EFiled: Nov 30 2023 11:52AM EST
Filing ID 71510505
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

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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DATED: November 30, 2023

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PRELIMINARY STATEMENT

NGL[1] complains that LCT's Opening Brief "left very little room for a cross-appeal" (Cross-Appeal AB at 3) but criticizing brevity does not speak to the merits. The structure of LCT's Opening Brief was necessitated by two things:

First, the factual record is relevant to the appeal and cross-appeal, and because NGL's Opening Brief was so full of distortions of the facts (affirmatively and by omission), strawman arguments and histrionics, LCT was compelled to provide detail sufficient to clean up the record. NGL is obviously upset that LCT exposed its attempt to create an alternative universe into which it inserted two evidentiary rulings—both supported by Delaware law and the law of the case and cleansed by fulsome limiting instructions—to try to upend a jury verdict supported by overwhelming evidence and *admissions* from NGL.

Second, LCT did not have to devote excessive space to its three cross-appeal issues because the first one (focused on how post-judgment interest is to be calculated) is straightforward and the other two issues will be moot if the jury's verdict is affirmed. In that regard, LCT respectfully requests that the Court affirm the jury's verdict and modify the post-judgment interest award to provide for post-judgment interest on the entirety of LCT's judgment against NGL.

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[1] Capitalized and abbreviated terms have the same meaning as in LCT's Answering Brief on Appeal and Opening Brief on Cross-Appeal.

ARGUMENT

I. POST-JUDGMENT INTEREST ON A FINAL "JUDGMENT" IS NOT "COMPOUND INTEREST"

This issue is not complicated. LCT did not ask the trial court to "add *compound* interest to the [jury's] award." (B at 13 (emphasis added).) Arguing that "simple interest" is the default rule and that "compound interest" is disfavored (a proposition not challenged by LCT) misses the point: Post-judgment interest on the *entirety* of a "judgment" (*i.e.*, the damages determination *and* pre-judgment interest) is *simple* post-judgment interest not *compound* post-judgment interest. It is simply interest on a "judgment" and nothing is being compounded.

One major flaw in both NGL's argument and the trial court's analysis is that they fail to separate the pre-judgment interest period from the post-judgment interest period, and they ignore the fact that pre-judgment interest and post-judgment interest are two different things and serve two distinct purposes. Pre-judgment interest ensures that a party is fully compensated for a loss at the time a judgment is entered, whereas post-judgment interest ensures that the value of a party's judgment is not diminished pending an appeal (or during a collection period). This is so because but for an appeal (or delay in satisfaction of a judgment), the prevailing party would be immediately entitled to the value of the judgment, which includes pre-judgment interest.

But for this appeal, LCT would have already received the jury's $36 million damages verdict *and* the approximately $20 million in pre-judgment interest LCT is entitled to "as a matter of right" for being deprived of fair compensation since 2014. *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 210 (Del. 1978) ("Interest is awarded in Delaware as a matter of right and not of judicial discretion").[2] Absent a calculation of post-judgment interest that includes the jury's damages award and pre-judgment interest (*i.e.*, the full and final "judgment"), NGL will—improperly—enjoy the time value of the $20 million portion of the final judgment pending this appeal. As shown below, that is wrong as a matter of logic, fairness and, most importantly, statutory construction.

NGL is asking this Court to treat post-judgment interest under 6 *Del. C.* § 2301(a) as if it is a continuation of pre-judgment interest, but it is not. Section 2301(a) applies equally to all judgments in all Delaware courts and the Court of Chancery has been applying the statute correctly for years, with a sound rationale:

> Without 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.

Brandin v. Gottlieb, 2000 WL 1005954, at *30 (Del. Ch. July 13, 2000).

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[2] *See also Metro Storage Int'l, LLC v. Harron*, 275 A.3d 810, 867 (Del. Ch. 2022) ("The plaintiffs did not have to ask for pre-judgment interest expressly because it is available as a matter of right and regularly calculated as part of the preparation of the final order, after the court has ruled.").

Brandin's logic applies with particular force here. Since the June 30, 2023 Final Order and Judgment, NGL has received the ongoing financial benefit of possessing not only the $36 million it originally owed LCT since 2014, but *also* the $20 million in pre-judgment interest. By only awarding post-judgment interest on the $36 million jury verdict but not the $20 million pre-judgment interest award, the trial court granted NGL a windfall whereby NGL will receive the financial benefit of that $20 million every day between June 30, 2023, and when the judgment is satisfied. Such an approach rewards delay, as then-Vice Chancellor Strine recognized more than two decades ago:

> Simply by delaying the payment of the final judgment, [defendant] could chip away at the real value of [plaintiff's] recovery and diminish the obligation to [plaintiff]. It is difficult, as a matter of economics or fairness, to conceive of the utility of an approach that would do other than attempt to guarantee that [plaintiff] will, at the time of payment, receive from [defendant] the real economic value of the final judgment on the date it is first entered.

Id. at *30.

The trial court drew an erroneous distinction between the Court of Chancery's equitable power to deviate from Section 2301(a) by compounding *pre*-judgment interest, or by awarding interest at a rate *higher* than the statutory rate, suggesting that the Superior Court lacked such "discretion." (B at 15.) The problem is that the analysis of this issue has been distorted for far too long by use of the word

"discretion" and a failure to treat pre-judgment interest and post-judgment interest as two distinct things. Whether the Court of Chancery has power in equity (distinct from "discretion") to deviate from the statutory rate and mandate of Section 2301(a) does not answer the question presented by LCT.

The question here is one of statutory interpretation that has nothing to do with the separation of law and equity. As noted, Section 2301(a) applies to all Delaware judgments, and it should be interpreted and applied uniformly by all Delaware courts. Section 2301(a) states that "any judgment … shall, from the date of the judgment, bear post-judgment interest of 5% over the Federal Reserve discount rate …" 6 *Del. C.* § 2301(a). The question can be stated this way: What is the "judgment" upon which post-judgment interest is to be awarded as a matter of right? The answer is that the "judgment" is the full and final judgment, which includes the damages calculation and the "obligation" to pay pre-judgment interest. *See Biggs v. Strauss*, 1988 WL 55343, at *1 (Del. Super. May 17, 1988) ("A judgment … may be defined as the court's official and final consideration and determination of the respective rights and <u>*obligations*</u> of the parties, …") (emphasis added) (quoting 46 Am.Jur.2d Judgments § 1 at 313-314 (1969)); *Definition and Function of Judgment*, 46 Am.Jur.2d Judgments § 1 (2023) (same).

Even if the analysis turns on "discretion" (it should not), discretion is not a concept that is alien to the Superior Court or other courts of law. If Section 2301(a)—which provides a *statutory* right—grants discretion to the Court of Chancery, to be consistently applied to all those who suffer harm, it must surely be interpreted to grant the same discretion to the Superior Court.[3] But again, this should have nothing to do with discretion, or jurisdiction, or the separation of law and equity, and should instead be solely a question of statutory construction.

NGL cites cases from 1993, 1998, and 1999 (Cross-Appeal AB at 40), but the law evolves, and the time has come for this statutory right to be consistently interpreted and applied to all judgments in Delaware. *See Brandin*, 2000 WL 1005954, at *28 (noting "the illogic of perpetuating a slavish devotion to an outmoded approach"). Respectfully, this Court should, as a matter of statutory construction, set the starting point for Section 2301(a). Nothing in such a ruling

[3] Indeed, the Superior Court has recognized its own discretion to award post-judgment interest on the entirety of a judgment. *See, e.g.*, *Prof. Investigation & Consulting Agency, Inc. v. Hewlett-Packard Co.*, 2015 WL 1417329, at *10 (Del. Super. Mar. 23, 2015) ("post-judgment interest on the full amount of the judgment, which includes the part comprised of pre-judgment interest, is left to the Court's discretion"); *Lamourine v. Mazda Motor of American, Inc.*, 2007 WL 3379328, at *4 (Del. Super. May 29, 2007) ("Trial courts in Delaware have a *significant* amount of discretion when awarding prejudgment interest."). The trial court did not exercise discretion against LCT, but merely thought it did not have discretion to interpret Section 2301(a) as requested by LCT.

would disturb the Court of Chancery's power to do "equity" under appropriate circumstances.[4]

As the trial court rightly noted, "[t]here may be excellent arguments and a *trend*, based on commercial expectations, to make [post-judgment interest on pre-judgment] interest the default." (B at 15-16 (emphasis added).) This "trend" of awarding post-judgment interest on the entire judgment (*i.e.*, a proper interpretation of Section 2301(a)) was followed in *Fortis Advisors, LLC v. Dematis Corp.*, where Judge (now Justice) LeGrow recognized the reality that interest on the entire

[4] Notably, the Superior Court has held that it has discretion in cases with equitable overtones. In *Rollins Environmental Services, Inc. v. WSMW Industries, Inc.*, the court chose not to exercise its discretion because the claim at issue fell "squarely within the class of cases for which a suit is entertained in a court of law and does not involve the application of equitable principles." 426 A.2d 1363, 1367 (Del. Super. 1980). Here, LCT's sole claim for *quantum meruit* "is a remedy rooted in equity." *Griffin Dewatering Corp. v. B.W. Knox Const. Corp.*, 2001 WL 541476, at *7 (Del. Super. May 14, 2001). The *Rollins* court noted "that allowance of interest in cases falling within equity jurisdiction has been held to be within the discretion of the Chancellor […] and in the exercise of that discretion the interest rate has not been considered to be a fixed 'legal rate,' but has varied according to a showing of the rate which a prudent investor could have obtained." *Id*. at 1366 (citations omitted). The *Rollins* Court also noted that the Superior Court in a prior decision, relying upon decisions of the Court of Chancery, permitted pre-judgment interest of 8% per annum for damages, and "[s]ince that decision applied the interest rate flexibly which is traditional in the Court of Chancery, it is assumed that that case involved issues of an *equitable overtone*." *Id*. at 1367 (emphasis added); *see also Dover Historical Soc., Inc. v. City of Dover Planning Com'n*, 902 A.2d 1084, 1090 (Del. 2006) ("The Superior Court does hear cases in which it is occasionally required to apply equitable principles."); *Professional Underwriters Liability Ins. Co. v. Zakrzewski*, 2006 WL 3872847, at *2 (Del. Super. Dec. 8, 2006) (same). Again, LCT's *quantum meruit* claim has more than an equitable *overtone*; it is rooted in equity. Thus, the trial court had the discretion it thought it lacked.

judgment is the norm unless there is good reason to "order otherwise." 2023 WL 2967781, at *2 (Del. Super. Apr. 13, 2023). This should be the "law" or default, not a "trend," because we are dealing with application of a statute.

This issue has broad implications beyond this case. Respectfully, this Court should (i) construe Section 2301(a) as treating pre-judgment and post-judgment interest separately, (ii) hold that the "judgment" upon which post-judgment interest is to be awarded per Section 2301(a) includes any applicable pre-judgment interest, and (iii) order equal application of Section 2301(a) so that all those who suffer damages and obtain redress can enjoy the full benefit of their judgment in the event of an appeal regardless of the Delaware court from which they obtained relief.

Accordingly, LCT requests that the Court reverse the trial court's ruling on post-judgment interest and award LCT post-judgment interest on its full judgment to ensure that LCT receives the full value of its judgment.

II. LCT HAD VIABLE CLAIMS FOR BREACH OF CONTRACT AND UNJUST ENRICHMENT FOR WHICH IT WAS ENTITLED TO PRESENT ITS EVIDENCE AND SEEK RECOVERIES FROM A JURY

Because of LCT's willingness to accept the jury's verdict, the following arguments will be moot if the Court affirms the verdict. If, however, the Court determines that the case must be tried a third time, it should reverse the premature dismissal of LCT's breach of contract and unjust enrichment claims in 2018.

A. The Trial Court's Grant Of Summary Judgment On LCT's Contract Claim Should Be Reversed Because Genuine Disputes Of Material Fact Exist Regarding Whether There Was Agreement On Material Terms

During the 2018 trial, NGL's CEO contradicted his own deposition testimony and testified that the parties had an "understanding"—a colloquial term used to describe "a mutual agreement not formally entered into but in some degree binding on each side," *Merriam-Webster's* Dictionary (2023)—that LCT would receive 2% of the NGL GP for free, a tax catch-up, and an option to purchase another 3% for $21 million. At the very least, the record shows a genuine dispute of material fact as to whether the parties agreed on the material contract terms, and that dispute should be resolved by a jury.

NGL's Answering Brief demonstrates why summary judgment was improper. LCT presented substantial evidence (in the form of documents and testimony) that the parties reached agreement on material terms and, in response, NGL presented its

evidence purporting to show that they did not. Thus, a genuine dispute of material fact existed as to whether an agreement was reached, and such a dispute must be resolved by the trier of fact. *See, e.g.*, *Cole v. State*, 922 A.2d 354, 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. Nov. 10, 2014) (material dispute of fact on the issue of contract formation precludes summary judgment).

Despite NGL's competing contentions, the contemporaneous evidence, and the consistent communications between LCT and NGL, demonstrate that the parties *did* in fact agree on the material terms of LCT's compensation: 2% of the NGL GP, a tax catch-up, and an option to purchase an additional 3% of the NGL GP for $21 million. Those terms were memorialized internally and externally (before and after the Transaction closed) by LCT and NGL officers and directors:

- May 17, 2014 text from Lou Talarico to Karl Kurz: "Spoke to Krimbill. Said he'd love to have [us] get 2% in fee and buy in for another 3%" (A277);

- May 30, 2014 email from Lou Talarico to Karl Kurz: "OK, just on with Mike [Krimbill]. He was *clarifying our deal*. He confirmed he has no problem with: 2% of GP after-tax and, 3% buy-in to GP at $700 million" (BR1 (emphasis added));

- June 4, 2014 text from Lou Talarico to Karl Kurz: "OK, spoke to Mike [Krimbill]. He has talked to most [of] board. We are at 2% (after tax) with option to buy another 3% at $700 million valuation" (BR2);

- June 5, 2014 email from Lou Talarico to Bruce Toth, NGL's counsel: "Following are the limited details on the GP transaction(s): 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" (B525);

    - As described by Mr. Talarico, "[t]his document is the memorialization of a conversation that I had the day before with Bruce Toth and Mike Krimbill where Bruce Toth asked me to send … an e-mail to memorialize the conversation we had the day before on June 4, 2014, in Denver" (B2139-2140);[5]

- June 16, 2014 email from NGL director John Raymond to Lou Talarico: "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));

- October 24, 2014 letter from NGL CEO Mike Krimbill to his investors: "We are proposing that LCT acquire 5% of our NGL General Partner for a $21 million purchase price" (A279-280 (which merely restated the equity terms agreed to prior to the closing of the Transaction));

- November 10, 2014 email from NGL director Patrick Wade to NGL director John Raymond: "As previously discussed, *Lou's fee* for the TransMontaigne deal is the receipt of 2% of the GP as a fee, along with the right to buy an additional 3% at the discounted 8/8 value of $700mm ($21mm cost to Lou)" (B625-626); and

[5] NGL's reaction (or non-reaction) to this email is telling. It was written just days before Krimbill executed the Purchase Agreement for the Transaction committing NGL to pay LCT's fee (BR3-210 (Note: In its Opening Brief, LCT incorrectly cited to B536-562)) and he had to know what NGL was paying before signing that document. If NGL wants to claim there was no such meeting or discussion, it is curious that there was no response from NGL's counsel asking why the email was sent to him or stating that it does not reflect the terms the parties agreed upon. In any event, such disputes of fact are for a jury to resolve.

- January 29, 2015 voicemail from Mike Krimbill to Lou Talarico: "Hey, yes, we've been – had [NGL counsel] Winston Strawn providing – they're working on the agreement…. So they are finishing up, and I should have it hopefully tomorrow and I'll forward that to you on the 3 percent. On the 2 percent I've been just trying to get ahold of [NGL tax advisor] Jeff Burns so we can get a document, and then they'll try to get back with that, yeah, real quick." (A295-303.)

Krimbill confirmed these facts in the 2018 trial, testifying: "[W]e try to honor our word, so even though we didn't have a complete understanding, *we certainly had 5 percent for 21 million*." (B1195 (emphasis added).)[6] Indeed, Krimbill 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 (emphasis added).)

Krimbill's 2018 trial testimony came after the trial court granted summary judgment on LCT's contract claim, so the trial court did not have the benefit of Krimbill's later admissions in making its summary judgment ruling. Krimbill's trial testimony was a departure from his May 2017 deposition testimony. In deposition,

[6] True to pattern, during a November 9, 2022 hearing on motions *in limine*, NGL's counsel attempted to deceive the newly-assigned second trial judge by claiming that Krimbill's admission in the 2018 trial was a snippet elicited *by LCT's counsel* about some alternative compensation proposal. (A617.) To the contrary, the admission was *elicited from NGL's counsel during direct examination*, and NGL's counsel had to know that because the counsel that elicited that testimony in 2018 was the same counsel that made the misrepresentation to the trial court on November 9, 2022. This is just another example of how NGL has played fast and loose with the record. NGL's counsel recognized the damaging nature of Krimbill's 2018 trial testimony and immediately cut him off. (B4341-4342.)

Krimbill was asked: "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?" Krimbill responded: "Not that I recall, no." (B939.) This was clearly a lie, as Krimbill confirmed in the 2018 trial.[7]

NGL's Answering Brief on Cross-Appeal (at 43-44) focuses on terms that are either immaterial or irrelevant and purposely conflates what the parties discussed and agreed to prior to the July 1, 2014 closing (when LCT's fee was due and the agreement was breached) with what the parties discussed in 2015 (when NGL tried to renegotiate the deal and LCT was willing to evaluate alternative proposals in lieu of suing).

The class of equity for LCT's compensation was never in doubt. It was the GP units proposed by NGL in writing on May 15, 2014 (A264-265), which is the same class of equity NGL sought to purchase from existing investors via the 2014 Letter. (A279-280.) The fact that LCT later evaluated some profit interest units (instead of equity units in the GP) proposed by NGL in 2015 (*see* B634 (which LCT determined to be worthless)) is irrelevant to whether the parties formed an

[7] During the 2023 trial, Krimbill conceded multiple times that he "corrected" his false 2017 deposition testimony at the 2018 trial. (B2943; B2945; B2949; and B2981.) "Corrected" is Krimbill's word, but the trial judge at the time had a different view and aptly referred to Krimbill as a "liar." (B1282-1283.)

enforceable agreement prior to July 1, 2014. Moreover, lawfully characterizing some of LCT's services as consulting services for tax purposes does not make them future services, nor alter the material terms. Future services were not part of the deal, nor were restrictions on the use of proceeds from LCT's purchase of the GP interests, but if NGL wants to make these factual claims, that is for a jury to decide.

NGL even contends that material terms were not reached because "[t]he counterparties to the potential agreements were not identified." (*Id.* at 43.) Apparently, NGL forgot that it conceded liability on LCT's *quantum meruit* claim. Moreover, NGL acknowledged the obligation to pay LCT in the Purchase Agreement (executed by the GP on behalf of the LP), which provides that, "[e]xcept for UBS Securities *and LCT Capital, LLC whose fees and expenses will be paid by Buyer*," and "Buyer" is defined as the LP. (BR38 at § 4.08.) There is no confusion about the parties to the fee agreement.

In any event, "[w]hat terms are material is determined on a case-by-case basis, depending on the subject matter of the agreement and on the contemporaneous evidence of what terms the parties considered essential." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1230 (Del. 2018) (citing *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1097 (Del. Ch. 1986)). The parties reached agreement on the terms they regarded as important before, but certainly no later than June 4, 2014, when Talarico met with Krimbill and Toth in Denver to formalize the

material terms. (B2139-2140.) Toth asked Talarico to send an email memorializing the terms agreed to, and Talarico did so on June 5, 2014. (B525.)

The fact that there were other issues that the parties discussed when NGL attempted to renegotiate the deal *post*-closing does not change the fact that the material terms had been resolved. *See Iacono v. Estate of Capano*, 2020 WL 3495328, at *10-12 (Del. Ch. June 29, 2020) (rejecting "defendants[']attempt to create uncertainty as to the basic terms of the oral agreement" and holding that "none of the additional features … were material terms. They were 'nice-to-have' provisions … but none were essential."); *see also Parker-Hannifin*, 589 F. Supp. 2d at 464 ("[T]erms [defendant] now claims to be necessary for an agreement obviously were not."). Critically, none of the subsequent discussions altered the material terms of 2% of the GP for free, a 3% option, and a tax catch-up, which were reached before the Transaction closed. (B1165 (Krimbill: "*I don't think [the terms] ever changed*.")). LCT completed its services in reliance on those terms.[8]

[8] At the 2018 trial, Krimbill claimed a "written" agreement was necessary to form an enforceable contract even though he knew otherwise because he testified otherwise before a South Carolina court where he previously sued to enforce an oral contract. (B4328-4339.) For Krimbill, litigation is a business tool rather than a sacred realm where the oath and truth matter. For example, NGL agreed to submit an acquisition dispute to an accounting arbitrator, but Krimbill sued in the Court of Chancery (*NGL v. Gold Energy*, C.A. No. 9648-VCN) anyway knowing it would be a breach because he wanted to use the litigation to renegotiate. (BR748-749.)

Importantly, the Court need not determine whether a contract was formed. That is a factual question for a jury to determine. What is clear is that the genuine disputes of material fact between LCT and NGL as to whether a contract was formed precluded summary judgment and requires reversal. This Court's opinion in *Lockwood v. Capano* is instructive. The underlying dispute included uncertainty as to whether a contract was properly formed and enforceable. The trial court held that it was and granted summary judgment in favor of one party. 2014 WL 7009737 at *2. The other party appealed and argued that the trial court should have held that no contract was formed and granted summary judgment in <u>*its*</u> favor. *Id.* at *1. This Court did neither and, instead, found "a material dispute of fact on the issue of contract formation that precludes summary judgment for any party." *Id*. at *1, *3. The same outcome is required here. If this Court determines that a third trial is necessary, the jury in that trial should also be given the opportunity to determine whether a contract was formed between LCT and NGL.

B. The Trial Court's Grant Of Summary Judgment On LCT's Unjust Enrichment Claim Should Be Reversed Because The Trial Court Misapplied Delaware Law

As explained in LCT's Opening Brief, the trial court erred (i) in applying the facts to the unjust enrichment factors and (ii) in its conclusion that LCT's unjust enrichment claim was duplicative of its *quantum meruit* claim, especially if the Court narrows LCT's *quantum meruit* damages.

To start, NGL conceded the validity of LCT's unjust enrichment claim:

> THE COURT: Let's end by the question I have to you: You're implying to the Court that you agree that there's an unjust enrichment claim that is valid and is allowed to proceed forward. You disagree as to the value of that –
>
> MR. SHAFTEL: Correct.

(BR593.)

NGL argues that LCT could not plead unjust enrichment and *quantum meruit* under one count because they are distinct causes of action (Cross-Appeal AB at 45), but this argument ignores the reality of how the two claims are dealt with under Delaware law. (E at 3 ("In some cases, such as this one, the same evidence is admissible to prove both claims [*quantum meruit* and unjust enrichment]").) While unjust enrichment and *quantum meruit* <u>can</u> be pled as separate claims, that is not always the case. For example, in *Pike Creek Professional Ctr. v. Eastern Elec. & Heating, Inc.*, 540 A.2d 1088 (Table), 1988 WL 32028 at *2 (Del. 1988), the Court treated the two claims as one. *Id.* at *1 (noting that plaintiff was "entitled to damages on a *quantum meruit* theory due to Pike Creek's unjust enrichment").

The trial court's holding that "allowing both claims to proceed separately at this juncture would be unfair and would inappropriately add a new claim to the litigation on the eve of trial" (C at 25) elevates form over substance. The Superior Court Civil Rules require that "[a]ll pleadings shall be construed as to do substantial

justice." Del. Super. Ct. Civ. R. 8(f). The trial court nevertheless used a technicality in the complaint to eliminate one of LCT's claims, in contravention of Rule 8(f) and Delaware practice. *See KnighTek, LLC v. Jive Commc'ns, Inc.*, 225 A.3d 343, 352 (Del. 2020) (reversing trial court's dismissal of fraud claim even though complaint did not expressly state that representation was "false").[9]

If a third trial is ordered, and this Court narrows the evidence for *quantum meruit* damages as NGL seeks, LCT must be permitted to pursue its unjust enrichment claim (as an alternative to its contract claim) otherwise no adequate remedy at law exists to make LCT whole. *See Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010). The record is clear that NGL was enriched by hundreds of millions of dollars as a direct result of LCT finding, negotiating and otherwise facilitating NGL's purchase of a billion-dollar company for $200 million, and LCT and NGL consistently discussed the intention for "identity of alignment" and for LCT to share in that enrichment. (B2308.) Even if NGL disputes these facts, sufficient evidence exists to submit LCT's unjust enrichment claim to a jury.

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[9] If the pleading of LCT's unjust enrichment and *quantum meruit* claims in a single count is the hangup, LCT respectfully requests leave to amend and replead unjust enrichment and *quantum meruit* as separate claims. Del. Super. Ct. Civ. R. 15(a) ("leave [to amend] shall be freely given when justice so requires"); *In re Transamerica Airlines, Inc.*, 2006 WL 587846, at *3 & n.8 (Del. Ch. Feb. 28, 2006) (rejecting defendants' "hypertechnical argument" and allowing plaintiff to amend to correct deficiencies); *Bellanca Corp. v. Bellanca*, 53 Del. 378 (Del. 1961) (plaintiff permitted to amend at close of plaintiff's case at trial to add claim for *quantum meruit*).

NGL claims that the trial court expressed skepticism as to whether NGL had been enriched at all, citing the court's conditional language that it found other factors not to be met "even if the Court was willing to find that Defendants have been enriched in some manner." (Cross-Appeal AB at 46.) It is axiomatic, however, that the provision of services without remuneration satisfies both the enrichment and impoverishment elements of an unjust enrichment claim. *Boulden v. Albiorix, Inc.*, 2013 WL 396254, at *14 (Del. Ch. Jan. 31, 2013) (Plaintiff "has pleaded adequately that [defendant] has been enriched by [plaintiff] having delivered the Plant to it and rendered services to bring about the acquisition of the Plant. To the extent that [plaintiff's] work went uncompensated, he was impoverished."). No justification exists to hold that LCT's unjust enrichment claim fails as a matter of law.

NGL fails to distinguish the case law cited by LCT. Suggesting that *Grunstein v. Silva*, 2011 WL 378782 (Del. Ch. Jan. 31, 2011), is inapplicable because "there was no *quantum meruit* claim" (Cross-Appeal AB at 46) misses the point. In *Grunstein*, plaintiffs alleged that they had reached an oral agreement with the defendant to form a joint venture to acquire a large provider of healthcare and rehabilitative services, and plaintiffs put significant effort into finalizing the acquisition (just like LCT did here with respect to NGL's acquisition of TransMontaigne). After closing, however, the defendant refused to share ownership with the plaintiffs and denied that an oral agreement existed. The plaintiffs filed a

number of claims, including unjust enrichment, and the defendant moved for summary judgment. The court denied the motion, holding that "the question of whether it would be unjust for Defendants to retain the benefits of Plaintiffs' 'time, effort, information, expertise' where Plaintiffs allege that they acted specifically at Defendants' request and insistence presents questions of material fact that the Court may not resolve at this stage." 2011 WL 378782 at *15. The same is true here.

NGL also misses the point of *Endowment Research Grp., LLC v. Wildcat Venture Partners, LLC*, 2021 WL 841049, at *13-14 (Del. Ch. Mar. 5, 2021), which LCT cited to demonstrate the error of the trial court's dismissal of the unjust enrichment claim because "Plaintiff has an adequate remedy at law which will satisfy those principals [*sic*], that is the *quantum meruit* claim." (C at 25.) If the trial court were correct, no unjust enrichment claim could survive if the plaintiff also pled a *quantum meruit* claim. This is clearly not the case, as is illustrated in, among many other cases, *Endowment Research Group*. 2021 WL 841049 at *13-14 (allowing both claims to survive dismissal and noting that plaintiff "pled a lack of adequate remedy at law").

Interestingly, NGL says nothing whatsoever about *Schaeffer v. Lockwood*, 2021 WL 5579050 (Del. Ch. Nov. 30, 2021) (cited in Cross-Appeal OB at 59). The trial court held that LCT could not establish "absence of justification" because "[w]hile NGL acknowledges that some compensation is owed, 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.) *Schaeffer*, however, demonstrates the error of this conclusion. There, the fact that the defendant "repeatedly acknowledged, both before and after litigation began, that [plaintiff] was owed something for his efforts" was sufficient on its own to meet the "absence of justification" factor. 2021 WL 5579050, at *21. NGL's failure to distinguish *Schaeffer* is a tacit acknowledgment that the trial court's holding was contrary to established Delaware law.

For all these reasons, if the Court remands for a third trial, the Court should reverse the trial court's summary judgment opinion and reinstate LCT's unjust enrichment claim.

CONCLUSION

For the foregoing reasons, and the reasons articulated in LCT's Opening Brief on Cross-Appeal, LCT respectfully requests that the Court (i) affirm the jury's verdict and reverse the trial court's post-judgment interest calculation and (ii) in the event the jury verdict is set aside, reverse the trial court's summary judgment rulings.

DATED: November 30, 2023

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