**IN THE SUPERIOR COURT**

**OF THE STATE OF DELAWARE**

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| LCT CAPITAL, LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | C.A. No.: N15C-08-109 WCC CCLD |
| | ) | |
| NGL ENERGY PARTNERS LP and | ) | |
| NGL ENERGY HOLDINGS LLC, | ) | |
| | ) | |
| Defendants. | ) | |

Submitted: May 11, 2016
Decided: October 3, 2016

**Upon Defendants' Motion to Dismiss - DENIED**

**MEMORANDUM OPINION**

David E. Ross, Esquire, Ross Aronstam & Moritz LLP, 100 S. West Street, Suite 400, Wilmington, DE 19801. Attorney for Plaintiff.

Roberto M. Braceras, Esquire, Brian C. Devine, Esquire, and Catherine G. Curley, Esquire, Goodwin Procter LLP, 53 State Street, Boston, MA 02109. Attorneys for Plaintiff.

A. Thompson Bayliss, Esquire, Abrams & Bayliss LLP, 20 Montchanin Road, Suite 200, Wilmington, DE 19807. Attorney for Defendants.

James P. Smith III, Esquire, Winston & Strawn LLP, 200 Park Avenue, New York, NY 10166. Attorney for Defendants.

**CARPENTER, J.**

Before the Court is Defendants NGL Energy Partners LP's and NGL Energy Holdings LLC's (collectively, "NGL" or "Defendants") Motion to Dismiss Plaintiff LCT Capital, LLC's ("LCT" or "Plaintiff") Amended Complaint. For the reasons set forth below, Defendants' Motion will be DENIED.

## FACTUAL AND PROCEDURAL BACKGROUND

This action stems from NGL's alleged breach of its contractual obligation to pay a significant "Finder's Fee" to LCT for LCT's services in connection with NGL's acquisition of TransMontaigne, Inc. ("TransMontaigne"). LCT is a Texas-based investment and banking firm, which specializes in advising energy companies and private equity firms.[1] Based in Oklahoma, NGL is in the business of transporting, storing, and marketing energy commodities.[2]

### *The TransMontaigne Transaction*

In December 2013, LCT learned that Morgan Stanley planned to sell its ownership of TransMontaigne, a refined petroleum products distributor.[3] LCT viewed TransMontaigne as an attractive investment and Louis C. Talarico, III ("Talarico"), LCT's founder and President, sought potential partners to participate in the sales process.[4]

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[1] Pl.'s Am. Compl. ¶ 2.
[2] *Id.* ¶¶ 23–24.
[3] *Id.* ¶ 29.
[4] *Id.* ¶¶ 3, 30–32.

LCT initially identified non-party The Energy and Minerals Group ("EMG") as a possible candidate.[5] On March 6, 2014, Talarico contacted John Raymond ("Raymond"), EMG's Chief Executive Officer, to inquire about whether EMG would be interested in pursuing the TransMontaigne acquisition.[6] Upon learning of EMG's interest, LCT engaged in several discussions with Morgan Stanley "in an effort to get EMG invited to participate as a potential buyer in the sales process."[7] As a result of LCT's efforts, Morgan Stanley emailed LCT on March 19, 2014, inviting EMG to participate in the TransMontaigne sale, which was code named "Project Titanium."[8]

Thereafter, LCT advised EMG on TransMontaigne's assets, ownership structure, and valuation, as well as "on strategies for being invited into the next round of the sales process."[9] Specifically, "LCT suggested that EMG inform Morgan Stanley that it was willing to acquire the 'full perimeter' of Project Titanium—i.e., all of TransMontaigne Inc. and the related assets that Morgan Stanley was interested in selling—and that it could complete the transaction quickly."[10] According to LCT, framing the transaction this way would provide

[5] *Id.* ¶ 33.
[6] *Id.*
[7] *Id.*
[8] *Id.* ¶¶ 33–35.
[9] *Id.* ¶ 36.
[10] *Id.*

EMG "a substantial advantage over other potential buyers" because LCT believed Morgan Stanley was seeking "to divest all of its TransMontaigne assets as quickly as possible, and thus would be willing to accept a lower purchase price for a 'full perimeter' transaction over a higher bid that was conditioned on changing the structure or omitting certain assets."[11] Taking LCT's advice, EMG informed Morgan Stanley that EMG was willing to purchase all of the TransMontaigne assets in an effort to impel the sale forward.[12] As a result, on March 31, 2014, Morgan Stanley invited EMG to proceed to the next round of the sales process.[13]

LCT continued its review of Project Titanium throughout April 2014, and led the due diligence discussions with Morgan Stanley. LCT also prepared a preliminary valuation of the transaction, the terms of EMG's "full perimeter" bid, and a draft bid letter for Morgan Stanley. EMG and LCT were invited to advance in the TransMontaigne sales process once more.[14]

***LCT Invites NGL to Participate in the Transaction***

While working with EMG on Project Titanium, LCT continued to consider other potential strategic partnerships for the transaction.[15] LCT believed NGL could be a "good fit" because, among other reasons, TransMontaigne could provide NGL

[11] *Id.*
[12] *Id.* ¶¶ 36–37.
[13] *Id.* ¶ 37.
[14] *Id.* ¶ 39.
[15] *Id.* ¶¶ 40–41.

an opportunity to build its fuel business. In addition, there were already close ties between EMG and NGL: EMG owned 12.1% of NGL Holdings at that time and Raymond, among other EMG representatives, served on NGL Holding's Board of Directors.[16] Talarico raised the idea with EMG, and EMG agreed to consider NGL's involvement in the transaction.[17] LCT, EMG, and NGL met on April 22, 2014 at EMG's offices in Houston. Following LCT's Project Titanium presentation, NGL's CEO, H. Michael Krimbill ("Krimbill") indicated that NGL was interested in participating in the sales process.[18] NGL made clear early on, however that it desired "to purchase as much of the transaction as possible, because it was an incredible value" and out of "concern[] that NGL would end up paying a much higher premium" should it seek to purchase the remainder in the future."[19]

After weeks of communication among the parties and EMG, it was ultimately decided on May 15, 2014 that NGL would bid for 100% of the TransMontaigne acquisition, with EMG participating indirectly by virtue of its ownership interest in NGL.[20] On May 16, 2014, after extensive consultations with LCT, NGL formally proposed buying TransMontaigne. In the weeks that followed, LCT continued to lead all communications and negotiations with Morgan Stanley on NGL's behalf.

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[16] *Id.* ¶¶ 41–44.
[17] *Id.* ¶ 44.
[18] *Id.* ¶ 47.
[19] *Id.* ¶ 48.
[20] *Id.* ¶¶ 48-51.

### *The TransMontaigne Purchase Agreement & Closing*

On June 5, 2014, NGL's Board of Directors approved the transaction. Krimbill introduced Talarico at the Board meeting and highlighted LCT's contributions to consummating the deal. From June 6 to June 8, LCT worked closely with Morgan Stanley and NGL to resolve any remaining contract issues. Finally, on June 8, 2014, NGL Energy Partners and Morgan Stanley signed the TransMontaigne Purchase Agreement ("Purchase Agreement").[21] In the weeks prior to closing, LCT continued to assist NGL and advise the company on operational issues and financing options.

The transaction officially closed on July 1, 2014.[22] NGL's final purchase price for TransMontaigne was $200 million, an alleged "incredible bargain" given that other interested investors were estimated to have offered Morgan Stanley over twice that amount to acquire the assets.[23] According to LCT, it was LCT's and NGL's ability to complete a "full perimeter" transaction that made NGL's offer more attractive and also enabled "LCT to successfully negotiate and execute the

[21] *Id.* ¶ 56.
[22] *Id.* ¶¶ 58–59.
[23] *Id.* ¶ 60 ("Media outlets estimated that other potential buyers were offering Morgan Stanley as much as $450 million—more than twice the amount paid by NGL—for certain TransMontaigne assets.").

transaction on favorable terms for NGL."[24] The TransMontaigne acquisition has "been an enormous success" for NGL, "creat[ing] hundreds of millions of dollars of value for NGL and its owners, including Mr. Krimbill."[25]

### *LCT's Finder's Fee*

As the TransMontaigne transaction progressed, LCT began to negotiate a fee for its services with NGL. On or around May 9, 2014, Talarico requested LCT's fee take the form of a 15% ownership interest in TransMontaigne, plus the right to purchase an additional 10% as a co-investment.[26] NGL countered with a proposal that LCT receive a 2% ownership interest in NGL Holdings, which it valued at $700 million.[27] The parties continued to trade numbers for several days.

On or around May 17, 2014, Krimbill allegedly agreed on behalf of NGL that LCT's fee would consist of: (i) a 2% ownership interest in NGL Holdings at a $700 million valuation; (ii) NGL's payment of LCT's taxes on its ownership interest; and (iii) an option to purchase an additional 3% ownership interest in NGL Holdings.[28] Then, on May 22, 2014, Krimbill communicated to Talarico that NGL wanted to structure LCT's 2% ownership interest in a way that deferred NGL's tax liability

[24] *Id*. (alleging "LCT also persuaded Morgan Stanley to accept favorable working capital calculations that resulted in an additional $140 million in net working capital for NGL").
[25] *Id.* ¶ 61.
[26] *Id.* ¶ 63.
[27] *Id.* ¶ 65.
[28] *Id.* ¶ 68.

over 10–15 years. Talarico responded that LCT was open to alternative arrangements, so long as the underlying economic terms of their agreement remained intact.[29] The parties again verbally confirmed LCT's fee agreement terms on May 30, 2014.[30]

On June 4, 2014, Talarico met with Krimbill and Bruce Toth, Esquire, in Denver, Colorado, to discuss drafting the parties' agreement with respect to LCT's fee. At the meeting, Krimbill dictated the terms of the parties' agreement to Toth. Per Toth's request, Talarico confirmed the terms of LCT's fee via email the following day: "[LCT] will receive 2% of [NGL Holdings] at $700 million valuation; NGL to pay taxes[.] We will have the opportunity to purchase up to 3% of the [NGL Holdings] at a $700 million valuation." [31] Toth did not question or challenge the accuracy of the terms reflected in Talarico's email.[32]

On June 8, 2014, NGL signed the Purchase Agreement, which explicitly provided LCT's "[f]ees and expenses will be paid by [NGL]."[33] On June 16, 2014, Raymond emailed Talarico to ensure NGL was honoring its obligations under the Purchase Agreement.[34] On June 23, 2014, Talarico sent Toth a draft engagement

[29] *Id.* ¶ 70.
[30] *Id.* ¶ 73.
[31] *Id.* ¶ 76.
[32] *Id.*
[33] *Id.* ¶ 78.
[34] *Id.* ¶ 81.

letter for LCT.[35] Talarico and Toth discussed the engagement letter further over the phone that day.[36] On July 1, 2014, after the TransMontaigne transaction closed, Toth contacted Talarico and insisted LCT had not been forgotten.[37] Toth assured Talarico the process should move more quickly now that the acquisition had closed.[38]

In July and August 2014, NGL allegedly was too distracted by the TransMontaigne acquisition to finalize LCT's fee agreement.[39] At this time, NGL was also in the midst of a Board dispute with SemGroup, an entity responsible for placing two NGL directors.[40] As a result, on July 24, 2014, Krimbill informed Talarico that NGL would have to reach a resolution with SemGroup prior to ironing out LCT's fee agreement.[41] Krimbill "reiterated, however, that LCT delivered excellent value in the TransMontaigne acquisition and that he was 100% in support of LCT receiving its ownership interests in NGL Holdings."[42] Then, on August 4, 2014, Krimbill told Talarico that Toth "was going to start working on the process for

[35] *Id.* ¶ 82.
[36] *Id.*
[37] *Id.* ¶ 83.
[38] *Id.*
[39] *Id.* ¶¶ 85–91.
[40] *Id.* ¶¶ 93–96.
[41] *Id.* ¶ 97. The SemGroup dispute would persist through October 2014. *Id.* ¶¶ 99–105.
[42] *Id.* ¶ 97.

LCT to receive its agreed-upon ownership interests in NGL Holdings."[43] Nevertheless, the delay persisted, as did NGL's dispute with SemGroup.

On October 6, 2014, Talarico requested a specific timeline for NGL's payment of LCT's fee.[44] In order to sell the 2% interest to LCT, Krimbill would have to ask that other NGL Holdings owners dilute their own interests.[45] Krimbill told Talarico the process would take approximately two weeks.[46] On October 24, 2014, Krimbill again informed Talarico that Toth would draft a purchase agreement for LCT's fee.[47] Krimbill also represented that he sent a letter to the other NGL Holdings owners regarding LCT's interests, but declined to share the letter with Talarico.[48] The letter purportedly reflected that LCT would be paying $21 million for a 5% ownership interest in NGL Holdings,[49] terms quite differed from the terms to which LCT and NGL had already purportedly agreed.

Over the next month, Talarico was unable to discuss the fee transaction and its tax consequences with anyone at NGL.[51] Finally, on November 25, 2014, Krimbill told Talarico that he intended to alter the agreement's terms, and admitted it was

[43] *Id.* ¶ 98.
[44] *Id.* ¶ 106.
[45] *Id.*
[46] *Id.*
[47] *Id.* ¶ 108.
[48] *Id.* ¶ 109.
[49] *Id.* ¶ 110.
[51] *Id.* ¶ 116.

contrary to what they had originally discussed.[52] Talarico reiterated LCT's willingness to consider an alternative fee structure, so long as the fee agreement's core economics remained the same.[53]

In January 2015, Talarico told Krimbill that LCT wanted NGL to honor the fee agreement's terms.[54] Krimbill responded that while NGL could provide a tax indemnification to LCT, it would not explicitly pay LCT's taxes directly.[55] On January 20, 2015, Krimbill proposed a new fee agreement: LCT would receive a 2% interest in NGL at a $700 million valuation, sign a services contract allowing it to recognize its income over 10-15 years, and have the option to purchase an additional 3% interest.[56] Under this framework, the 2% interest was a profit interest, not equity.[57]

In March 2015, Talarico told Krimbill:

> [W]e should close this . . . fee . . . we agreed to last year. There is no reason why the fee should have changed in any way. [LCT] has been patient and supportive of discussing new structures. However, we need to be made whole on what we agreed to.[58]

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[52] *Id.*
[53] *Id.*
[54] *Id.* ¶ 119.
[55] *Id.*
[56] *Id.* ¶ 121.
[57] *Id.* ¶¶ 122–25.
[58] *Id.* ¶ 129.

Krimbill replied that NGL never agreed to LCT's proposed fee.[59] Throughout the remainder of March and into April of 2015, the parties exchanged proposals on the fee structure.[60] By the end of April, 2015, Krimbill advised that he wanted to redistribute some of LCT's $21.0 million investment to the other NGL Holdings owners,[63] and told Talarico to "take it or leave it."[64] On May 18, 2015, Krimbill asked Talarico if LCT was going to accept NGL's ultimatum.[65] Talarico called Krimbill back the next day, again requesting NGL pay LCT the originally agreed-upon fee.[66] Krimbill declined.[67]

These events led LCT to initiate the instant litigation in August 2015. LCT filed its Amended Complaint on September 29, 2015. Count I alleges NGL breached its contract by failing to pay LCT's finder's fee.[68] In connection with this claim, LCT contends Krimbill had actual or apparent authority to bind NGL.[69] Count II alleges NGL was unjustly enriched by its conduct, depriving LCT of the reasonable expectation of being compensated for its services.[70] Count III alleges Krimbill, acting as NGL's CEO, fraudulently represented to LCT that it would

[59] *Id.* ¶¶ 129–31.
[60] *Id.* ¶¶ 133–34.
[63] *Id.* ¶ 139.
[64] *Id.* ¶ 140.
[65] *Id.* ¶ 143.
[66] *Id.* ¶ 144.
[67] *Id.*
[68] *Id.* ¶¶ 152–60.
[69] *Id.*
[70] *Id.* ¶¶ 161–67.

receive a 2% ownership interest, plus the option to purchase an additional 3% valuation, and that NGL would pay LCT's taxes with regard to LCT's interest.[71] In response, NGL moved to dismiss the Amended Complaint on November 20, 2015. LCT opposed the Motion.[72]

## STANDARD OF REVIEW

In reviewing a motion to dismiss filed pursuant to Superior Court Civil Rule 12(b)(6), the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[74] The Court must accept as true all well-pleaded allegations,[75] and draw any reasonable factual inferences in the non-moving party's favor.[76] That said, the Court need not accept conclusory allegations unsupported by specific facts.[77]

Moreover, in considering a motion to dismiss under Rule 12(b)(6), the Court generally may not consider matters outside the complaint.[78] Documents that are integral to or incorporated by reference in the complaint may be considered however.[79] Ultimately, at this preliminary stage, the Court will grant a motion to

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[71] *Id.* ¶¶ 168–73.
[72] NGL filed its reply on February 8, 2016.
[74] *See Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[75] *See id.*
[76] *See Wilmington Sav. Fund. Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super. Mar. 9, 2009) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[77] *See Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011).
[78] *See* Super. Ct. Civ. R. 12(b).
[79] *See In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).

dismiss only when it determines with "reasonable certainty" that no set of facts can be inferred from the pleadings upon which the claimant could prevail.[80]

## DISCUSSION

NGL moves to dismiss LCT's First Amended Complaint for failure to state a claim on the grounds that (1) New York law governs the action; (2) no contract was formed under New York law; (3) LCT failed to adequately plead unjust enrichment or *quantum meruit* under New York law; and (4) LCT failed to adequately plead fraudulent misrepresentation.

Before addressing these contentions, some general comments regarding the merit of Defendants' Motion are in order. Counsel is aware that, at this junction of the litigation, the Court is bound to accept as true the allegations of the Amended Complaint. It is clear, based on the assertions set forth therein, that this litigation is not ripe for dismissal. There appears to be no dispute that LCT was a major player in the effort to purchase the TransMontaigne assets and that, without LCT's initiative, guidance, and advice, NGL would not have obtained the valuable outcome it did in this transaction. The Court is confident that discovery will uncover a mountain of emails, documentation and conversations relevant to LCT's claims and alleged communications with NGL's CEO regarding compensation.

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[80] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38–39 (Del. 1996) (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

Against this backdrop, the vast majority of NGL's arguments advocating for dismissal are simply premature. Instead of answering the Complaint, NGL is using counsel to develop a strategy to attack not only LCT's conduct, but that of NGL's own CEO. If LCT's assertions are proven, the conduct of NGL is shocking even to the most cynical view of ethics in business dealings. The Court appreciates that counsel is simply representing the position of their client, as NGL would presumably like to keep the millions allegedly offered to LCT for the services they provided. That said, this Court will not engage, entertain or waste its time at this point in the litigation addressing arguments regarding choice of law and statute of fraud. It is simply too early to make these determinations. If there is any merit to these interconnected legal issues, it will be decided later following a full and fair review of the facts uncovered through discovery. Putting those issues aside, the Court makes the following findings with respect to NGL's remaining arguments.

## I. Breach of Contract

### a. Contract Formation

In order to survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must demonstrate: (1) "the existence of a contract, whether express or implied;" (2) "the breach of an obligation imposed by that contract;" and

(3) "resultant damage to the plaintiff."[87] A complaint alleging breach of contract is sufficient at the motion to dismiss stage so long as it sets forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[88]

Here, LCT alleges the parties had a contract whereby LCT agreed to serve as a financial advisor to NGL in connection with the TransMontaigne acquisition in exchange for NGL's payment to LCT of a finder's fee "consisting of (i) a 2% ownership interest in NGL Holdings at a $700 million valuation, with LCT's taxes to be paid by NGL; and (ii) the option to purchase an additional 3% ownership interest in NGL Holdings at a $700 million valuation."[89] LCT claims it fully performed its obligations in accordance with this agreement, and that, by failing to compensate LCT in return, NGL breached the contract.[90]

NGL argues LCT's breach of contract claim must fail because "no final, binding agreement was ever formed."[91] Under Delaware law, contract formation is generally a question of fact.[92] Three elements are necessary to prove an

[87] *See VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).
[88] *See id.* at 611 ("Such a statement must only give the defendant fair notice of a claim and is to be liberally construed.").
[89] Pl.'s Am. Compl. ¶ 154.
[90] *Id.* ¶¶ 158-59.
[91] Defs.' Mot. to Dismiss at 12.
[92] *See Sheets v. Quality Assured, Inc.*, 2014 WL 4941983, at *2 (Del. Super. Sept. 30, 2014).

enforceable contract exists: (1) the parties' intent to be bound by the contract; (2) sufficiently definite terms; and (3) consideration.[93]

First, NGL alleges that the Amended Complaint fails to allege mutual assent on behalf of the parties to enter a binding agreement.[94] NGL emphasizes LCT's repeated use of the terms "proposal" and "counterproposal" and characterizes the allegations as establishing, at most, a "preliminary agreement, as to which both parties clearly intended further negotiations and formal documentation." [95] According to NGL, the absence of "executed definitive documentation" or board approval underscores the parties' lack of intent to form a binding fee agreement.[96]

The Court disagrees. LCT's allegations suffice, at this stage, to demonstrate that the parties may have mutually intended to be bound with respect to LCT's fee. LCT alleges that it requested of Krimbill that LCT's finder's fee take the form of an ownership in the TransMontaigne general partner and that LCT submitted a proposal reflecting its preferred arrangement to Raymond.[97] According to the Amended Complaint, Raymond responded on behalf of EMG and NGL on May 15, 2014,

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[93] *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010) ("[A] valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration." (citing *Carlson v. Hallinan,* 925 A.2d 506, 524 (Del. Ch. 2006))).
[94] Defs.' Mot. to Dismiss at 12-14.
[95] *Id*.
[96] *Id*. at 15.
[97] *See* Pl.'s Am. Compl. ¶¶ 62-64.

counter-proposing that LCT receive a 2% ownership interest in NGL holdings.[98] LCT discussed Raymond's proposal with Krimbill later that same day and Krimbill was allegedly supportive of the arrangement.[99] In fact, LCT claims that Krimbill "indicated that he was supportive of LCT receiving an even larger interest in NGL Holdings."[100] Ultimately, LCT alleges Krimbill agreed on May 17, 2014 that NGL would pay LCT a fee consisting of a 2% ownership interest in NGL Holdings, with LCT's taxes to be paid by NGL, plus an option to purchase an additional 3% interest.[101] LCT asserts that the parties met in person, spoke over the phone, and exchanged emails and text messages confirming these terms with respect to the finders' fee in the days leading up to the Purchase Agreement's execution on June 8, 2014.[102] The Purchase Agreement provides that LCT's "fees and expenses will be paid by NGL."[103]

According to LCT, the terms arrived at on May 17, 2014 formed "the heart of the parties' agreement" and any exchanges that followed pertained only to administrative details regarding how NGL would pay LCT's taxes on the ownership interest. Indeed, the Amended Complaint repeatedly stresses that, while LCT

[98] *Id.* ¶¶ 51, 65-67.
[99] *Id.* ¶ 67.
[100] *Id.* ¶ 68.
[101] *Id.* ¶ 69.
[102] Pl.'s Br. in Opp'n to Defs.' Mot. to Dismiss at 21.
[103] Pl.'s Am. Compl. ¶ 78.

entertained NGL's deliberation with respect to exploring alternative means of structuring the fee for purposes of deferring NGL's tax liability, LCT was adamant that the underlying economics of the agreed-to arrangement remain unchanged.[104] The Court finds these assertions are sufficient at this stage of the litigation and NGL's Motion as to this issue is denied.

## II. Agency Authority

NGL next argues that Krimbill never had any authority, actual or apparent, to agree to structure LCT's Finders' Fee the way he is alleged to have in this litigation. According to NGL, Krimbill needed formal approval from a majority of NGL's Board of Directors in order to approve selling NGL Holdings shares to LCT. In support of this assertion, NGL cites § 3.01(b) of its Limited Liability Company Agreement ("LLC Agreement"):

> The Company may issue additional Membership Interest and options, rights, warrants and appreciation rights relating to the Membership Interests for any Company purpose at any time and from time to time to such Persons for such consideration and on such terms and conditions as the Board shall determine in accordance with Section 9.04.

Section 9.04 states:

> Each Director shall be entitled to one vote. On all matters requiring the vote or action of the Board, but excluding

[104] *Id.* ¶ 116.

> any matter otherwise expressly set forth in this Agreement, any action undertaken by the Board must be authorized by the affirmative vote of at least a majority of Directors at any meeting at which a quorum is present.

NGL argues these provisions required Krimbill to seek Board approval in order to sell additional NGL interests, such that he could not have accomplished the task individually.

LCT responds that Krimbill had actual or apparent authority because Section 10.03 of the LLC Agreement gave him, responsibility as NGL's CEO to manage NGL's general affairs. Such responsibility would include the ability to enter into a contract to pay LCT a fee, regardless of the fee's structure. In terms of apparent authority, LCT emphasizes the way he held himself out to LCT as NGL's CEO and his repeated assurances that Board approval would not be an issue.

Ultimately, the Court finds that NGL's agency argument is premature at the motion to dismiss stage. Determining whether an agency relationship exists is normally a question of fact.[107] The Court must determine whether a contract existed prior to determining agency. Taking LCT's pleadings as true, which the Court must do at this stage, it is reasonable to conclude that Krimbill had some sort

[107] *See Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. 1997).

of authority: express,[108] implied,[109] or apparent.[110] LCT has alleged a number of facts concerning Krimbill's role at NGL and relevant representations he purportedly made to LCT while acting in his capacity as NGL's CEO. Such allegations are sufficient for LCT's breach of contract claim to withstand dismissal at this juncture. The Court also finds it disturbing that instead of NGL placing blame on its CEO and perhaps firing him for his alleged improper conduct, they blame LCT for inappropriately relying on his promises. The lack of action by the Board regarding the conduct of their CEO may actually imply that he did have such authority to bind the company. In any event, the allegations have been sufficiently pled at this juncture of the litigation.

## III. Unjust Enrichment

Alternatively, LCT contends NGL was unjustly enriched. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good

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[108] *See Jack J. Morris Assocs. v. Mispillion Street P'rs, LLC*, 2008 WL 3906755, at *3 (Del. Super. Aug. 26, 2008) ("Express authority may be conveyed to the agent, either orally or in writing.").

[109] *See Montgomery v. Achenbach*, 2007 WL 3105812, at *2 (Del. Super. July 26, 2007) ("Implied actual authority is evidenced by conduct, that is the conduct of the principal being such to justify a jury in finding that the agent had actual authority to do what he did.").

[110] *See Billops v. Magness Const. Co.*, 391 A.2d 196, 198 (Del. 1978) ("The concept of apparent agency or authority focuses not upon the actual relationship of a principal and agent, but the apparent relationship. Manifestations by the alleged principal which create a reasonable belief in a third party that the alleged agent is authorized to bind the principal create an apparent agency[.]").

conscience."[111] The elements required to establish unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.[112]

The Amended Complaint alleges LCT negotiated the Purchase Agreement with Morgan Stanley, assisted NGL in closing and post-closing matters, and brought the Project Titanium transaction to NGL's attention. LCT maintains the Project Titanium transaction created $500 million of value in NGL Holdings alone.[113] In addition to the executed Purchase Agreement, which expressly contemplates that NGL would be obligated to compensate LCT for its services, LCT cites NGL press releases and a letter dated October 24, 2014 sent by Kimbrill to NGL's owners which state that LCT served as NGL's "financial advisor" in connection with the transaction and recognize that NGL could not have obtained TransMontaigne for the price it did without LCT's help.[114] Nevertheless, LCT alleged NGL has refused to compensate LCT for its services without justification.[115]

The Court finds these allegations sufficient, at this stage, to state a claim for unjust enrichment. As NGL has yet to provide justification for its conduct, the Court

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[111] *See, e.g., Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009).
[112] *See Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010).
[113] Pl.'s Am. Compl. ¶ 162.
[114] *Id.* ¶ 111. *See also* Pl.'s Br. in Opp'n to Defs.' Mot. to Dismiss at 32-33, Ex. 5-7.
[115] Pl.'s Am. Compl. ¶ 165.

believes it appropriate to allow LCT to engage in discovery. The Court notes that LCT has pled its quasi-contractual claims for unjust enrichment and *quantum meruit* under one count, Count II. As a result, NGL urges the Court to dismiss the claim in so far as it asserts unjust enrichment as duplicative of LCT's *quantum meruit*, fraud, and breach of contract claims. While LCT may ultimately be prevented from recovering under one or more of these theories, it is permitted, at this stage in the litigation, to plead its claims in the alternative. NGL's Motion to Dismiss LCT's unjust enrichment claim is therefore denied.

## IV. Quantum Meruit

NGL has also moved to dismiss Count II of the Amended Complaint to the extent LCT pleads *quantum meruit*. *Quantum meruit* is a quasi-contractual claim by which a plaintiff, "in the absence of an express agreement," may seek to "recover the reasonable value of ... services it rendered to the defendant."[116] To prevail under this theory, a plaintiff must show (1) its services were performed "with the expectation that the recipient would pay for them" and (2) "the recipient should have known ... [plaintiff] expected to be paid."[117]

This claim also survives dismissal. It is uncontested that LCT performed services for NGL; the Court need not belabor that point. It is also uncontested that

[116] *See Hiller & Arban, LLC v. Reserves Mgmt., LLC,* 2016 WL 3678544, at *2 (Del. Super. July 1, 2016).
[117] *See id.*

LCT expected to be paid for its contributions, a contention not even NGL can dispute. LCT's Amended Complaint is replete with allegations inferring NGL knew of LCT's expectation of payment. These allegations are sufficient, at this preliminary stage in the proceedings, to avoid dismissal.

## V. Fraudulent Misrepresentation

Last, LCT alleges NGL fraudulently misrepresented that LCT would be compensated for its services with ownership interests in NGL. Generally, a party cannot maintain fraudulent misrepresentation and breach of contract claims based on the same underlying misconduct. Rather, the fraud claim will survive only if premised "on conduct that is separate and distinct from the conduct constituting breach."[118] Indeed, it must be shown that the damages pled under each cause of action are distinct.[119]

Here, there is still a question of whether a contract was ever formed between the parties. LCT can allege, at this stage, competing variations of the same claim, *i.e.*, that NGL represented LCT would be paid a certain fee to induce LCT's participation in the deal to NGL's benefit when NGL never intended to compensate LCT according to that representation. If a contract is later shown to exist, however, LCT will be required to demonstrate an independent basis for its fraud claim.

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[118] *Id.* at *4.
[119] *Id.*

## CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is **DENIED.**

**IT IS SO ORDERED.**

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.