EFiled: Oct 09 2018 10:18AM EDT
Filing ID 62537260
Case Number 308,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEAF INVENERGY COMPANY, a Cayman Islands exempt limited liability company, Plaintiff Below-Appellant/ Cross-Appellee, v. INVENERGY RENEWABLES LLC, a Delaware limited liability company, Defendant Below-Appellee/ Cross-Appellant.	No. 308, 2018 Court Below: Court of Chancery of the State of Delaware, C.A. No. 11830-VCL PUBLIC VERSION Filed October 9, 2018

DEFENDANT BELOW-APPELLEE'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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September 26, 2018

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NATURE OF THE PROCEEDINGS

This is a breach-of-contract case. Plaintiff, Leaf Invenergy Company ("Leaf"), owned 2.3% of Invenergy Wind LLC ("Invenergy"). Pursuant to Section 8.04(b) of Invenergy's Operating Agreement, Leaf had a right to consent to certain transactions ("Material Partial Sale" or "MPS" transactions) "***unless***" it was paid a certain sum of money – a "Target Multiple" – to redeem its interest and thus bypass its consent right.

It is undisputed that (i) on December 15, 2015, Invenergy completed a sale of certain assets to a third party, TerraForm Power, Inc. (the "TerraForm Transaction"); (ii) the TerraForm Transaction was a Material Partial Sale under the Invenergy LLC Agreement; and (iii) Invenergy did not obtain Leaf's consent to the transaction or pay it a Target Multiple. (Invenergy obtained consent from its other two minority members but concluded that Leaf's consent was not contractually required because Leaf was not a member when the TerraForm Transaction sale contract was signed.) On June 30, 2016, the trial court granted Leaf's motion for partial judgment on the pleadings, finding Leaf's consent was required because Leaf became a member before the TerraForm Transaction closed, and thus ruling Invenergy breached the LLC Agreement. That ruling is not appealed.

The ***sole*** issue at the ensuing damages trial, and thus on this appeal, is the amount of damages to which Leaf is entitled. After considering all the evidence, the trial court properly found Leaf suffered no injury as a result of the TerraForm Transaction, and in fact had actually benefitted from that sale, which the evidence showed to be on very favorable terms. Memorandum Opinion ("Op.") 78. Indeed, Mark Lerdal, the principal of Leaf, thought that the TerraForm Transaction "was a great deal for us." A1006. And the court further observed after trial, "Leaf did not [even] assert that the TerraForm Transaction harmed its interests." Op. 78. Leaf had the contractual right to enjoin the TerraForm Transaction but chose not to because it did not want to stop the TerraForm Transaction. A596, §15.11. Indeed, as Lerdal admitted at trial, "ironically" Leaf is better off today than it would have been if Invenergy had sought its consent and Leaf had withheld consent, scuttling the TerraForm Transaction. A1052. Thus, this is a case in which the Plaintiff not only suffered no injury from the breach of its contractual consent right, but admittedly was ***benefitted*** by the breach.

Under Delaware law, a party is entitled to damages solely to compensate for the harm, if any, that actually results from a defendant's wrongdoing. Op. 66. If such wrongdoing causes no injury, then only nominal damages are appropriate. *Zimmerman v. Crothall*, 62 A.3d 676, 713 (Del. Ch.

2013). Consistent with this principle, damages are not awarded in the amount that the breaching party could have spent to avoid breaching. Indeed, as the trial court pointed out, Delaware recognizes the principle of efficient breach – which provides that a contract can be even intentionally breached to achieve the economically efficient result where damages for the injury actually caused by the breach would be less than the breaching party's cost to avoid the breach. Op. 77. Because Leaf admits it suffered no harm, the trial court properly granted only nominal damages.

Leaf has attempted to claim huge damages despite its admitted lack of injury by asserting that it is entitled to receive a Target Multiple ($126 million) under the "Unless Clause" exception to its consent right in Section 8.04(b). But as the trial court ruled three times, the Unless Clause – on its face – provided only an "exception" for Invenergy's benefit to Leaf's preceding consent right. B430-31; Op. 76-77; B1442-43. By its terms, Section 8.04(b) is a "Governance" provision that prohibited Invenergy from completing an MPS without Leaf's consent "***unless***" Invenergy paid Leaf its Target Multiple (here, $126 million) to redeem Leaf's interest at the closing. Conversely, by its plain language and structure, the Unless Clause did not provide a contractual "requirement" mandating that Invenergy redeem Leaf's interest at the Target Multiple amount if Invenergy completed an MPS without Leaf's consent. Indeed, the Unless Clause cannot even

be grammatically read to provide any such standalone payment requirement. Rather, the Unless Clause is plainly an exception to the preceding consent right, as even Leaf's attorney admitted. A1101.

Further, as the trial court noted, this plain reading of the Unless Clause as an "exception" was consistent with two well-reasoned Delaware cases holding that similar "unless" clauses provided exceptions to the preceding consent rights, not standalone payment rights. *In the Matter of the Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973 (Del. Ch. 1997), and *In re Appraisal of GoodCents Holdings, Inc.*, 2017 WL 2463665 (Del. Ch. June 7, 2017).

Nonetheless, at trial (and, again, here on appeal), Leaf asserted multiple arguments to attempt to convert this exception for Invenergy's benefit into a contractual "requirement" for Leaf's benefit. These arguments are premised not on any actual harm to Leaf (it admits there was none), but on a notion that it was deprived of some inherent right to "coerce" value by withholding consent to a transaction that it believed to be beneficial. Op. 78. As the trial court properly noted, "Under *Fletcher*, there is a strong argument that this concession should end the matter." *Id.* Nonetheless, the trial court considered and properly rejected each of Leaf's variants as a matter of law and fact.

First, Leaf argued that to complete an MPS in compliance with Section 8.04(b), Invenergy had to either (i) obtain Leaf's consent, or (ii) bypass the need for that consent by paying Leaf its Target Multiple at closing – Leaf's "binary world" argument. Opening Brief of Appellant Leaf Invenergy Company ("OB") 21. Consequently, according to Leaf, if Invenergy completed an MPS without Leaf's consent, Invenergy was "required" to buy out Leaf at its Target Multiple.

But the illogic of Leaf's "binary world" argument is obvious. The only "requirement" of Section 8.04(b) is that Invenergy not do an MPS without either obtaining Leaf's consent, or bypassing that consent by invoking the exception. But Invenergy never sought to invoke the Unless Clause. Op. 76. So while Invenergy was required by Section 8.04(b) to get Leaf's consent if Leaf was not bought out, Invenergy was not required – as Leaf would have it – to buy out Leaf if Leaf did not consent. Invenergy's only contractual requirement if Leaf did not consent, and thus Leaf's contractual expectancy, was that Invenergy simply would not do the TerraForm deal. Invenergy violated this prohibition. But, Leaf was admittedly not harmed by the TerraForm Transaction, so the trial court properly awarded it only nominal damages.

Next, Leaf argues that Section 8.04(b) is ambiguous, and that extrinsic evidence shows all parties "subjectively understood" that if an MPS were done

without Leaf's consent, Invenergy would be required to pay Leaf its Target Multiple at closing. But the court rejected this claim, explaining that Leaf's argument would "turn the exception into a payment right" and "[p]roperly understood the exception was only an exception." Op. 77.

Leaf further argues that the "extrinsic evidence" showed the parties subjectively believed that Leaf would be entitled to payment of the Target Multiple. The trial court properly found that what this evidence actually showed was the parties' "misunderstanding" of the legal consequences of a breach under Delaware law. Op. 77. Moreover, this evidence was not "extrinsic evidence" that reflected all the contracting parties' intent, when they were entering the LLC Agreement, to specify a remedy not provided by Delaware law – namely a buyout at a Target Multiple in the event of a breach. The record is clear that the remedy for a breach was never discussed, and there certainly was no *ex ante* agreement that Leaf would be entitled to payment of a Target Multiple as a remedy for breach. To the contrary, Leaf's witnesses testified that they knew the other members would have to consent to a transaction involving a Target Multiple payment, A961-62, A979, A1007, A1009, and Leaf did not have any reasonable expectation that those other parties would do so here. *See* p. 47, *infra*. Thus, as the trial court repeatedly held, the Unless Clause did not provide "a liquidated damages provision or specify

the remedy for breach of [the] Consent Right," (B1443), a point that Leaf necessarily has conceded. OB 27. Nor, as shown herein, would such a provision have been a reasonable estimate of damages for breach of Section 8.04(b) had it been discussed as such.

Lastly, because the language of the Unless Clause could not be "clarified" by extrinsic evidence into a requirement to receive a Target Multiple as a remedy for breach, Leaf is in essence asking that the LLC Agreement be equitably "reformed" to provide for a Target Multiple redemption right due to "mutual mistake." But Leaf first sought this relief in a post-trial Motion for Reargument below and the court rejected the reformation argument as too late. B1444. In all events, any claim for reformation would necessarily fail where, as here, the parties never agreed to the contractual provision that the plaintiff would assert through reformation.

Having found Leaf benefitted from the Transaction, the Court, applying *Fletcher International, Ltd. v. ION Geophysical Corp.*, 2013 WL 6327997 (Del. Ch. Dec. 4, 2013), nonetheless explored whether Leaf would be entitled to damages as a non-consenting party, measured by the additional amount (if any) it would have been able to extract in a "hypothetical negotiation" for its

consent. The trial court concluded, however, that Leaf would not have obtained any additional consideration in a *Fletcher* negotiation.

Leaf takes issue with the trial court's conclusion. OB 40-45. But as Leaf conceded in its post-trial argument, it deliberately did not try to prove damages based on "some sort of hypothetical negotiation" (B1379), and it has therefore waived that argument. In all events, the evidence presented at trial fully supports the trial court's conclusion that Leaf could not have extracted value in a *Fletcher* negotiation.

Finally, under the provisions of the LLC Agreement, Leaf had a separate right to put its shares to Invenergy for repurchase, and Invenergy had a right to call Leaf's shares. Both of those rights were exercised immediately after the TerraForm Transaction closed while Leaf was simultaneously pursuing this litigation. The purchase price for Leaf's interests is the same under both the put and call provisions. The contract requires each party to estimate the value of Leaf's interests and, absent agreement on price, to submit an appraisal by a qualified "independent" appraiser. If the appraisals are more than 20% apart, the parties must jointly engage a third appraiser, and the put or call price is then the average of the three appraisals.

Here, the undisputed evidence reveals Leaf improperly instructed its "independent" appraiser, XMS Capital Partners, LLC ("XMS"), to determine "Fair Market Value" at the "highest amount that could be achieved . . . on an M&A sale." Op. 93 (quoting A993; B561). XMS conceded that it had never used such a methodology before. B909. Even using that value-inflating measure, XMS initially valued Leaf's interest in Invenergy at a range of $45.7 to $56.7 million. But Leaf would not accept XMS' valuation, calling the range "pathetic." A1054. Leaf "bird dogged" and "cajoled" XMS to raise its appraisal, and within a few days XMS raised its appraisal by approximately 40% – from a range of $45.7 to $56.7 million, to a final number of $73.1 million. Op. 61 n.256, 62. Leaf's principal, Mark Lerdal, admitted that he had "no reason to believe that but for Leaf's cajoling and bird dogging, XMS would ever have gotten above the top of its prior range" of $45.7 to $56.7 million, much less to $73.1 million. A1050.

Delaware law is clear that where a party "takes actions to taint the appraisal process" so that "the appraisal is unworthy of respect because it does not, as a result of contractual wrongdoing, represent the genuine impartial judgment on value that the contract contemplates," the appraisal will be disregarded. *Senior Hous. Capital, LLC v. SHP Senior Hous. Fund, LLC*, 2013 WL 1955012, at *26 (Del. Ch. May 13, 2013). The trial court erred in treating the XMS appraisal as

independent when the facts indicate that it dramatically increased as a result of Leaf's improper pressure.

SUMMARY OF ARGUMENT

As to the appeal:

1. Denied. Expectation damages exist to compensate a plaintiff for injury by providing it with what it reasonably expected to receive had the contract been performed. Here, had the contract been performed, Leaf's contractual expectation was the TerraForm Transaction would not have been done, ***not*** that it could have received a Target Multiple over the opposition of the other members (whose consent to both the TerraForm Transaction and any non-*pro rata* payment to Leaf was also required). Leaf had no right to a $126 million payment. The failure to honor Leaf's consent right permitted the TerraForm Transaction to occur, but that transaction benefitted Leaf. Leaf thus suffered no injury from the breach of its consent right, and it is not entitled to any damages other than the $1 of nominal damages awarded by the trial court.

2. Denied. Leaf argued below that "*Fletcher* simply cannot inform this action" (A1281) and admitted at argument that it deliberately decided not to argue for damages based upon a *Fletcher* hypothetical negotiation. B1379. It cannot rely on a *Fletcher* analysis now. In all events, the trial court's finding that Plaintiffs would not have obtained consideration in a *Fletcher* negotiation is (Op. 79-81) fully supported by the record and therefore must be affirmed.

As to the cross-appeal:

3. As the trial court properly found, "the plain language of the Put-Call Provisions required each side to select an appraiser that was independent in the sense of being able to render a valuation on the merits, free of extraneous considerations or influences." Op. 88-89. Leaf instructed XMS "to determine 'Fair Market Value' as the 'highest' price that anyone would pay for the Company." Op. 93. Leaf's appraiser, XMS, did exactly that, determining the value of Leaf's interest in Invenergy to be in the range of $45.7 to $56.7 million. But Leaf rejected this "pathetic range" and "bird dogged" and "cajoled" XMS, causing it to manipulate the inputs in its valuation model to arrive at a higher value. The trial court erred by failing to apply established precedent, which holds courts will not rely on "independent" appraisals where one of the parties "takes actions to taint the appraisal process" such that the "appraisal is unworthy of respect because it does not, as a result of contractual wrongdoing, represent the genuine impartial judgment on value that the contract contemplates." *Senior Hous. Capital*, 2013 WL 1955012, at *26.

STATEMENT OF FACTS

A. THE PARTIES.

Leaf is a wholly owned subsidiary of Leaf Clean Energy Company, a publicly held investment company that specializes in clean technology and renewable energy. B1142-43. After pressure from activists, Leaf determined that it would pursue an orderly liquidation of its assets. A1008. The largest of its assets (by far) was its investment in Invenergy. B1143. On April 1, 2014, Leaf's parent hired attorney Mark Lerdal to oversee the orderly liquidation, and granted him an incentive fee that was tied to the value of returns he generated. Op. 23.

Defendant Invenergy is the developer, owner and operator of wind power generation projects. B1143. Michael Polsky founded Invenergy in 2001 and since then has served continuously as CEO. Op. 2-3. Polsky holds a majority of Invenergy's equity through two investment vehicles: Invenergy Wind Holdings LLC and Invenergy Wind Financing LLC. *Id.* at 3.

B. LEAF'S INVESTMENT IN INVENERGY.

In 2007, Invenergy raised approximately $250 million through issuance of Series A convertible notes (the "Series A Notes"), primarily to two third-party investors – Liberty Mutual Insurance Company ("Liberty") and Citigroup Global Markets, Inc. ("Citigroup"). Op. 3. In the summer of 2008,

Invenergy began soliciting interests in an offering of Series B convertible notes (the "Series B Notes"). Liberty expressed an interest in investing in the Series B Notes, as did Leaf's parent. *Id.*

It is undisputed that, as negotiated, the terms of the Series B Notes tracked the terms of the Series A Notes. Op. 8. The undisputed trial testimony also established that, in the negotiations for the Series A Notes, Liberty and Citigroup asked for a consent right in the event of a change-of-control transaction. A1113. Invenergy agreed to that consent right on the condition that it have the right to bypass that consent right if the investors achieved a specified return. *Id.* The parties further agreed that the Series A Noteholders would have the same consent rights if Invenergy sold material assets (a "Material Partial Sale" transaction), and that Invenergy would have the same right to bypass the noteholders' consent by paying a Target Multiple. *Id.* Thus, the Unless Clause was added, at Invenergy's request, to limit the noteholders' otherwise unlimited consent right to certain transactions, including MPS transactions.

As the trial court found, the original term sheet proposed by Invenergy for the Series B Notes provided that, in a "non-Control Transaction" such as a Material Partial Sale, the noteholders' consent would not be required and Invenergy would have the option to redeem the Notes in exchange for payment of

the Target Multiple. Op. 5. Liberty rejected that proposal, and instead proposed terms that mirrored those in the Series A Notes. *Id.* 8. Invenergy agreed.

C. THE CDPQ INVESTMENT.

At the end of 2012, Invenergy raised $160 million by issuing Series C Notes to a large Canadian pension fund named Caisse de dépôt et placement du Québec ("CDPQ"). Invenergy used a portion of the Series C proceeds to redeem Citigroup's Series A Notes, leaving Liberty as the dominant holder of those Notes.

D. UNDER PRESSURE FROM ITS ACTIVE INVESTORS, LEAF ATTEMPTS TO MONETIZE ITS INTEREST IN INVENERGY.

As of 2014, Leaf owned $30 million in Series B Notes that were convertible into equity at Leaf's option. Invenergy could repay the Notes beginning December 22, 2015, if the Notes were not converted into equity. B76-77, §1.4(c). If the Notes were converted into equity, the equity could be called by Invenergy or put to Invenergy by Leaf beginning on December 22, 2015, with "Fair Market Value" to be determined by an appraisal process. B50-51, §11.09(b); *accord* A582-84, §11.09(a), (d) and A545 (definition of "Fair Market Value").

Leaf hoped, however, to liquidate its Invenergy investment before the end of 2015. In the first half of 2014, Leaf retained a financial advisor, Gordon

Dean of Dean, Bradley & Osborne ("DBO"), to advise Leaf on "exit scenarios." B132-39. Leaf sought to market its notes to third parties and sought $70 million even though the principal and interest was only $46 million. B147; A1000; B149. Leaf sought to justify this inflated price in part by telling potential purchasers that upon an exercise of the put right the "investor will select [an] appraiser who will likely place high value on required return right." B142.

E. THE 2014 TRANSACTION.

In 2014, Invenergy effectuated a recapitalization transaction through which (among other things) CDPQ acquired a $441 million equity interest in Invenergy by converting its Series C Notes into equity and paying approximately $300 million in cash. As part of that transaction, the parties also approved the Third Amended and Restated LLC Agreement (the "LLC Agreement") which is the operative agreement for this dispute. B1147.[1]

During the 2014 negotiation, Leaf retained Mike Russell at Wilson, Sonsini, Goodrich & Rosati, P.C. to provide advice on the proposed changes to Invenergy's governing documents. Op. 26. A series of emails between Mr. Russell and Joseph Condo, Invenergy's General Counsel at the time, ensued. On

[1] JX160 (A380-451) is the form of the LLC agreement that the parties approved in 2014; JX332 (A534-607) is the executed LLC agreement. A1118.

May 27, 2014, Russell asked Condo why Leaf was not included in the newly-proposed Section 8.01(e) of the LLC Agreement. *Id.* Condo responded that the section did not address Leaf because "Leaf's rights in the event of an MPS are specified explicitly in Section 8.04(b)." *Id.*

Russell then pointed out that, in his view, Section 8.04(b) did not actually provide for a payout to Leaf in the event of an MPS. *Id.* Condo responded that the consent right provided that Invenergy could not, under the contract, do a Material Partial Sale without Leaf's consent absent payment of the Target Multiple. *Id.* 27. Russell remained concerned, however, that the LLC Agreement only required Invenergy to "receive" sufficient cash proceeds, but did not expressly require Invenergy to pay those proceeds to Leaf. *Id.* Invenergy felt that Leaf was "wrapped around the axle on a semantic game thinking we don't actually have to pay them" (*Id*. 28) and therefore proposed to resolve the situation by clarifying language. Accordingly, Section 8.04(e) of the LLC Agreement was clarified as follows:

> [Invenergy shall not] participate in or permit a Material Partial Sale, unless the transaction giving rise to the Material Partial Sale yields cash proceeds equal to or greater than the amount that, ~~if received,~~ would provide the Series B Non-Voting Investor Members, as of the closing of such Material Partial Sale, with cash proceeds equal to or more than their applicable Target Multiple,

> with such Target Multiple to be paid upon such closing of the Material Partial Sale.

Op. 29. Leaf agreed with this proposed amendment, and it was added to the LLC Agreement. These discussions were about what would be required to comply with the contract; as Russell admitted he never had any conversation with Condo about what would happen if Invenergy breached the LLC Agreement, and Leaf never requested that Invenergy include a liquidated damages provision or that anything be added to the LLC Agreement governing damages or remedies in the event of a breach. A1108-09. The parties regarded the new language as a "clarification," not a substantive change granting new rights to Leaf. A1084; A1106.

F. INVENERGY CONSIDERS A MATERIAL PARTIAL SALE.

In late 2014, Invenergy began to consider selling some of its assets and retained Goldman Sachs & Co. LLC. Op. 39. Invenergy believed there was a favorable market, but had "no pressing need for the proceeds from the TerraForm Transaction." Op. 39, 80. Lerdal was on the board of TerraForm and in March 2015 learned that TerraForm was preparing a bid. *Id.* 40. In what he described as "not [his] proudest moment," Lerdal immediately notified another manager of Leaf, Yoni Alemu, that Invenergy was pursuing an asset sale – even though he knew that was TerraForm's confidential information. *Id.* 40; A1002. Lerdal and

Alemu were thrilled, because they thought the sale would either trigger the MPS clause, or else would establish "really good precedent" for determining Invenergy's Fair Market Value under the Put/Call Provisions. Op. 40.

The net proceeds to Invenergy of the TerraForm Transaction, after assumption and repayment of debt (some of which encumbered the assets sold) and mandatory tax distributions, were estimated to be $107 million (Op. 51; B186); as the transaction was ultimately consummated, those net proceeds to Invenergy were $85 million. Op. 58; B213 (revised schedule).[2] The proposed transaction did not require the consent of Leaf (which was then still a Noteholder), but did require the consent of Liberty and CDPQ.[3]

CDPQ and Liberty saw "significant value in this transaction" but wanted proceeds to be distributed to the members. Op. 43. Invenergy strongly disagreed, and told Liberty and CDPQ that the TerraForm Transaction was too small to have room for equity distributions. B151-52. Liberty and CDPQ ultimately agreed but expressly conditioned their consents to the transaction on

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[2] The proceeds and their uses are set forth in more detail in Defendant's Demonstrative Exhibit #2 (B1137-38).

[3] The thresholds for a Material Partial Sale were higher in the Series B Note Agreement than in the LLC Agreement. Thus, the transactions required consent of Liberty and CDPQ as LLC members, but not of Leaf as a Noteholder.

Invenergy's use of the cash proceeds in accordance with a prescribed schedule. B187-204; Op. 51. That schedule, and thus the consents of Liberty and CDPQ, allowed for only required tax distributions to equity members. *Id.*

These undisputed facts underscore that the parties would never have proceeded with the TerraForm Transaction if it required payment of a $126 million Target Multiple to Leaf. Invenergy believed (correctly, as it turned out) that the "put" value of Leaf's shares was in the neighborhood of $40 million, and it would make no economic sense to pay what was effectively an $86 million premium to Leaf. As the trial court properly found, Invenergy was under no compulsion to sell assets (Op. 79-80), and when Liberty and CDPQ had earlier asked for a distribution to equity to be part of the TerraForm Transaction, Polsky flatly refused. The record is clear that Polsky would have foregone the TerraForm Transaction rather than pay the proceeds to holders of equity (even though Polsky was the largest equity holder). He certainly would never have agreed to a deal in which a sum greater than all of the working capital generated from the transaction was paid to Leaf, a holder of just 2.3% of Invenergy.

This evidence is corroborated by Polsky's contemporaneous actions. As initially proposed, the TerraForm Transaction would repay Liberty's $100 million of Series A Notes a few days before their December 2015 payment date.

Liberty sought an additional $2 million prepayment premium. Op. 82. Polsky flatly rejected that request as "insane" (B158) and Invenergy told Liberty it would not complete the transaction if it had to pay Liberty a $2 million prepayment penalty. A1153. Liberty then agreed to forego the prepayment penalty. *Id;* Op. 82.

The TerraForm Transaction also required approval of both Liberty and CDPQ, and the record is undisputed that each of those entities consented to the transaction only after being provided with a schedule of uses of proceeds, which did not include a premium payment to Leaf. Op. 49-50; B165. As the trial court properly found, neither CDPQ nor Liberty would have consented to a preferential distribution to Leaf. Oliver Renault, a representative of CDPQ, and Alexander Fontanes, a representative of Liberty, both expressly so testified, and there was no contrary testimony or even effective cross-examination. The Court viewed that testimony skeptically, noting that a damage award in favor of Leaf would harm CDPQ and Liberty indirectly. But the Court nonetheless credited their testimony after considering actual context (CDPQ and Liberty owned over 40% of

Invenergy's equity while Leaf owned just 2.3%, and Liberty was firmly rebuffed when it requested a $2 million prepayment) and seeing them testify.[4] Op. 82.

Thus, as the trial court properly found, the record "shows that if Leaf had insisted on a meaningful payment, then the TerraForm Transaction would not have taken place." Op. 66.

G. LEAF LAYS IN WAIT TO ENSURE THAT THE TERRAFORM TRANSACTION CLOSES.

From the time Leaf learned of the proposed TerraForm Transaction, it believed the transaction required Leaf's consent, and that the necessity of such consent would give Leaf an opportunity to "coerce value" from the transaction. A1047. Leaf knew, however, that its legal position was at best uncertain and therefore, as early as March 2015, began to consider retaining a "rapacious litigator." B153; A1014. Leaf also recognized that if it did not get its Target Multiple, there would be a liquidity event later that year through the exercise of the Put and Call rights, and the proposed TerraForm Transaction would be "very good for that process." A1015.

Leaf thus believed that stealth was important. Although intending to convert its Notes into equity, Leaf believed that it "should time this properly" and

[4] Mr. Fontanes was unable to attend trial because of health issues, and his testimony was presented by video deposition.

"want[ed] the[] deal to be fully baked before we tip our hand." B156; A1015. As Lerdal explained, he didn't want to "screw up the Invenergy sale because [Leaf] believed that [the] transaction would give Leaf a better return under the appraisal process, either the put or the call," and it might also get a Target Multiple, which "would also be good." A1015.

Leaf therefore wanted a signed deal or something close before exercising its conversion rights. A1015. Lerdal feared that if Invenergy was "aware of – if they were contemplating our right to the Target Multiple, that they might put it – they might have a closing date after the date that they could call our shares" and thereby avoid any claim by Leaf to receive a Target Multiple. B648; *accord* A1003. Alemu agreed with the "stealth" strategy, replying to Lerdal: "Best for the company to advance the contemplated transaction prior to playing our hand." B156.

Accordingly, Leaf deliberately waited until mid-June 2015 to deliver a notice to Invenergy of the conversion of its Series B Notes into LLC interests. B1149. It appears Leaf deliberately timed its notice of conversion to be after the deal was "fully baked," but before any agreement was actually signed, because Leaf wanted to argue that it had sought conversion before any transaction was signed.

Following execution of the TerraForm Transaction, but before its announcement, Invenergy's CEO, Jim Murphy, called Alemu to advise him about the transaction, including the principal economic terms, the intended use of the proceeds, and the expected closing date. B205-06; A964-65; A1121. Murphy advised Alemu that Invenergy did not believe the transaction would constitute a Material Partial Sale under the Note Agreement. B205-06; A527-29; A965; A1121. Alemu did not raise the question of whether the transaction would be a Material Partial Sale under the LLC Agreement, and that subject was not discussed. B205-06; A965.

Alemu arranged a second call with Murphy on July 23, 2015. B207; A966; A1151. During that call, Alemu asserted that Leaf was entitled to a Target Multiple (A966), but Murphy disagreed, stating Leaf was not a member when Invenergy signed the transaction and therefore Leaf's consent was not required. B207; A966; A1121-22. At the end of the call, Murphy requested that Leaf promptly raise any issues with Invenergy's interpretation. B207; A967. Leaf did not do so, however, because it wanted to avoid anything that might disrupt the transaction or give TerraForm an ability to back out. A1005.

Months later, on October 9, 2015, Alemu sent an email to Murphy setting forth Leaf's position that Leaf was entitled to formal notice under the LLC

Agreement before the company closed the transaction. B208; A968; A1006. Through its then-outside counsel, Vedder Price, Invenergy reiterated that Leaf was not an equity member when Invenergy entered into the transaction, and therefore did not have a right to notice of, or a right to consent to, the transaction. A968; B210-11. At no time did Leaf object to the transaction, ask Invenergy not to pursue the transaction, or communicate any opposition to the transaction. A1122; A1074.

Under the LLC Agreement, Leaf's express remedy if it believed its rights were being violated was to obtain an injunction to stop the transaction. A596, § 15.11; A1047. Although Leaf considered an injunction, it immediately rejected that option because it did not want to jeopardize a favorable transaction. B654; A1047; A1054; *see* Op. 56. Accordingly, Leaf delayed until December 21, 2015 – more than nine months after learning of the TerraForm Transaction, more than five months after learning of its signing, and less than a week after closing of that transaction – to file its lawsuit.

H. THE PARTIES EXECUTE THE PUT AND CALL RIGHTS.

On December 28, 2015, Invenergy issued notice that it was exercising its right to call Leaf's interest in Invenergy. B216-19. That same day, Leaf responded by notifying Invenergy of its "election" to put its entire interest. B214-

15. Leaf explained that it was exercising its put rights because Invenergy's call right was revocable and Leaf wanted to ensure its units would be purchased. *Id.*

Despite a contractual obligation to negotiate in good faith, Leaf contended the value of its shares was $214 million. A990; A1049; A582-83, §11.09(a); B220-25. This "valuation" was nearly double the amount Leaf told its investors that all of Leaf's assets were worth, three times what its inflated appraisal later would show, and five times the amount that the independent appraiser selected by the parties eventually determined. *See* p. 28, *infra*; B227 (Leaf's December 31, 2015 Interim Report to its investors). Given Leaf's position, the negotiations failed, and Invenergy and Leaf hired "independent" appraisers to determine Invenergy's Fair Market Value pursuant to the Put/Call.

As discovery revealed, Leaf sought to manipulate the appraisal process from the outset. Although the LLC Agreement defines "Fair Market Value" as "the amount that could be obtained from an arm's length willing buyer (not a current employee or Executive Officer) for 100% of the Company Interests" (A545), Leaf instructed XMS that fair market value was "the highest amount that could be achieved . . . on an M&A sale." B561; *see also* A993. XMS understood that it would be incorporating "a lot of valuation assumptions that would drive to a higher value," and that applying this unusual version of fair market value "was part

of the ground rules of [our] engagement." B910. Moreover, even though Leaf recognized the TerraForm Transaction "was a very, very tip-top of the market situation" (B765) and a "top of the market" deal (A1015), Leaf got XMS' agreement that "the TerraForm Transaction and the implied discount rates that were assumed in that transaction would be very important benchmarks" for valuing Invenergy. B910-11.

XMS completed its work on April 20. B245 ("I think we are done here"), arriving at a value range of $45.7 million to $56.7 million based upon discount rates that XMS thought were "very defensible given precedents" and a valuation of Invenergy's development pipeline at [redacted]. B246-77; B1001, B1002, B1004.

Leaf's reaction to XMS' valuation was shock and disappointment. A975; A978; A1050; B787. It is undisputed that, through a series of subsequent calls, Leaf pressured XMS to change the fundamental inputs into its valuation model (discount rate, capacity assumptions and projected value to megawatt) to arrive at much higher values. Leaf characterized this as "bird dogg[ing]" XMS and "cajol[ing]" XMS into reaching a higher value. B419; A1050. It is undisputed that following these efforts, XMS raised its valuation by over 40%, from $51.2 million (midpoint of its range) to $73.1 million. (More details of these efforts are

set forth in the Argument section, *infra*.) At trial, Lerdal admitted that he had "no reason to believe that but for Leaf's cajoling and bird-dogging, XMS would ever have gotten above" $56.7 million – the top of what Dean called XMS' "pathetic" range. A1050; A1054.

Because the two appraisals were more than 20% apart, the parties were required under the LLC Agreement to cooperate to select a third appraiser. Leaf initially refused to cooperate, but after Invenergy filed its Counterclaim in this matter, Leaf agreed (with encouragement from the court) to the retention of Moelis & Company ("Moelis") as a third appraiser. Moelis completed its appraisal and arrived at a value of $42.5 million (B467) – revealing the extent to which XMS' "cajoled" appraisal is an outlier.

ARGUMENT

I. LEAF IS NOT ENTITLED TO DAMAGES EQUAL TO THE $126 MILLION TARGET MULTIPLE.

A. QUESTION PRESENTED.

Did the trial court err in awarding nominal damages of $1 when the Plaintiff admitted, and the trial court properly found, that Plaintiff suffered no damage (and in fact benefitted) from the TerraForm Transaction proceeding in violation of Plaintiff's contractual consent right?

B. SCOPE OF REVIEW.

The Supreme Court reviews a trial judge's factual findings for clear error. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010). "So long as the Court of Chancery's findings and conclusions are supported by the record and the product of an orderly and logical deductive process, they will be accepted." *E.g.*, *SV Inv. Partners, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 210 (Del. 2011). Moreover, the Supreme Court "review[s] findings as to damages by the Court of Chancery for an abuse of discretion. 'The Court of Chancery has the . . . power 'to grant such . . . relief as the facts of a particular case may dictate.'"" *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015) (citations omitted). Legal determinations concerning the rights and obligations of the parties are reviewed *de novo*. *ThoughtWorks*, 37 A.3d at 209-10.

C. MERITS.

1. Because Leaf Suffered No Injury, And In Fact Benefitted From The Breach, The Court Properly Awarded It Nominal Damages Of $1.

It is undisputed that the purpose of damages in a breach-of-contract case is to put the plaintiff in "as good a position as he would have been in had the contract been performed." Op. 75, n. 303; B429 (*citing* RESTATEMENT (SECOND) OF CONTRACTS, § 347, cmt. a.); B150. Such damages can be measured as the loss suffered by the plaintiff as a result of the breach, or as the amount of an expected contractual gain that the plaintiff did not receive as a result of the breach. "Expectation damages are measured by the losses caused and gains prevented by defendant's breach." *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146-47 (Del. 2009), *see also Am. Air Filter Co., Inc. v. McNichol*, 527 F.2d 1297, 1299 (3d Cir. 1975) (same). Where a contract has been breached but the plaintiff suffers no injury, it is common to award nominal damages, often $1. *E.g.*, *Zimmerman*, 62 A.3d at 713.

In this case, the breach was of Leaf's consent right. Section 8.04(b) of the LLC Agreement, under the heading "GOVERNANCE," provides that, absent Leaf's consent, Invenergy shall not:

> (b) participate in or permit a Material Partial Sale, unless the transaction giving rise to the Material Partial Sale yields cash proceeds equal to or greater than the amount that would provide [Leaf], as of the closing of such Material Partial Sale, with cash proceeds equal to or more than [its] applicable Target Multiple with such Target Multiple to be paid upon such closing of the Material Partial Sale. At the option of all other Members, any such transaction may be structured to provide such other Members with lower proceeds on a pro rata basis as [Leaf] in order to yield [Leaf] with [its] Target Multiple.

A574, § 8.04(b).[5]

Under the plain structure of this provision, Leaf had the right to consent to Material Partial Sale transactions, unless its consent was bypassed through payment of a Target Multiple. It is undisputed that the exception to the consent right was not invoked and, thus, no bypass to the consent occurred. Op. 63, 76-77. Accordingly, the consent right remained in place and was breached when the TerraForm Transaction was closed without Leaf's consent. That is the contractual breach for which Leaf is entitled to be made whole.

The undisputed record shows that Leaf was not harmed by the violation of its consent right – in fact, Leaf actually benefitted. Without the

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[5] The LLC Agreement uses the term "Series B Non-Voting Investor Member," but at all times relevant to this suit, Leaf was the sole such member.

TerraForm Transaction, Leaf admits that it still would have put its shares to Invenergy in December of 2015, but the value of those shares would have been millions of dollars less. A1051-52. Thus, Lerdal admitted that Leaf is better off with its consent right having been violated (and the TerraForm Transaction having closed), than it would have been had the consent right been observed (and the TerraForm Transaction scuttled):

> Q: Right. And so you're better off today with an appraisal and a fair market value with a TerraForm transaction than you would be if the negotiations resulted in a stalemate, because there, you'd be in an appraisal world at a lower price; correct?
>
> A: Ironically, that's correct.

A1052.

Where, as here, a breach of contractual rights does not harm the plaintiff, and in fact benefits it, only nominal damages are available. *E.g.*, *Zimmerman*, *supra*. Plaintiff cites no contrary authority, and we are aware of none. Indeed, awarding damages to a party who has suffered no injury would create a windfall, which this Court has held impermissible. *Paul*, 974 A.2d at 146 ("damages should not act as a windfall").

2. The Trial Court Properly Concluded That the "Binary World" Structure Did Create a Payment Right.

In awarding nominal damages, the trial court rejected Leaf's argument that the Target Multiple exception provides the measure of Leaf's damages based on the assertion that the contract provided only two paths for Invenergy to do an MPS without breaching Leaf's consent right: (i) the "Consent Path," or (ii) the "Payment Path." OB 20-23.

While the "binary world" expectation Leaf proffered sets forth what is required to complete an MPS in compliance with the contract, the trial court properly rejected Leaf's claim that the Target Multiple exception (the "Payment Path") provided the measure of damages. Op. 1, 76. Put differently, only one of the paths was actually a contractual requirement, namely that Leaf's consent be obtained or the deal not done. The other path was an exception that was not utilized, and therefore was not implicated.

As the court explained, Leaf's argument "would . . . turn the exception into a payment right. Properly understood the exception was only an exception." Op. 77. So, while Invenergy was required by Section 8.04(b) to obtain Leaf's consent if Leaf was not bought out, Invenergy was not required – as Leaf would have it – to buy out Leaf if Leaf did not consent. Invenergy's only contractual

obligation in the latter event, and thus Leaf's contractual expectancy, was that Invenergy simply would not do the TerraForm deal. *Id.* Invenergy violated this prohibition. But, since Leaf was admittedly not harmed by the TerraForm Transaction, the trial court properly awarded it only nominal damages.

Leaf's primary argument on appeal is that, under the LLC Agreement, Leaf had a ***right*** to compel a redemption of its shares if Invenergy engaged in a Material Partial Sale without Leaf's consent. On the first page of its brief, Leaf asserts that Invenergy "was obligated to" pay Leaf a Target Multiple in such circumstances and, on the second page of its brief, asserts that the LLC Agreement gave Leaf a "bargained-for exit right." Similar statements appear in the brief at page 3 ("right" to be deemed), 7 ("obligation to pay"), 28 (Leaf had a "buy-out option"), 29 (same), 31 (the parties' "bargain" was that Leaf could force a buyout at the Target Multiple) and 33 ("Section 8.04(b) is a stand-alone" exit right given to Leaf).

The trial court expressly rejected this interpretation of Section 8.04(b) on multiple occasions. In its Damages Order, the trial court explained the problem with Leaf's analysis – Section 8.04(b) does not establish a payment right if consent is not obtained:

> [T]he Series B Consent Right does not expressly entitle Leaf to $126 million if its consent to a Material Partial

> Sale is not obtained. The payment path instead establishes a scenario in which the Company does not have to obtain Leaf's consent. The Company did not follow the Payment Path, so that exception does not apply.

B430-31. Consistent with that explanation, in its decision after trial, the trial court held that the exception in Section 8.04(b) "does not create a right to receive the specified consideration in the event of breach." Op. 76. And in its Order denying Leaf's motion for reargument, the court reiterated that "the LLC Agreement did not provide explicitly for the payment of the Target Multiple in the event of breach." B1442-43.

The trial court's holding that Leaf did not have a payment right under Section 8.04(b) is clearly correct, as evidenced by the structure, language, and purpose of that provision, and by unambiguous Delaware case law.

The structure of Section 8.04(b) is clear: it establishes a corporate governance rule, and an exception to that rule. It appears under a section headed "GOVERNANCE." (The relevant language is at pp. 30-31, *supra*.) The governance rule is that, to engage in an MPS, Invenergy must obtain Leaf's consent. The exception is that Invenergy can bypass this governance provision (Leaf's consent right) if Leaf receives a Target Multiple, either through a *pro rata*

distribution or through a non-*pro rata* distribution with the consent of the other Members.

The plain language of Section 8.04(b) is also clear: it provides a consent right but gives Invenergy the right to bypass that consent right if a transaction results in payment of a Target Multiple to Leaf. The exception, set forth in the Unless Clause, gives no new rights to Leaf. It serves only as a limitation on Leaf's right to consent.

This is easily demonstrated. Assume that Section 8.04(b) did not contain the Unless Clause and stated simply that, absent Leaf's consent, Invenergy "shall not engage in a Material Partial Sale" – no exceptions. If Invenergy then engaged in such a transaction without obtaining Leaf's consent, Leaf would have a right to pursue damages, but it would have no claim to payment of a $126 million Target Multiple, or any other specific number. It would have to prove damages, as does any party claiming harm from a breach of contract. Yet the central premise of Leaf's argument is that inclusion of the ***limitation*** on Leaf's rights – that Leaf's consent right can be bypassed in certain circumstances – actually increases its rights by giving it a contractual right to payment in the event of breach. *See* A1046. This flies in the face of the plain meaning of Section 8.04(b).

Leaf's claim that the Unless Clause in Section 8.04(b) provides it with a payment right is also contrary to the purpose of that provision. It is a governance provision. As Murphy testified at trial without contradiction or effective cross-examination, the Unless Clause was added to limit investors' rights, not to increase them. A1113. Similarly, Leaf's attorney Mark Russell admitted that such "unless clauses" are common and generally serve the purpose of limiting a consent holder's right to block favorable transactions. A1101-02.

Finally, Leaf's position is also contrary to Delaware case law. In *Ford Holdings*, 698 A.2d 973, holders of two types of preferred stock sought appraisal of their shares following a merger. Ford Holdings argued that the certificates of designation set forth what holders would receive in a merger, and therefore set forth what holders were entitled to upon appraisal. As to one type of preferred, which entitled holders to a fixed dollar amount upon a merger, the court agreed and entered judgment in Ford Holdings favor. The second type of preferred stock ("Auction Preferred") specified in its certificate of designations that:

> Without the affirmative vote of the holders of a majority of the Outstanding shares of all series of Auction Preferred, Voting Preferred and Parity Preferred, voting as a single class, . . . [Holdings] may not . . . merge with or into any other corporation ***unless . . . each holder of shares of Auction Preferred, Voting Preferred and Parity Preferred shall receive, upon such . . . merger, an amount in cash equal to the liquid preference, Merger***

> ***Premium, if any, and accumulated and unpaid dividends . . . .***

698 A.2d at 978-9 (emphasis added). Ford Holdings argued that this provision gave the holders of the Auction Preferred a right to payment upon a merger that obviated any right to a court-determined appraisal value. The court disagreed, noting the structure of the "Unless Clause" there in issue gave the holders of the Auction Preferred the right to consent to merger transactions, with an exception:

> but that the class *loses that power if* the preferred receive specified consideration – the liquidation preference ($100,000), a merger premium, if any is authorized, and accumulated and unpaid dividends.

Id. at 979 (emphasis in original). The court held that the provision at issue was a voting provision that did not give the holders of the preferred stock any right to payment of the amount that would, if paid, divest them of a consent right. In the words of the court:

> The voting provisions are, in the end, voting provisions. The stipulated absence of a class vote is too frail a base upon which to rest the claim that there has been a contractual relinquishment of rights under Section 262 or, to state it differently, that the consideration that acts to remove the rights to a class vote also is conclusively established to be the "fair value."

Id. Because the "unless" clause in *Ford Holdings* did not give holders of the preferred a right to payment, it did not specify the payment those holders would

receive upon a merger, and thus did not dictate the amount that those holders would receive in an appraisal. The court thus denied Ford Holdings' request for a judgment that the holders of the preferred subject to the "unless" clause would receive only the amount to invoke the "unless" clause in an appraisal.

The court considered similar contractual language, and reached a similar result, in *GoodCents Holdings*, 2017 WL 2463665. There, the Company's certificate of incorporation provided that:

> Without the affirmative vote of the holders of a majority of the Series 1 Cumulative Convertible Preferred Stock, the corporation [i.e. GoodCents] shall not . . . effect any merger or consolidation . . . unless the agreement or plan of merger . . . shall provide that the consideration payable to the stockholders of the corporation . . . shall be distributed to the holders of capital stock of the corporation in accordance with Sections B.6.a. and B.6.b. above.

Id. at *3. Section B.6.a required that the Preferred Stock be paid its liquidation preference before any payment to the common.

The Company effectuated a merger in which the aggregate consideration ($57 million) was less than the preferred stock's liquidation preference ($73 million). *Id.* at *1. Accordingly, the Company paid all of the merger consideration to holders of the preferred, and none to holders of the common. *Id.* Holders of the common sought appraisal. The Company asserted

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that holders of the common stock were not entitled to any consideration, arguing that Section B.6.c. (quoted above) created a payment right in the holders of the preferred, entitling them to their liquidation preference in a merger. *Id.* at *4.

The court disagreed. *Id.* It held:

> [The] language [that] follows the word "unless" []simply means that the Preferred Stockholders' right to block a merger by withholding their affirmative vote falls away if the terms of the merger agreement 'shall provide that the consideration payable to the stockholders of the corporation . . . or consideration payable to the corporation . . . shall be distributed to the holders of capital stock of the corporation in accordance with [the Preferred Stockholders' Liquidation Preference].' ***No part of Section B.6.c provides that whenever GoodCents enters a merger, the Preferred Stockholders shall be paid their Liquidation Preference***."

Id. (emphasis added, footnote omitted).

The court bolstered its holding by comparing the language of Section B.6.c (upon which Petitioner relied) with that of Section B.6.a, which stated that in the event of certain transactions, "the holders of shares of [Preferred Stock] then outstanding *shall be entitled to be paid out of the assets of the corporation* available for distribution to its stockholders, before any payment shall be made to the holders of shares of Junior Stock, by reason of their ownership thereof, an amount equal to [the Liquidation Preference]." *Id.* at *5 (emphasis supplied by the

court). The court noted that "[s]uch language specifically providing for a right to payment is noticeably absent from section B.6.c." *Id.*

The Unless Clause in Section 8.04(b) is identical in structure to the similar clauses at issue in *Ford Holdings* and *GoodCents*. Leaf was given a right to consent to certain transactions, but it "loses that power" if it receives "specified consideration" – the Target Multiple. As in *Ford Holdings* and *GoodCents*, the rights in Section 8.04(b) "are, in the end, voting provisions." They do not entitle Leaf to any right to payment.

Moreover, as in *GoodCents*, several other provisions in the parties' agreements expressly gave Leaf a payment right:

- Series B-2 NPA (A218, § 1.4(e)(iv)): "Upon the occurrence of . . . the Company must offer to prepay . . ." (MPS Redemption right if sufficient proceeds);
- LLC Agreement (A422, §9.02(b)): " . . . upon which the Company shall . . ." (Tax Distributions).
- LLC Agreement §11.03: "after receipt of the Tag Notice, each Member shall have the right . . . ." (Tag Along Rights); and
- LLC Agreement §11.09(a): "Between December 22, 2015 and December 22, 2016, any Series B Non-Voting Investor Member may require that the Company purchase . . . ." (Put and Call Rights)

As in *GoodCents*, "[s]uch language specifically providing for a right to payment is noticeably absent" from Section 8.04(b). 2017 WL 2463665, at *5.

3. Leaf's "Extrinsic Evidence" Cannot and Does Not Establish That Leaf Was Entitled to a Target Multiple Buyout.

Much of Leaf's brief is addressed to extrinsic or "parol" evidence, arguing that all of the parties expected that Invenergy's choices were "binary," *see* OB at 1-2, 9-12; that if Invenergy engaged in a Material Partial Sale without Leaf's consent, it could only do so by paying Leaf a Target Multiple, *see* OB at 7; and, therefore, that the trial court should have used this extrinsic evidence to transform the Unless Clause exception into an enforceable redemption right that now entitles Leaf to payment of a Target Multiple as damages. *See* OB at 1-2, 7, 9-12, 36-39. This argument fails, however, because the Court should not consider parol evidence and because in any event, the parol evidence, even if considered, does not support Leaf's position.

Under Delaware law, a court may consider extrinsic evidence only where the contract is ambiguous. It is black letter law that parol evidence may not be used to change the meaning of a contract that is clear. "'When no ambiguity is present in a contractual provision, the court will not resort to extrinsic evidence in order to aid in interpretation, but will enforce the contract in accordance with the plain meaning of its terms.'" *State v. Corr. Officers Ass'n of Del.*, 2016 WL 6819733 at *9 (Del. Ch. Nov. 18, 2016) (quoting *Wilm. Firefighters Ass'n v. City*

of Wilm., 2002 WL 418032, at *7 (Del. Ch. Mar. 12, 2002)). "When the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties have not assented." *Rhône-Poulenc Basic Chems. Co v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del. 1992). Because the trial court found that the contract created a consent right and an exception (Op. 76-77), there was no ambiguity and parol evidence could not be used to vary those unambiguous terms. Moreover, the trial court's construction is supported by both *Ford Holdings* and *GoodCents*, in which the court found that similar consent rights with "unless clause" exceptions did not create payment rights. Both cases were decided on motions for summary judgment without resort to extrinsic evidence. *Ford Holdings* 698 A.2d at 974; *GoodCents*, 2017 WL 2463665, at *1. Here, the Unless Clause is equally clear, and resort to extrinsic evidence is therefore prohibited.

Leaf asserts that the court "acknowledged" during argument on its motion for judgment on the pleadings (as to damages) that the "unless clause" exception could reasonably be read to provide an enforceable redemption right to Leaf. This is incorrect. Although the trial court decided to look at evidence of the parties' understanding and negotiations to see whether the Target Multiple was the

"best measure" of damages for breach of the consent provision, the court was crystal clear that it "wouldn't" use such evidence "to find that the 'unless' clause was intended to create an independent payment right." A741-42 (responding to Invenergy counsel). As the court made clear, ***"I wouldn't say it was a payment right."*** A742 (emphasis added). Thus, while the trial court gave Leaf wide latitude to prove its damages – exploring whether the Target Multiple was an appropriate measure of damages – it never suggested that Leaf's argument about the Unless Clause providing a standalone redemption right was reasonable.

In all events, Leaf's argument that the extrinsic evidence of the parties' subjective expectations supports a construction of the Unless Clause as an independent enforceable redemption right, *see* OB at 13-14, fails for multiple reasons.

First, the parol evidence as to what the parties "expected" if the contract were complied with adds nothing to the plain meaning of the contract as outlined above.

Second, the subjective, unexpressed intent of the parties is not parol evidence, and cannot be used to interpret a contract. The LLC Agreement is a multi-lateral contract, but the "extrinsic evidence" upon which Leaf relies consists primarily of internal emails and reports to Leaf or emails between just Invenergy

and Leaf. "It is the law of Delaware that subjective understandings of a party to a contract which are not communicated to the other party are of no effect." *Supermex Trading Co., Ltd. v. Strategic Solutions Grp., Inc.*, 1998 WL 229530, at *9 (Del. Ch. May 1, 1998).

Under a multi-party agreement, relevant extrinsic evidence must bear on the expressed understanding of all of the parties, not just a few. "[U]nless extrinsic evidence can speak to the intent of ***all parties*** to a contract, it provides an incomplete guide with which to interpret contractual language." *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) (partial emphasis added). Thus, the internal communications of Leaf's witnesses are simply not relevant extrinsic evidence, and communications between Invenergy and Leaf that were not shared with CDPQ and Liberty are also not relevant.

Similarly, after-the-fact statements by the parties about their "understanding" is not extrinsic evidence that can create an *ex ante* contractual expectation. *Demetree v. Commonwealth Trust Co.*. 1996 WL 494910, at *4 n.9 (Del. Ch. Aug. 27, 1996) ("recent testimony" concerning "subjective expectations" do not "aid the Court in construing a reasonable objective meaning"). "[R]elevant extrinsic evidence is that which reveals the parties' intent *at the time they entered into the contract*. In this respect, backward-looking evidence gathered after the

time of contracting is not usually helpful." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.11 (Del. 1997) (emphasis in original).

Third, the expectation evidence Leaf relies on does not support Leaf's claimed entitlement to a Target Multiple buyout. The evidence shows that the Unless Clause was negotiated and understood as it was expressly structured – as an exception to the right to consent to MPS transactions. A1101. As the record makes clear, the few relevant contemporaneous communications addressed what was required for the parties to comply with the contract – not what would happen if it were breached. A1108 (Russell) (admitting that he never had any conversation with Condo about what would happen if Invenergy breached the LLC Agreement); A1109 (admitting that Leaf never requested that anything be added to the LLC Agreement that governed damages or remedies available in the event of a breach); *accord*, A1077 (Condo) (the context of the emails cited by Leaf "is what we have to do to comply with the unless clause").

Finally, as to this transaction, the record shows none of the parties – including Leaf – actually expected that Leaf would be paid a Target Multiple in connection with the TerraForm Transaction. Indeed, the Payment Path could not be utilized even if Invenergy had wanted to do so, as the net proceeds of the TerraForm Transaction ($85 million) were far less than the $5.47 billion ($126

million ÷ 0.023) that would be required to pay Leaf a Target Multiple through a *pro rata* distribution, and payment of a Target Multiple through a non *pro rata* distribution would require consent of both Liberty and CDPQ. Leaf could not have expected that it would receive payment of a Target Multiple if the contract were adhered to: Leaf's witnesses admitted that Leaf knew the other members would have to consent to a transaction (B156-57; A961-62, A979, A1007, A1009) and it did not know whether those other parties would do so. A985 ("no idea what they would have done") (Alemu); A1010 ("might or might not" give consent) (Lerdal). In fact, as the trial court properly found, neither Liberty nor CDPQ would have given such consent. *See* pp. 21-22, *supra*.

Leaf nonetheless contends that Leaf and Invenergy subjectively believed that Leaf would be entitled to payment of a Target Multiple upon establishing a breach of the LLC Agreement, and that their erroneous understanding of what the law requires should be enforced. OB at 39. The court properly found this evidence only showed the parties' subjective "misimpression" of the damages remedy provided under Delaware law. Op. 76-77. The trial court properly rejected this as a basis for awarding Leaf a Target Multiple, holding that "the parties' subjective beliefs about a remedy are not controlling unless they are implemented in a remedial provision in an agreement, such as a liquidated

damages clause." Op. 74. As the court pointed out, the RESTATEMENT (SECOND) OF CONTRACTS states that the components of expectation damages include the following:

> (a) The loss in value to [the injured party] of the other party's performance caused by its failure or deficiency, plus
>
> (b) Any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) Any cost or other loss that [the injured party] has avoided by not having to perform.

Op. 74-5, citing RESTATEMENT (SECOND) OF CONTRACTS, § 347 (Am. Law Inst. 1981).

Those measures do not refer to the parties' subjective beliefs. *Id*. Rather, the court must determine an amount that will give the injured party "the benefit of its bargain by putting that party in the position it would have been but for the breach." Op. 75, quoting *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000); *accord, Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001) ("This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract."); RESTATEMENT (SECOND) OF CONTRACTS, § 347 cmt. a ("[c]ontract damages . . . are intended to give [the injured party] the benefit of his

bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.").

Indeed, expectancy damages "must be tied to and limited by the express promises made to [the plaintiff] in the Agreement." Op. 76, *quoting Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 551 (Del. Super.), *aff'd* 886 A.2d 1278 (Del. 2005) (TABLE). As shown above, there was no promise that Leaf would be paid a Target Multiple as a remedy for breach, and that amount therefore cannot be a measure of "expectation damages."

Leaf's assertion that it could be entitled to damages equal to its subjective belief concerning the damages available upon a breach not only is not supported by a single case, it also would eliminate the possibility of an "efficient breach," a concept that is recognized in the law. *Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 n.39 (Del. 2013). The doctrine of efficient breach holds that "properly calculated expectation damages increase economic efficiency by giving 'the other party an incentive to break the contract if, but only if, he gains enough from the breach that he can compensate the injured party for his losses and still retain some benefits from the breach.'" *E.I. DuPont de Nemours and Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996) (*quoting* RESTATEMENT (SECOND) OF CONTRACTS, Reporter's Note to Introductory Note to CH. 16 Remedies). This case

provides a perfect example of efficient breach: since Leaf claims that it would never consent to the TerraForm Transaction without payment of at least $100 million (A1051), and the other parties whose consent was required would never consent to any such payment, the TerraForm Transaction would not happen and ***all parties*** (including Leaf) would be worse off. Through an efficient breach, the parties other than Leaf were able to realize the benefits of the TerraForm Transaction with no harm to Leaf. Indeed, the breach in this instance was so efficient that even Leaf benefitted. Hence, it was awarded nominal damages of $1.

If the trial court concluded the parties' subjective expectations and negotiating history could not provide the measure of damages, why then did the court consider and address this evidence at all? Because the court gave Leaf wide latitude to present evidence to attempt to show that the Target Multiple was an appropriate proxy for damages for breach of the consent right. At post-trial argument, for example, the trial court explored at length whether evidence of this "expectation" of a Target Multiple redemption could reflect an amount that the parties – through negotiations – had settled on as damages for breach of its consent right. B1379-82, B1403-07. As the evidence from witnesses for both parties showed, that subject was never even discussed, much less agreed to. A1108-09.

Moreover, the evidence shows there is no logical relationship between

the Target Multiple and the expected injury from breach of the MPS consent provision. The Target Multiple formula was never intended to and did not reflect the actual market value of Leaf's membership interest at the time of a prohibited MPS, much less the amount any injury to that value by reason of a prohibited transaction. Under the LLC Agreement, a "Material Partial Sale" is any sale of assets in excess of $240 million. If those assets were sold at 20% below their "true" value, the injury to Invenergy would be $24 million, and the injury to Leaf, as a 2.3% owner of Invenergy would be $552,000. Paying Leaf $80 million more than the value of its interest would never be a reasonable estimate of such injury. To the contrary, as exemplified by the TerraForm transaction, a redemption at Target Multiple would simply provide a huge windfall to Leaf in a circumstance in which it admittedly suffered no injury and was withholding consent only to attempt to coerce value. Op. 78.

Simply put, the Unless Clause was intended to allow Invenergy and its members to agree to bypass Leaf's consent if it made economic sense to do so by buying out Leaf. The provision was never intended to estimate Leaf's injury in the event of a breach of its consent right, and certainly not to provide Leaf with a huge windfall in the event such a breach occurred – which the evidence showed was precisely what Leaf was seeking.

Ultimately – after taking all the evidence and expectations into consideration – the trial court correctly concluded the appropriate remedy for breach of the consent right was nominal damages. As the trial court pointed out in its later opinion denying Leaf's motion for reargument, this conclusion was consistent with what the trial court already had said about damages:

> Leaf accuses the court of "chang[ing] the rules." Reargument Mot. 2. Leaf observes that the order denying the motion for entry of final judgment posited that if Leaf proved that it expected to receive the Target Multiple, then "the Target Multiple could provide the proper measure of damages." Dkt. 81, at 11. The verb "could" denotes a possibility, not a guarantee. Invenergy argued successfully that the Target Multiple was not the proper measure of damages.

B1443.

4. Leaf Cannot Now Seek To Rewrite the Contract

In the end, the relief that Leaf seeks requires not an interpretation of the LLC Agreement but, instead, a substantial rewriting of it. Leaf's argument that the court should now enforce the parties' claimed expectation (that, on a breach of the consent right, Leaf would be entitled to damages equal to its Target Multiple) is in reality a plea to reform the contract to add a mandatory payment provision as a remedy for breach of Leaf's consent right. No claim for reformation was pleaded, and the elements of reformation were not tried. B1444. The other parties to the

LLC Agreement, necessary parties to such a claim, were never included as defendants. *See, e.g.*, 7 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1613 (3d Ed. 2001) ("In cases seeking reformation . . . all parties to the contract probably will have a substantial interest in the outcome of the litigation and their joinder will be required."). Accordingly, as the trial court held when Leaf first advanced such a claim in a post-trial motion for re-argument, any claim for reformation is too late and has been waived. B1444; *Nationwide Emerging Managers, LLC v. Northpointe Hldgs., LLC*, 112 A.3d 878, 892 (Del. 2015). Moreover, extrinsic evidence would not help Leaf in any event, as Leaf does not even contend that there was ever an agreement to provide Leaf with such a remedy; to the contrary, it concedes that such remedies were never even discussed. *See* p. 18, *supra*. For all the reasons such evidence does not support the construction Leaf seeks, it likewise does not support a claim to rewrite the contract.

II. LEAF IS NOT ENTITLED TO *FLETCHER* DAMAGES.

A. QUESTION PRESENTED.

Has Plaintiff waived any claims to *Fletcher* damages? If not, did the trial court err in finding that the factual record did not support the award of such damages?

B. SCOPE OF REVIEW.

The trial court's holding was the result of findings of fact after trial, and such findings are to be accepted if they "are supported by the record and [are] the product of an orderly and logical deductive process." *ThoughtWorks*, 37 A.3d at 210. Moreover, the Supreme Court reviews "findings as to damages by the Court of Chancery for an abuse of discretion." *RBC Capital Markets*, 129 A.3d at 864 (quotations and citations omitted). Legal determinations are reviewed *de novo*. *ThoughtWorks*, 37 A.3d at 209-10.

C. MERITS.

In *Fletcher*, 2013 WL 6327997, at *19-26, the Court of Chancery held that one possible measure of damages for breach of a consent right is the amount a non-consenting party would have been able to obtain in a "hypothetical negotiation." The trial court addressed potential *Fletcher* damages and found that the evidence presented did not support a claim that Leaf could have obtained

consideration in a *Fletcher* negotiation. Op. 79-83. Leaf asserts both that the trial court erred in relying on *Fletcher* to assess damages (OB at 40-42) and that, under *Fletcher*, the court's conclusion that "Leaf would not have been able to extract any payment in return for its consent" was erroneous and "illogical." OB at 42-45.

As an initial matter, Leaf has expressly waived any *Fletcher* arguments. It asserted in its opening post-trial brief that "the outcome in *Fletcher* simply cannot inform this action." A1281. And it stated at the post-trial argument that it deliberately did not try to prove damages based on "some sort of hypothetical negotiation." B1379. Having affirmatively disavowed any *Fletcher* argument, Leaf has waived any argument that a *Fletcher* negotiation would result in its receiving payment for its consent right. *See* Supreme Court Rule 8. Because Leaf deliberately chose to rest its argument entirely on its claim to a right to receive a Target Multiple, it cannot now claim entitlement to *Fletcher* damages.

In any event, however, the record fully supports the trial court's determination that Leaf would not have obtained any unique consideration for its consent pursuant to a *Fletcher* negotiation. Simply put, Leaf was in the process of an orderly dissolution and intended to put its shares to Invenergy in December of 2015, with or without the TerraForm Transaction. The record is also undisputed that Leaf believed that the TerraForm Transaction would significantly increase the

value of Leaf and result in a higher put price. Op. 46; A1015; B156. On the other hand, as the trial court properly found (Op. 80), Invenergy had no need to sell assets. Invenergy's contemporaneous conduct – being prepared to walk away from the TerraForm Transaction when Liberty tried to obtain a $2 million payment for its consent – supports this finding. And having failed to obtain additional equity distributions themselves, the court correctly found Liberty and CDPQ would not have consented to Leaf obtaining such consideration. The record fully supports the trial court's determination that Leaf would not have had the leverage to extract value in a *Fletcher* negotiation. Op. 79, 83.

III. THE TRIAL COURT IMPROPERLY DECLINED TO GRANT RELIEF STRIKING THE MANIPULATED XMS APPRAISAL.

A. QUESTION PRESENTED.

Did the trial court err by giving weight to an "independent" appraisal when Cross-Appellee Leaf admits that it instructed the appraiser to adopt a definition of fair market value contrary to Delaware law and that the appraisal was significantly increased in the days before its final submission in response to Leaf's "bird dogging" and "cajoling"?

B. SCOPE OF REVIEW.

The trial court's holding was the result of findings of fact after trial, and such findings are to be accepted if they "are supported by the record and [are] the product of an orderly and logical deductive process." *ThoughtWorks*, 37 A.3d at 210. Legal determinations are reviewed *de novo*. *Id.* at 209-10.

C. MERITS.

In its Memorandum Opinion, the trial court found that the LLC Agreement required Leaf to appoint an "independent appraiser" and that under Delaware law "the concept of 'independence' refers to the ability to make a decision based on the merits, free of 'extraneous considerations or influences.'" Op. 89, *quoting Beam, ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004). The Memorandum Opinion further found that

Leaf instructed XMS "to determine 'Fair Market Value' as the 'highest' price that anyone would pay for the Company" (Op. 93), that Leaf "cajoled" and "bird dogged" XMS in an effort to get it to increase its valuation (*id.* 61) and that "Lerdal admitted that he had 'no reason to believe that but for Leaf's cajoling and bird-dogging, XMS would ever have gotten above the top of its prior range.'" *Id.*, quoting A1050. Despite these findings, and many other significant admissions by Leaf and XMS, the trial court found that "Invenergy failed to establish that Leaf pressured XMS to such a degree that XMS was no longer independent for purposes of the Put-Call Provisions." Op. 90.

Established Delaware law holds that, where parties agree to have contractual valuations made by an appraiser, the work of the independent appraiser cannot be second-guessed by a Court unless the appraisal process has been tainted. As then-Chancellor Strine held in *Senior Housing Capital*, 2013 WL 1955012, at *26, "[i]n such a scenario, it is a contractual expectation that the appraiser make a good faith, independent judgment about value to set the contractual input." However, "[i]f one of the parties to the contract takes actions to taint the appraisal process – for example, by providing the appraiser with false financial statements – a court can of course protect the injured party." *Id.* In other words, "judicial review is not unavailable, but is restricted to considering a claim that the appraisal

is unworthy of respect because it does not, as a result of contractual wrongdoing, represent the ***genuine impartial judgment*** on value that the contract contemplates." *Id.* (emphasis added). Thus, for example, where the record showed that a party "improperly pressured [the independent appraiser] in the final stages of its work to increase the discount rate, in a way that distorted the integrity of the appraisal process," the appraisal could be rejected. *Id.* at *39; *accord*, *Morris, Nichols, Arsht & Tunnell v. R-H Int'l, Ltd.*, 1987 WL 33980 at *3 (Del. Ch. Dec. 29, 1987) (refusing to dismiss claims alleging that the defendant had submitted a fraudulently high appraisal because it knew that even if the dispute resolution mechanism was triggered, the high value would be included in the averaging of the appraised values).

The facts here show exactly the type of manipulation of a supposedly "independent" appraiser as was found improper in *Senior Housing Capital*.

First, Leaf improperly instructed its supposedly independent appraiser, XMS, to determine "fair market value" as the "highest" price that anyone would pay for the Company. A993. This was both contrary to the contract and contrary to Delaware law. When Leaf originally invested, the LLC Agreement at the time defined the term "fair market value" as:

> the product of (x) the highest price per unit of equity interest which the Company could obtain from a willing

> buyer (not a current employee or director) for the Company's Company Interests in a transaction involving the sale by the Company of all equity interest times (y) the number of Company Interests being valued.

Op. 93 (quoting A161). As the Opinion recognizes, the definition of Fair Market Value in the governing LLC Agreement "dropped the 'highest price' language and defined the measure simply as 'the amount that could be obtained from an arm's length willing buyer.'" Op. 94 (quoting A545). Thus, the "highest price" instruction was directly contrary to the language of the parties' integrated contract, which defined fair market value as "the amount that could be obtained from an arm's length willing buyer."

Leaf's instruction to XMS was also contrary to Delaware law. Under the Delaware Supreme Court's recent decision in *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 370 (Del. 2017), "fair value is just that, 'fair.' It does not mean the highest price that a company might have sold for had Warren Buffet negotiated for it on his best day and the Lenape who sold Manhattan on their worst." *See also Metropolitan Mut. Fire Ins.Co. v. Carmen Holding Co.*, 220 A. 2d 778, 780 (Del. 1966) (defining fair market value). By directing XMS to use an erroneous valuation standard, Leaf ensured that it would receive an inflated appraisal.

Leaf did not stop there. Even using Leaf's skewed definition of fair market value, XMS valued Leaf's interest at $45.7 to $56.7 million. XMS arrived at this valuation based upon discount rates that XMS thought were "very defensible given precedents," B1001, and on a valuation of Invenergy's speculative development pipeline at [redacted]. B1004-05. At that point, XMS believed its appraisal was ***final***. *See* B245 ("I think we are done here.").

But Leaf's reaction to XMS' appraisal was shock and disappointment. A975; A978; A1050; B787. Leaf had advised its stockholders that the value of the Leaf investment was close to $100 million – nearly double XMS' appraisal. B227. Leaf regarded XMS' valuation range as "pathetic." A1054. Dean and Alemu immediately called XMS, which revised its appraisal, increasing the valuation range of $45.7 million to $56.7 million to a revised range of $57.8 million to $71.1 million. *Compare* B246 *with* B282. To accomplish this increase, XMS slashed the discount rate on Invenergy's long-term development pipeline from 15% to 10%, thereby increasing the projected value of the pipeline by [redacted]. *Compare* B279-81 *with* B287, B375; B388. XMS also cut the merchant sales discount rate by a full percentage point, *compare* B280-81 *with* B287, and increased its capacity

projections, *compare* B281 *with* B390, and inflated the projected value per megawatt by 20%. *Id.*

The mid-point of XMS' new range was $64.5 million, still well below the $70 million price at which Leaf had previously tried to sell its Note. So, under continuing pressure from Leaf, XMS further revised its valuation, lowering the discount rates even further – to 7.5% for merchant sales and 9% for the pipeline (from its original 15% a few days earlier). B403, B411. It also further increased capacity projections, and further inflated the projected value per megawatt. *Compare* B390 *with* B411. With these new assumptions, XMS arrived at a valuation that Leaf would accept – $73.1 million.

Leaf understood the appraiser was supposed to remain independent. B559. Nonetheless, Leaf admits it "bird dogged" XMS and "cajoled" it into reaching a higher value. B419; A1050. As Nygaard admitted, XMS used the "lowest possible discount rate we could justify" (B919) and came to the "highest possible value for the pipeline." B919-20. Moreover, Nygaard admitted that the changes between his original appraisal ($45.7 million to $56.7 million) (B246) and his final appraisal ($73.1 million) (B412) were "speculative." B928. And even though the appraisal standard is what a willing buyer would pay for the assets, Nygaard testified that he "never formed an opinion in terms of what a willing

buyer would, in fact, pay for the development of pipeline." B932. At trial, Lerdal admitted he had "no reason to believe that but for Leaf's cajoling and bird-dogging, XMS would ever have gotten above" $56.7 million – the top of what Dean had called XMS' original "pathetic" range. A1050; A1054.

The type of pressure Leaf admittedly placed upon XMS is precisely the same as the pressure that was applied, and found to be improper, in *Senior Housing*. Accordingly, the XMS appraisal should be disregarded.

There is no merit to Leaf's assertion that Invenergy similarly manipulated the valuation of its independent appraiser, Navigant. While Invenergy reviewed drafts of the Navigant appraisals, there is nothing wrong with that. As the court recognized in *Senior Housing Capital*, it is appropriate for parties to review the work of independent appraisals for factual or methodological errors. 2013 WL 1955012, at *25 n.253. Thus, when Mr. Sane commented on the Navigant appraisal, he noted that Navigant had misallocated development expense between the operating business and the development business, incorrectly calculated income tax rates, and made some mathematical errors. A1185. The record is undisputed that Invenergy ***did not*** attempt to influence Navigant's independent judgment regarding factors affecting value, such as the discount rate or other key assumptions. *See, e.g.*, B870 (deposition of Thomas Houlihan

(Navigant)) (testifying that "no key assumptions . . . were altered" based upon conversations with Invenergy). Indeed while some of Invenergy's comments reduced Navigant's valuation, others increased it. *See* A1185. There is thus no equivalence in the communications that Invenergy had with Navigant and the pressure imposed on XMS by Leaf.

Under established principles set forth in *Senior Housing Capital*, Leaf's conduct violated Invenergy's contractual expectation of a good faith, independent appraisal, and the appraisal should thus have been disregarded. Accordingly, the trial court improperly relied on the XMS appraisal when averaging the three appraisals obtained by the parties. The trial court's decision on this issue should be reversed by this Court.

CONCLUSION

For the reasons set forth herein, Leaf's appeal should be denied, and Invenergy's cross-appeal should be granted. This Court should affirm the award to Leaf of damages in the amount of $1, and should remand the case to the Court of Chancery for a determination of the Fair Market Value of the put-call, with an instruction that the XMS appraisal be disregarded.

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September 26, 2018