Two weeks after Talarico memorialized the terms with NGL's counsel (B525-526), NGL Director Raymond emailed Talarico and stressed:

> Checking in here to make sure all is going as agreed re acquiring your GP interest *etc* at NGL? They have had a lot on their plates re financing etc but we need to get this done properly and *honor what we all discussed/agreed on NGL end of it!*

(B535 (emphasis added);[19] *see also* B625-626.)[20] These actions are "manifestations of assent" that signal to a reasonable negotiator that agreement had been reached. Even if NGL could argue that it did not agree to the tax catch-up, that is a dispute of material fact to be resolved by a jury. *See Grunstein v. Silva*, 2011 WL 378782, at *14 (Del. Ch. Jan. 31, 2011) (if "Defendants dispute the contours or existence of the alleged contract, the disagreement presents issues of material fact that the Court may not now resolve").

The trial court erred in granting summary judgment on LCT's breach of contract claim.[21]

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[19] During Raymond's deposition, counsel improperly objected to questioning about this email, saying "the document speaks for itself." (B1010.) Indeed, it does!

[20] Notably, the NGL Board passed a Resolution, dated June 5, 2014, which approved the Transaction and instructed Krimbill, as CEO, to execute all documents and pay all expenses in connection with the Transaction. (B528-534.) All fees/expenses incurred in connection with a transaction are known and generally paid at the time of closing. In compliance with the Board Resolution, Krimbill executed the Purchase Agreement, dated June 8, 2014. Section 4.08, titled "Finders' Fee," states that NGL is paying LCT's fee. (B536-562.) Does NGL expect everyone to believe that the NGL Board approved the Resolution and Krimbill committed NGL to pay LCT's "fees and expenses" without knowing what NGL was going to pay LCT?

[21] If LCT's breach of contract claim is reinstated, this would revive LCT's fraud claim. *See NetApp, Inc. v. Cinelli*, 2023 WL 4925910, *17 (Del Ch. Apr. 21, 2023) ("A party may elect to proceed on either theory [contract or fraud]").

2. LCT's Unjust Enrichment Claim Should Be Reinstated To Permit A Full Recovery

The trial court's dismissal of LCT's unjust enrichment claim rests on a misapprehension of the different remedies available for unjust enrichment and *quantum meruit*. Unjust enrichment requires "(1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4) the absence of justification, and (5) the absence of a remedy at law." *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010)). The trial court held as a matter of law that LCT did not meet factors four and five. (C at 25-26.)

Regarding factor four, the trial court held that "the lack of a clear and precise written fee document provides an avenue for Defendants to justifiably withhold payment until the dispute is resolved." (C at 26.) Under this logic, no plaintiff with an oral contract could successfully plead unjust enrichment in the alternative. Moreover, this holding is inconsistent with Delaware law. In *Grunstein*, for example, the defendant disclaimed the existence of an oral agreement, but summary judgment was denied because "the question of whether it would be unjust for Defendants to retain the benefits of Plaintiffs' 'time, effort, information, expertise' … presents questions of material fact that the Court may not resolve at this stage." 2011 WL 378782 at *15. *See also Schaeffer v. Lockwood*, 2021 WL 5579050, at *21 (Del. Ch. Nov. 30, 2021) (holding that defendant's acknowledgment plaintiff "was owed something for his efforts" was sufficient to meet fourth element).

Regarding factor five, the trial court held that LCT "has an adequate remedy at law which will satisfy those principals, that is the *quantum meruit* claim." (C at 25.) If NGL is successful in narrowing the remedy available to LCT under *quantum meruit*, by excluding evidence of value creation and/or the parties' fee discussions and limiting damages to some "objective market evidence" the parties never discussed, the *quantum meruit* claim would be insufficient to fully compensate LCT for the uncompensated enrichment it bestowed on NGL. It would be a matter for the jury to decide the extent of NGL's enrichment and the appropriate remedy. *Endowment Research Grp., LLC v. Wildcat Venture Partners, LLC*, 2021 WL 841049, at *14 (Del. Ch. Mar. 5, 2021) (holding that plaintiff sufficiently alleged both unjust enrichment and *quantum meruit* claims).

CONCLUSION

For the foregoing reasons, the Court should (i) affirm the jury's verdict and reverse the trial court's post-judgment interest calculation and (ii) reverse the trial court's summary judgment rulings.

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DLA PIPER LLP (US)

John L. Reed

John L. Reed (I.D. No. 3023)
Peter H. Kyle (I.D. No. 5918)
Daniel P. Klusman (I.D. No. 6839)
1201 North Market Street, Suite 2100
Wilmington, DE 19801-1147
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@us.dlapiper.com
peter.kyle@us.dlapiper.com
daniel.klusman@us.dlapiper.com

Attorneys for Appellee/Plaintiff-Below /Cross-Appellant LCT Capital, LLC