IN THE SUPREME COURT OF THE STATE OF DELAWARE

OXBOW CARBON & MINERALS HOLDINGS, INC., INGRAHAM INVESTMENTS LLC, OXBOW CARBON INVESTMENT COMPANY LLC, WILLIAM I. KOCH, and OXBOW CARBON LLC, Plaintiffs and Counterclaim Defendants-Below/Appellants, v. CRESTVIEW-OXBOW ACQUISITION, LLC, CRESTVIEW-OXBOW (ERISA) ACQUISITION, LLC, CRESTVIEW PARTNERS, L.P., CRESTVIEW PARTNERS GP, L.P., CRESTVIEW ADVISORS, L.L.C., and LOAD LINE CAPITAL LLC, Defendants and Counterclaim Plaintiffs-Below/Appellees.	No. 536, 2018 Court below: Court of Chancery of the State of Delaware C.A. Nos. 12447-VCL and 12509-VCL

OPENING BRIEF OF APPELLANTS OXBOW CARBON & MINERALS HOLDINGS, INC., WILLIAM I. KOCH, INGRAHAM INVESTMENTS LLC, OXBOW CARBON INVESTMENT COMPANY LLC, AND OXBOW CARBON LLC

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NATURE OF PROCEEDINGS

The trial court rewrote the clear and unambiguous provisions of Oxbow's LLC Agreement ("LLCA") to imply a term that contradicted the existing provisions of that agreement. The court twice found that Oxbow's LLCA does not permit certain minority investors (the "Minority Members") to force a contractual "Exit Sale" of the Company under current market conditions.[1] In order to reach its desired result, the trial court improperly employed the implied covenant of good faith and fair dealing, inventing a new term to enable the Minority Members to force such a sale. This Court has long sought to curtail the use of the implied covenant to a narrow set of circumstances that did not exist here. The trial court expressly recognized, but violated, these bedrock principles of Delaware law. Unless reversed, the trial court's improper use of the implied covenant to rewrite the plain terms of an unambiguous contract will inject substantial uncertainty into written agreements governed by Delaware law.

The trial court concluded on summary judgment and again post-trial that the plain language of the LLCA permitted the Minority Members to force an Exit Sale

[1] "Oxbow" refers to Oxbow Carbon LLC. "Koch Parties" refers to Oxbow Carbon LLC; Oxbow Carbon & Minerals Holdings, Inc.; William I. Koch; Ingraham Investments LLC; and Oxbow Carbon Investment Company LLC. Unless otherwise noted, capitalized terms have the same meaning as in the trial court's February 12, 2018 post-trial Opinion ("Op."). "Remedy Decision" refers to the trial court's August 1, 2018 opinion on remedies. Emphasis is added and citations are omitted. The LLCA is found at A2075.

only if the sale price met or exceeded a contractually-mandated price floor. That floor is set by the Member requiring the highest sale price to achieve a contractually-required 1.5x return on its capital contributions to Oxbow, accounting for past distributions, called the "1.5x Return Requirement." The LLCA also contains "Equal Treatment Requirements" mandating, among other things, that an Exit Sale be on the "same terms and conditions" for all Members. Thus, *all* Members must receive the *same* per-Unit sale price. The court called this combination of contractual requirements the "Highest Amount Interpretation," and correctly concluded it was the "only reasonable reading" of Oxbow's LLCA.[2]

It is undisputed that, when the litigation was commenced, two "Small Holders" of Oxbow, admitted as Members several years after the Minority Members, needed to receive approximately $414 per Unit for a 1.5x return in an Exit Sale. Thus, under the Highest Amount Interpretation, the Minority Members could have forced an Exit Sale only if *all* Members (not just the Small Holders) received at least $414 per Unit. When the Minority Members tried to force an Exit Sale to their preferred bidder at $176.59 per Unit, less than half the required price, the Koch Parties sued to enforce their contractual rights.

On summary judgment, the trial court held that the LLCA precluded a forced sale at the price offered because the agreed-upon contractual conditions to an Exit

[2] Op.3, 137-38.

Sale had not been met. The court rejected the Minority Members' principal theory that the Small Holders could be "left behind" while an Exit Sale proceeded as to all other Members.[3] It did so because the LLCA explicitly requires the Exit Sale to include a sale of "all, but not less than all" Units.[4] That determination should have ended the litigation. Instead, despite finding that the plain language of the LLCA resolved the dispute, the court questioned, *sua sponte*, whether the implied covenant might be used to vary that plain language.[5] That musing led to expensive discovery and a six-day trial on a new claim added by the Minority Members only at the court's suggestion: that an implied covenant permitted the Small Holders to be "topped-off"—that is, receive more consideration than the other Members to achieve a 1.5x return—notwithstanding the contractual Equal Treatment Requirements.

In its post-trial Opinion, the trial court reaffirmed its summary judgment ruling that "the Highest Amount Interpretation is the only reading that gives effect to the LLC Agreement as a whole" and that the plain language of the LLCA "forecloses a Top Off Option."[6] But the court again declined to enforce the plain language of the parties' contract to preclude a forced sale at well below the contractually-mandated price floor. Instead, the court improperly invoked its

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[3] A545-46.
[4] A2079 (Art.I ("Exit Sale")).
[5] A545-46.
[6] Op.6, 128-29.

subjective view of "fairness" to insert an implied "top-off" right allowing the Minority Members to force an Exit Sale by making an additional payment to just the Small Holders. To reach this result, the court adopted a theory that was raised by the Minority Members pre-trial, but abandoned after trial: that there was a "gap" in the process by which the Small Holders were admitted as Members by the Board of Directors of Oxbow (the "Board"), years after the LLCA was signed.

In reaching its implied covenant holding, the trial court committed eight fundamental errors in violation of clear Delaware law, each of which requires reversal:

First, the trial court erred by employing the implied covenant where there was no gap in the contract to be filled by an implied covenant. Here, the contract not only addresses the issue presented—that is, the preconditions to forcing an Exit Sale—but actually *prohibits* the term the court implied. The court expressly found that the Highest Amount Theory, which the court found to be the "only reasonable" interpretation of the LLCA, "forecloses" an implied "top-off" term. As the court held, a top-off payment would, among other things, violate the Equal Treatment Requirements. Thus, not only was there no gap in the LLCA, but the court found that the contract prohibited the very term it implied.

Second, the trial court erred by employing the implied covenant to address what it called an "intentional gap" in the LLCA. But as that term itself suggests, the

issue was foreseeable at the time of contracting in 2007; Delaware law only permits the implied covenant to be used to address matters "that could not be anticipated." In 2007, the Minority Members were aware, among other things, that new Members could be added who would have a different baseline Capital Contribution for purposes of the 1.5x calculation. Indeed, with that knowledge the Minority Members obtained preemptive rights to protect against the dilution caused by later issuances, but neither sought nor obtained any variation in the way later-added Members would affect the Minority Members' ability to force an Exit Sale.

Third, the trial court erred by implying a top-off term to which the court found the Koch Parties would not have agreed at the time of contracting. Delaware law is clear that a court may only imply terms that are so obvious that the parties "must have intended" them and would have agreed to them at the time of contracting had they been raised. Here, the court found the exact opposite, crediting Mr. Koch's trial testimony that had the top-off concept been raised during contract negotiations in 2007, it would have been a "deal killer" for him.[7]

Fourth, the trial court erred by relying on its subjective view of "fairness," rather than the plain terms of the contract. The court found the LLCA created a "commercially unreasonable" "harsh result" that it believed was "inequitable." But Delaware law is clear that the plain terms of the parties' contract dictate the outcome,

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[7] Op.155-56.

not a court's view of "fairness." Indeed, Delaware courts have long recognized that there is nothing "unfair" about holding highly sophisticated parties to their contractual bargains. Here, that bargain was carefully negotiated by the highly sophisticated parties, who were advised by preeminent counsel. It was not the prerogative of the court to disturb it. As a result of that bargain, the Minority Members have already received, from distributions alone, a return over double their investment in Oxbow.

Fifth, the trial court erred by holding there was an "intentional gap" in the LLCA as to the rights of newly-admitted Members. As the court found, the LLCA gives the Board authority to vary new Members' rights, providing that Members "may be admitted … on such terms and conditions as the Directors may determine at the time of admission" by majority vote. It also defines "Member" to include "any Person subsequently admitted as a Member." Accordingly, the LLCA did not leave any "gap" as to the rights of later-added Members for an implied term to fill. Moreover, for this reason, it was foreseeable that if Oxbow's Board admitted new Members but did not expressly vary their 1.5x rights at the time of admission, those Members' 1.5x rights would affect the minimum price needed to force all Members into an Exit Sale. The foreseeability of that development precluded application of the implied covenant.

Sixth, the trial court erred by treating the process by which Oxbow's Board admitted the Small Holders as Members in 2011 as a "moment of contracting" that left a gap in the LLCA to be filled by an implied covenant. Under Delaware law, the relevant point in time for analyzing a claimed implied covenant is the time of contracting, which, in this, case was 2007. At that time, the parties agreed upon the terms required to force an Exit Sale. Nothing about the 2011 admission of the Small Holders by the Board reopened those terms. The LLCA makes clear the admission process is an exercise of authority committed to the Board, not an act of "contracting" among the Members, who are the parties to the LLCA. By treating a years-later board action as an act of contracting, the court improperly and vastly expanded the scope of actions subject to implied covenant analysis.

Seventh, even if the process by which the Board admitted the Small Holders as Members four years after the execution of the LLCA could properly be the subject of an implied covenant, there was still no "gap" to be filled. As noted above, the Board *could have* used its permissive power under the LLCA to vary the Small Holders' rights as compared to other Members, but it did not. Thus, by admitting the Small Holders, but only varying the price term of their Units, the Board—including the three Minority Member directors—voted unanimously to grant them the same rights as all other Members.

Finally, the trial court erred by relying on an argument that the Minority Members made before, but abandoned after, trial. Relying on an argument that the Minority Members waived was error.

This erroneous result should be reversed and judgment should enter for the Koch Parties.

SUMMARY OF ARGUMENT

I. The trial court erred in its application of the implied covenant to the LLCA by (i) using the implied covenant to rewrite an unambiguous contract that it twice found directly addressed the issue presented, where there was no gap in the contract, and where the implied term contradicted the express terms of the contract; (ii) implying a term to address a situation that was foreseeable by the parties at the time of contracting; (iii) implying a term that would not have been agreed to by the parties at the time of contracting; and (iv) basing its decision on its subjective view of "fairness."

II. The trial court erred by finding a "gap" in the LLCA as to the rights of newly admitted Members, since the LLCA directly addresses that issue. The court further erred by holding the process by which the Small Holders were admitted as Members of Oxbow years after the LLCA was executed left a "gap" in the previously agreed-upon LLCA. In conducting an implied covenant analysis, the relevant period is the time of contracting, 2007. The court erred by treating the Board's subsequent admission of the Small Holders in 2011 as an act of "contracting," rather than an exercise of authority granted to the Board under previously agreed-upon contractual terms. In any event, none of the court's findings supported the existence of a "gap" in that process. Finally, the court erred by relying on an argument that the Minority Members made before, but abandoned after, trial, and therefore waived.

III. The trial court erred in holding that Oxbow Holdings breached the LLCA's cooperation covenant. Because the court found Oxbow Holdings' interpretation of the LLCA was correct, the conditions to an Exit Sale were not satisfied and no Exit Sale could occur. As a result, there could be no breach of the cooperation provision in connection with such a sale.

IV. The trial court erred in awarding the Minority Members (i) contingent "backstop" damages in the event specific performance of an Exit Sale did not yield at least the ArcLight Indication price (defined below), a remedy that was waived and has no basis in the LLCA or Delaware law; and (ii) their *pro rata* share of the legal fees and expenses paid by Oxbow to its counsel, Mintz Levin, in connection with this litigation as damages, which improperly pierced the corporate veil to award a remedy for a derivative claim the Minority Members never brought and therefore waived.

STATEMENT OF FACTS

A. The 2007 LLCA Negotiations

Oxbow, the leading third-party service provider to the global petcoke market, was founded by William Koch in 1983. Koch controls Oxbow Carbon and Minerals Holdings, Inc. ("Oxbow Holdings"), the Company's Majority Member, through which Koch, members of his family, and certain current and former employees of the Company invested in Oxbow.[8]

In 2006, Oxbow explored financing to fund acquisitions. Although Oxbow had sufficient capital to finance acquisitions and access to the debt markets, several private equity firms competed to invest in the Company. Crestview Partners, a private equity firm formed in 2004 and controlled by Barry Volpert and Robert Hurst, was among those vying to invest.[9] Volpert and Hurst are highly sophisticated investors who collectively spent fifty years at Goldman Sachs, where both held senior leadership positions.[10]

Negotiations commenced in early 2007, culminating in the execution of the LLCA on May 8, 2007. Davis Polk represented Crestview and Latham & Watkins represented Oxbow.[11] Crestview contributed $190 million to Oxbow for 23.48% of

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[8] Op.9-10.
[9] Op.10-11.
[10] A781; A852.
[11] A1725.

Oxbow's Units; Load Line, the investment vehicle of a shipping magnate, contributed $75 million for 9.27%.[12]

Under the LLCA, three Minority Member-affiliated directors sit on Oxbow's Board. The LLCA requires a supermajority vote on certain issues, and allows the Minority Members to force an Exit Sale of Oxbow under specific, clearly-delineated circumstances.[13] Article XIII §8(a) provides a Put Right, under which Crestview could, after seven years, request that the Company repurchase its Units at a contractually-determined Fair Market Value ("FMV").[14] If the Company declines the Put, the LLCA permits Crestview to trigger a process to force a full-Company "Exit Sale." As an Exit Sale would, by definition, result in the forced sale of the Majority Members' Units, Koch ensured that the LLCA included four clear and unambiguous conditions that must be met to compel an Exit Sale:[15]

1. **All Securities Requirement.** There must be a transfer "of all, but not less than all" Units.[16]

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12 Op.28.

13 A2086-87 (Art.III-§§1, 3(d)); A2114-16 (Art.XIII-§8).

14 A2114 (Art.XIII-§8(a)).

15 A2079 (Art.I ("Exit Sale"); A2114 -16 (Art.XIII-§§7(d), 8(e)); Op.7-18, 20-21 (A931-33, A945); A533-36.

16 A2079 (Art.I ("Exit Sale")); Op.1, 126. Having spent two decades trying to vindicate his rights as a minority investor, Koch sought to ensure that none of his family members would have their personal wealth tied up in a company controlled by others. Op.20.

2. **FMV Requirement.** Aggregate consideration must exceed FMV, as determined in the Put process.[17]

3. **Equal Treatment Requirements.** All Units must be transferred "on the same terms and conditions;" and the aggregate purchase price must (i) be distributed "in accordance with their [the Members'] Percentage Interests," and (ii) distributed to "all unitholders in proportion to the number of units held."[18] Crestview added the "same terms and conditions" language to the LLCA because it "wanted to ensure that Koch could not receive superior terms for his control block; they wanted everyone to receive the same terms in an Exit Sale," a view Koch shared.[19]

4. **1.5x Return Requirement.** The "Exercising Put Party may not require any other Member to engage in such Exit Sale unless the resulting proceeds to such Member (when combined with all prior distributions to such Member) equal at least 1.5 times such Member's aggregate Capital Contributions through such date."

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[17] A2115-16 (Art.XIII-§8(e)); Op.3, 157, 161; Remedy Decision 15.
[18] A2114, A2116 (Art.XIII-§§7(d), 9(b)); Op.24, 33, 129; A538-40.
[19] Op.21-22; A936.

> Payments from sources other than distributions or Exit Sale proceeds do not count toward the 1.5x hurdle.[20]

Thus, an Exit Sale may proceed only if it gives each Member a return of at least 1.5 times its capital contributions to Oxbow (accounting for all prior distributions), and, because of the Equal Treatment Requirements, the Member with the highest required sale price sets a floor price for all Members.[21] These requirements, read together, result in the "Highest Amount Interpretation," which the trial court twice found is the "*only* reading that gives effect to the LLC Agreement as a whole."[22]

The trial court found that if pre- and post-contracting extrinsic evidence were considered, it would not change its interpretation.[23] That evidence included testimony by Mr. Koch, credited by the court, "that during negotiations in 2007, any request by Crestview for a Top Off Option would have been a 'deal killer.'"[24]

B. Crestview Anticipated The Admission of Additional Members

The LLCA authorizes the Board to issue Units to new Members. Article IV, §5 provides: "Subject to Article XIII, Section 5, upon the approval of the Directors, additional Persons may be admitted to the Company as Members and Units may be

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[20] A2115-16 (Art.XIII-§8(e)).
[21] Op.3.
[22] Op.6, 136, 137.
[23] Op.133, 137-38.
[24] Op.155-56 (A937).

created and issue to such Persons as determined by the Directors on such terms and conditions as the Directors may determine at the time of admission." The LLCA further provides that the term "Member" "includes any Person subsequently admitted as a Member."[25]

These provisions demonstrate the parties anticipated Oxbow would add new Members, as the Company expected to make additional acquisitions that could potentially be financed by equity.[26] The Minority Members sought protection against dilution by obtaining preemptive rights, but neither sought nor obtained any variation in the way later-added Members would affect the Minority Members' ability to force an Exit Sale.[27] Thus, it was always foreseeable that new Members would be added, and that those Members could have a different baseline capital contribution for purposes of the 1.5x calculation.[28] It was also foreseeable to Crestview that the 1.5x requirement might not be met.[29]

C. The Board Unanimously Admits The Small Holders

In 2011, Oxbow acquired ICEC from its management-owners, who went to work for Oxbow and wanted to invest in it.[30] As detailed below, multiple

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25 A2080 (Art.I ("Member")).
26 Op.144.
27 Op.144.
28 Op.35-37 (A1867), 144.
29 A790.
30 Op.34.

communications to the Board stated that the ICEC executives would invest through an investment vehicle, which would become a Member of Oxbow and receive the same class of Units as existing Members.

On November 1, 2010, Koch emailed the Board stating that the ICEC executives would hold their Oxbow Units "via an investment trust."[31] In a subsequent email, Koch suggested "offering $30 million at $300/share to minimize our dilution from an investment trust, so that we have only one additional stockholder" in Oxbow.[32] Also included was an analysis prepared by then-Oxbow executive Steve Fried, explaining that an investment vehicle ("Newco") would be established to enable an indirect investment by ICEC executives in that "single purpose vehicle" which "would become *a member of Oxbow, owning the same class of units as currently exists*"; and "[a]n affiliate of Oxbow" would "serve as the Manager of Newco…[which would] enable Oxbow to maintain control and management of Newco."[33]

That day, Fried sent the Board another memo detailing the transaction. Consistent with Koch's email, Fried informed the Board that Oxbow intends "to

31 Op.34 (A1866).
32 Op.34-35 (A1791).
33 Op.35 (A1807).

implement an investment vehicle structure through which some former [sulfur-company] management … may invest in [Oxbow]….”[34]

Oxbow acquired ICEC in January 2011 for $150 million.[35] On November 9, 2011, after a presentation by Fried, the Board, including the three Minority Member directors, discussed the acquisition and the issuance. It then unanimously approved the investment and admitted Oxbow Carbon Investment Company LLC (“Executive LLC”) as a Member.[36]

Contemporaneously, relatives of Koch also invested in Oxbow through a special-purpose entity (“Family LLC,” together with Executive LLC, the “Small Holders”). Koch discussed this with Volpert several times.[37] In a November 3, 2010 email, Volpert wrote Hurst: “[Koch] asked if it is okay with us for his ex-wife to invest ‘a few million’ in Oxbow at $300/share alongside ICEC. I told him I thought this would be fine.”[38] Crestview understood Koch would control Family LLC and “just didn’t make a big deal out of it.”[39] The Board, including the three Minority Member directors, again voted unanimously to approve the investment, in a resolution stating that the new Units were for members of Koch’s family.[40]

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[34] Op.36 (A1811).
[35] Op.37.
[36] Op.146 (A2042).
[37] Op.36-7 (A1867).
[38] Op.36 (A1867).
[39] Op.34-37 (A817).
[40] Op.37 (A1886).

After the unanimous Board votes, the Company issued 66,667 Units to Family LLC and 50,000 Units to Executive LLC at $300 per Unit, for total consideration of $35 million.[41] In exchange for their investment, and consistent with the multiple communications from Koch and Fried to the Board, the Small Holders were admitted as Members of Oxbow like all other Members. The only terms and conditions stated by the Board in the resolutions were the price per Unit and number of Units issued.[42] At no point did the Minority Members even discuss, let alone attempt to have the Board vary, the Small Holders' rights as compared to other Members.[43] With the Minority Members' express approval, the Small Holders' investment was immediately distributed, with $11 million going to the Minority Members.[44] During the five years following the Small Holders' admission, the Minority Members received monthly reports reflecting that the Small Holders were Members;[45] yet they never raised any objection until this litigation.

At the time the Small Holders were admitted to Oxbow, the Minority Members were actively analyzing their own exit rights. Koch had delivered them an economic home run: Crestview's principals believed Oxbow should be valued at ten times forecasted annual EBITDA of $566 million "supporting a potential exit at

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41 Op.39-40 (A723).
42 Op.144-45 (A2040, A2042).
43 Op.144-45
44 A811; A941.
45 A808-09, A817-18; A940.

close to $560 per unit."[46] Crestview's principals discussed whether another investor was "interested in purchasing 10-20% of the company at $500/share…"[47] Crestview was so bullish about Oxbow at the time the Small Holders purchased that Volpert boasted "[w]e thought we were giving them all a great discount" and Crestview considered selling some of its stake to capture its enormous profits.[48] Given the "valuation that they placed on Oxbow" (which far exceeded 1.5x the Small Holders $300 per Unit issuance price at the time of issuance), the trial court found there "is some reason to think that Crestview's principals were not overly concerned with the issuances to the Small Holders."[49]

Throughout 2015, the parties negotiated amendments to the LLCA which, among other things, extended the deadline for the Minority Members to exercise their Put.[50] None of those amendments changed the LLCA's four Exit Sale conditions, its provisions governing the rights of subsequently-admitted Members, or belatedly purported to alter any of the Small Holders' rights as compared to other Members.[51]

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46 Op.41-42 (A1894; A1909; A799).
47 Op.41-42 (A1889).
48 Op.41-42 (A1987; A1889).
49 Op.41-42 (A1909; A799).
50 A2049-56 (Amends. 4-6); Op.1 n.1.
51 A2049-56 (Amends. 4-6).

D. Crestview Corrupts Oxbow's Attempts to Raise Capital So Its Principals Could Squeeze Out Koch and Retain Equity In A Recapitalized Oxbow

As Crestview repeatedly told its investors, Oxbow has prospered under Koch's leadership; the Minority Members have received tremendous returns, with distributions alone of more than double the amount of their investment.[52] Nevertheless, beginning in 2014, Crestview focused on its own exit and sought to strip down Oxbow for sale, opposing acquisitions or capital expenditures essential to continued growth.[53] But as Oxbow's markets turned downward, Crestview's principals saw an opportunity: to take the business for themselves at an enormous discount to the over-$500/Unit valuation they previously expected.[54]

Crestview embarked on a plan to undermine Oxbow's financing efforts, intending to force Koch to sell down his units so Crestview could work with an outside investor to seize control of Oxbow. First, in fall 2014, Oxbow met with three investment banks to discuss raising capital to attempt to redeem Crestview's interests. Crestview insisted that Oxbow abandon this effort and made false promises of a cooperative exit process.[55] Those promises worked: "Koch believed that détente had been achieved and halted Oxbow's efforts to hire an investment

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52 A2156; A806-07.
53 A944.
54 Op.42; 76-77.
55 Op.52; A1939-40.

banker."[56] But in early 2015, Crestview continued its resistance to the Company's growth and began to indicate it would exercise its Put Right. Crestview enlisted the assistance of both Christina O'Donnell, CEO of Koch's family office, who surreptitiously "worked to promote a transaction with . . . [a] private equity firm[] in which Koch gave up control" of Oxbow, and Oxbow's then-President Eric Johnson, with whom O'Donnell had become "close friends."[57]

Crestview disrupted Oxbow's financing efforts in numerous ways, including continually intimating to the market that it would soon be exercising its Put and by demanding an unreasonably high price for its shares.[58] All parties understood that exercising the Put would doom efforts to secure replacement minority financing, as it would falsely signal to investors that the entire company would soon be available at a fire-sale price.[59]

O'Donnell, working with Crestview, also manipulated communications with potential bidders, making it appear to Koch that bidders would require him to quit as CEO and sell down his majority ownership.[60] Contrary to Koch's request for an independently-run process, Crestview, Johnson, and O'Donnell contacted several Crestview-friendly investors and falsely represented that Koch would sell down, step

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56 Op.52.
57 Op.54, 65.
58 A947-48; A1997.
59 A807; A894-95; A954; A1984; A1989; A1994.
60 A1963; A1969; Op.61, n.236.

down, or both—when, in fact, Koch never expressed any such interest.[61] This conduct polluted the market with false information.[62]

Finally, Crestview deceptively attempted to convince Koch he "needed" to accept one of the term sheets from Crestview's hand-picked investors. Crestview conspired with O'Donnell to secretly manipulate Koch's personal balance sheet to mislead Koch into believing that he needed to sell down.[63] O'Donnell violated her obligations to Koch by sharing his personal financial information with Crestview, hoping to use it to force Koch, his family, and other unitholders to sell at a depressed price.[64] Volpert, Hurst and O'Donnell schemed to get "Bill to resign as CEO before the process continues, so he thinks it is his idea and he is not getting pushed."[65]

On September 28, 2015, Crestview exercised its Put Right.[66] But, as noted, Crestview's goal was *not* to exit Oxbow entirely. Instead, Crestview sought to take advantage of the "depression" in Oxbow's markets, forcing the sale of Koch's and Crestview's limited partners' Units while "rolling over" its principals' Units in a deal with an outside investor at an enormous discount to long-term value.[67]

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61 Op.59; A1959; A1967-68; A949, A1395.
62 A950-52.
63 Op.60-61; A1944; A1947; A1948; A952-53.
64 Op.60-61.
65 A1965.
66 Op.70.
67 Op.76-77; A969.

During the Put process, Crestview continued to interfere with Oxbow's financing efforts to ensure that Oxbow's attempt to raise capital would fail, leading to a full-company Exit Sale.[68] Crestview steered O'Donnell to Crestview's preferred banker at Goldman Sachs, in order to ensure that a firm with which Crestview had deep connections would advise Oxbow on the process.[69]

In November 2015, Crestview held its annual meeting, where Volpert said that Oxbow would either fully redeem Crestview in January 2016 or Crestview would force a full-Company sale.[70] Goldman reported that, within a week of this statement, numerous potential investors withdrew from the minority financing process and indicated they preferred to wait for a full-company sale.[71] In "backchannel discussions with Goldman," Volpert "encourage[ed]" Goldman to have bidders "hang around" and participate in a "control deal," because he thought Crestview would have the right to control any Exit Sale,[72] and planned to use that control to "roll a good chunk of [their] stake" into the new ownership structure.[73]

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[68] Op.76-77.
[69] A633-34; A967.
[70] A968-69.
[71] *Id.*
[72] Op.77 (A2003; A1999).
[73] Op.77 (A2003), 89 (A2011).

Given Crestview's interference, the financing failed, with the highest bid at $120/unit, well below FMV of $169/Unit.[74] Lacking financing, on January 19, 2016, the Oxbow Board rejected Crestview's Put.[75]

E. Crestview Secretly Solicits an Indication from ArcLight

The day after Oxbow rejected the Put, the Minority Members triggered the Exit Sale process.[76] O'Donnell and Johnson conspired with Crestview on an "ambush approach" whereby Crestview would act "as though they have zero interest to sell or change anything [in 2016]."[77] In an email to Johnson days after Crestview triggered the process, O'Donnell demonstrated the group's malicious motivations:

> Let's take [Koch's] company from him quickly, not a day of relief, put him through the hell he put us through. … Let's make it very personal, just like he did. … Let's take his plane, his job, and when it's over let's drink his wine before you take me dancing.[78]

Crestview would be "very subtle" by "creating the illusion that Goldman Sachs [was] not favored by Crestview, [did not] want to go to market for a year and [would] be the only firm that [could] protect" the company's confidential information.[79] Then Crestview would "turn on a dime and sell hard."[80]

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74 Op.76.
75 Op.79.
76 Op.80.
77 Op.85-86 (A2007).
78 Op.85 (A2006).
79 Op.86 (A2008).
80 Op.86 (A2007).

And that is exactly what happened.

Crestview secretly solicited an indication of interest from ArcLight Capital.[81] O'Donnell met with ArcLight and reported back to Volpert.[82] After Koch fired O'Donnell for misconduct, she organized a meeting between ArcLight and Volpert.[83] After that meeting, consistent with Crestview's plan, ArcLight's investment committee was told that any transaction would entail ArcLight acquiring 80% of Oxbow's equity, while offering Crestview's principals the opportunity to roll over a portion of their equity.[84] Hurst dissembled about these contacts when asked directly by the Board.[85]

On March 15, 2016, having been "encouraged" by Crestview to "consider an offer" just slightly higher than the confidential FMV amount,[86] ArcLight sent to Crestview alone a non-binding indication of interest, nominally in the amount of $176.59 per Unit.[87] On March 28, the Koch Parties rejected ArcLight's indication, explaining that it failed to satisfy the LLCA's requirements, including the Highest Amount Interpretation.[88] On May 27, ArcLight revised its non-binding indication

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[81] Op.76-7.

[82] Op.88 (A2004; A2005).

[83] Op.89 (A2014).

[84] Op.90 (A2016).

[85] Op.170 (A2193).

[86] Op.170 (A2016).

[87] Op.90-91 (A2024).

[88] Op.98-99 (A2035). Oxbow's March 28 letter also rejected the notion that a leave-behind or top-off was permissible under the LLCA; in response, the Minority

with a higher equity value permitting Oxbow to have a higher net debt level at closing, resulting in an effective per Unit price of $176.59 (the "ArcLight Indication").[89]

F. This Litigation

At a June 10, 2016 board meeting, Volpert threatened that if the Company did not sign the ArcLight Indication within two days, Crestview would commence litigation.[90] Crestview insisted that it could force a sale to ArcLight by "leaving behind" (but not "topping off") those Members who did not receive the required 1.5x return.[91] In response, the Koch Parties sued to establish that the Highest Amount Interpretation controlled and that an Exit Sale could not proceed at the price indicated by ArcLight.

Following an early summary judgment hearing, the trial court found the LLCA was clear; agreed that the LLCA mandated the Highest Amount Interpretation; and rejected Crestview's "leave behind" interpretation. Instead of ending the litigation, the court raised, *sua sponte*, the question of whether an implied covenant could vary the contract's plain terms because it believed enforcing those

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Members only asserted that a leave-behind was permissible, but did not dispute that a top-off was prohibited by the LLCA. Op.99.

[89] Op.102-03 (A731); A2043.

[90] A2149; A975.

[91] Op.99; A2030-37.

plain terms led to “a harsh result.”[92] The Minority Members then amended their complaint and switched arguments: while still claiming that the LLCA permitted the Small Holders to be “left behind,” they also claimed, by virtue of the implied covenant, that the Small Holders could be “topped-off” by either a “waterfall top-off,” in which transaction proceeds are used to first satisfy the 1.5x Clause for the Small Holders and then distributed *pro rata* (their preferred option), or a “seller top-off,” in which the Minority Members who triggered the Exit Sale would provide additional consideration to the Small Holders (the less economically-beneficial option to them).[93]

After extensive discovery and trial,[94] on February 12, 2018, the trial court issued the Opinion, again holding that the Highest Amount Interpretation “is the only reasonable reading of the LLC Agreement” and that the plain language of the LLCA “forecloses a Top Off Option.”[95] Instead of ending the analysis, the court erroneously invoked the implied covenant to confer upon the Minority Members the very top-off right that the court found was foreclosed by the LLCA’s plain language.

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[92] Op.5, 108 (referencing SJ Order); A545-46.

[93] Op.2-5; A1170.

[94] By allowing the litigation to proceed despite its summary judgment finding that the clear contract governed the dispute, the parties were forced to the expense of 39 depositions, the production of 857,349 pages of documents, and a six-day trial. A1.

[95] Op.129, 138.

The trial court then held that by failing to predict that the court would retroactively insert a top-off right into the LLCA, the Koch Parties breached Article XIII, §8(f) requiring all parties to use "reasonable efforts" to effect an Exit Sale.[96] The court also directed the parties to brief the issue of remedies. In its Remedy Decision, the court awarded, in addition to specific performance of a new Exit Sale, two damages remedies that were both improper under Delaware law and had been waived by the Minority Members: (i) contingent damages to ensure the Minority Members receive proceeds at least equal to the ArcLight Indication,[97] and (ii) damages based on the Minority Members' *pro rata* portion of Oxbow's legal fees and expenses in this litigation.[98]

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[96] Op.165.

[97] Remedy Decision 27-31.

[98] *Id.* 31-37.

ARGUMENT

I. The Trial Court Erred By Invoking An Implied Covenant To Vary The Plain And Unambiguous Conditions To An Exit Sale, Which Were Not Met

A. Question Presented

Whether the trial court erred by (i) using the implied covenant to rewrite an unambiguous contract that it twice found had no gap because it directly addressed the issue presented, and where the implied term contradicted the express terms of the contract; (ii) implying a term to address a situation that was foreseeable by the parties at the time of contracting; (iii) implying a term that would not have been agreed to by the parties at the time of contracting; and (iv) basing its decision on its subjective view of "fairness." These issues were preserved for appeal. *See* A1290-1303; A1339.

B. Scope Of Review

The trial court's legal conclusions are reviewed *de novo*. *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 889 (Del. 2015), *as revised* (Mar. 27, 2015).

C. Merits Of Argument

The central issue in this litigation is whether an Exit Sale "must provide all members with the highest amount necessary to satisfy the 1.5x Clause for any

member."[99] The trial court twice found that "[b]ecause the per-unit amount must clear [the 1.5x] requirement for every holder, and because every holder must receive the same amount, all holders must receive the highest amount needed to satisfy the 1.5x Clause for any particular holder."[100] The court held that the "plain language … mandates" this interpretation; that it is "the only reading that gives meaning to the LLC Agreement when read as a whole"; and thus "is the only reasonable reading of the LLC Agreement."[101] Accordingly, an Exit Sale that provides anything less than $414 per Unit to all holders does not comply with the LLCA. Thus, the LLCA "forecloses a Top Off Option."[102]

Well-settled principles of Delaware law, which the trial court cited but did not heed, required the court to enforce the contract's plain language:

- "[T]he implied covenant will not infer language that contradicts a clear exercise of an express contractual right."
- The implied covenant "cannot be invoked where the contract itself expressly covers the subject at issue."
- "[A] reviewing court does not simply introduce its own notions of what would be fair or reasonable under the circumstances."'
- "[T]he implied covenant 'seeks to enforce the parties' contractual bargain.'"[103]

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99 Op.132.
100 Op.176.
101 Op.136-38.
102 Op.129, 137-38.
103 Op.139-43.

The court's failure to apply these well-settled principles was legal error.

1. The Trial Court Improperly Implied A Covenant Where There Was No Gap In The Contract To Fill

The trial court's plain-language reading of the LLCA disposes of this case. The Minority Members cannot force an Exit Sale at $176.59 per unit because that amount does not provide a 1.5x return to all Members. Delaware law does not permit a court to imply a term that overrides express contractual terms.

The implied covenant requires a contractual "gap," and thus, as this Court has held, it "does not apply when the contract addresses the conduct at issue." *Nationwide*, 112 A.3d at 896; *Allied Capital v. GC-Sun Holdings, LP*, 910 A.2d 1020, 1032 (Del. Ch. 2006) (implied covenant only applies when the "contract is truly silent with respect to the matter at hand.").[104] Here, the contract is not silent; the "Highest Amount Interpretation" of the LLCA dictates the result.

Where "existing contract terms" address the question presented, those terms control, because "implied good faith cannot be used to circumvent the parties' bargain." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005); *Nationwide*, 112 A.3d at 897 (no implied covenant where "parties negotiated a specific [contractual] term" on point); *Lazard Tech. Partners, LLC v. Qinetiq N.*

[104] *Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *10 (Del. Ch. May 7, 2008) ("the implied covenant … cannot be invoked where the contract itself expressly covers the subject at issue").

America Operations LLC, 114 A.3d 193, 195-96 (Del. 2015) (same, noting the "specificity of the merger agreement on that subject"). This is particularly true because, as the Minority Members argued and the trial court found, the contract is clear and unambiguous. *See Nationwide*, 112 A.3d at 887, 896–99 (no implied covenant where "[c]uriously, even as NorthPointe argued that the Superior Court should graft implied terms onto the Purchase Agreement, NorthPointe also contended that the terms of the Agreement were clear and unambiguous.").[105]

The legal error of re-writing the LLCA to evade the requirements of the Highest Amount Interpretation is compounded by the fact that the "top-off" term the trial court implied is expressly foreclosed by the LLCA's plain terms. As this Court has held, "[t]he implied covenant cannot be invoked to override the express provisions of [the] contract." *Nemec v. Shrader*, 991 A.2d 1120, 1128 n.26 (Del. 2010); *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 191 (Del. Ch. 2014) (no implied covenant claim where implied term would "conflict fundamentally with the plain language and structure" of the contract), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015).

As the trial court held on summary judgment, "the plain language of the Exit Sale right" was "contrary to the Minority Members' position" that they had "the ability to compensate the Small Holders separately" from the proceeds of an Exit

[105] Op.120; A511-12; A1256-57.

Sale and, "[a]s a matter of plain language," any "Exit Sale must provide the same consideration to all members."[106] Post-trial, the court reaffirmed this conclusion, holding that "[t]he plain language of the Exit Sale Right does not permit some members to receive greater consideration than others in an Exit Sale" and thus "forecloses a Top Off Option."[107] Rather, as a matter of the contract's plain text, if "an Exit Sale does not satisfy the 1.5x Clause for any member, then it cannot proceed."[108]

Given the terms of the contract forbade an Exit Sale in which some Members received different consideration than other Members, the implied covenant could not allow such unequal treatment. "Delaware courts must … not imply a different bargain than that reflected under the express terms of the contract." *Nationwide*, 12 A.3d at 899. Employing the implied covenant to grant the Minority Members a new top-off right not found in the LLCA did not fill a contractual gap. Rather, it impermissibly deprived the Koch Parties of their explicit contractual right to receive the "same terms and conditions" as every other Member in an Exit Sale, as embodied in the bargained-for Equal Treatment Requirements.

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[106] A540, A545-46. *See Allied Capital*, 910 A.2d at 1033 (rejecting argument that if contract precluded claim, then the implied covenant entitled party to discovery of parties' intent).

[107] Op.127, 129.

[108] Op.132.

The trial court did so by implying a term whereby the Small Holders could receive $414/Unit from an Exit Sale while all others receive only $176.59/Unit, contravening the contract's express terms "by providing different consideration to different members and distributing proceeds contrary to a *pro rata* allocation."[109] Indeed, the top-off term implied by the court would deprive other Members of Oxbow (not just the Koch Parties) of *their* Equal Treatment rights under the LLCA, which further underscores the harm caused by overriding the contract's express provisions and employing the implied covenant where no gap existed.

2. The Trial Court Improperly Used An Implied Covenant To Fill A Purported "Intentional Gap" But The Implied Covenant Addresses Only Unforeseeable Issues

To sidestep the plain meaning of the LLCA, the trial court improperly found there was a "gap" in the process by which the Small Holders were admitted to Oxbow.[110] The court held that, when it was executed in 2007, the LLCA "left open the question of what rights and obligations subsequently admitted members would have, creating an ***intentional gap***."[111] Hence, "[b]y deferring until a later point the question of what rights subsequent members would have, the LLC Agreement created a gap."[112] This conclusion was erroneous.

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109 Op.3

110 Op.6, 144, 151, 161, 163.

111 Op.149.

112 Op.145.

As this Court has held, the implied covenant may only be used to address matters "that could not be anticipated." *Nemec*, 991 A.2d at 1126; *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 421 (Del. 2013) (courts "will not imply terms to rebalance[e] economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract"), *overruled on other grounds by Winshall v. Viacom Int'l Inc.*, 76 A.3d 808 (Del. 2013). Thus, under Delaware law, there is no such thing as an "intentional gap" to be filled later by an implied covenant. By definition, an "intentional" gap at the time of contracting relates to matters known to, and therefore anticipated by, the parties.

When the LLCA was executed in 2007, the parties anticipated Oxbow would add new Members, as the Company expected to make additional acquisitions that would potentially be financed through equity. The Minority Members obtained preemptive rights to protect against dilution caused by additional issuances.[113] It was also anticipated from the outset that because Oxbow is in a cyclical business, "the 1.5x Clause might not be satisfied when the time to exercise the Put Right arrived."[114] Consequently, it was entirely foreseeable that new Members would be admitted, and that those Members could have a higher baseline Capital Contribution for purposes of the 1.5x calculation, raising the price required to force an Exit Sale.

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[113] Op.35-37 (A1870), 144.

[114] Op.162 (A789-91).

The highly sophisticated Minority Members represented in the LLCA that they and their representatives "possess[] … expertise, knowledge and sophistication in financial and business matters"; they were "capable of evaluating the merits and economic risks of acquiring and holding Units"; and were "able to bear all such economic risks now and in the future."[115] The Minority Members' "claimed shock" that the 1.5x Exit Sale hurdle now exceeds the Company's current price "bespeaks a faux naivete" that does not support their invocation of the implied covenant. *Allied Capital*, 910 A.2d at 1034.

3. The Trial Court Erred In Imposing A Term The Koch Parties Would Not Have Agreed To At The Time Of Contracting

The trial court also erred because it implied a term that it expressly concluded the parties would *not* have agreed to at the time of contracting in 2007.

As this Court has held, "[t]he implied covenant seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them….[and] had they considered the issue in their original bargaining positions at the time of contracting." *Gerber*, 67 A.3d at 418; *Blaustein v. Lord Baltimore Capital Corp.*, 84 A.3d 954, 959 (Del. 2014) (same). To satisfy this standard, the implied term must be so "necessarily involved in the contractual relationship … that the parties *must*

[115] A2094 (Art.IV-§7(e)).

have intended them and … only failed to express them because they [were] too obvious to need expression." *Dieckman v. Regency GP LP*, 155 A.3d 358, 368 n.26 (Del. 2017); *Nationwide*, 112 A.3d at 897 n.4 ("a court can only imply terms when it is clear from the [contract] that [the parties] would have agreed to the omitted terms").

The trial court reached the exact opposite factual conclusion here. It expressly accepted Koch's testimony "that during negotiations in 2007, any request by Crestview for a Top Off Option would have been a 'deal killer.'"[116] The court also found that "in 2007, Koch had leverage" because "Oxbow did not need [the Minority Members'] capital."[117] Moreover, the parties *did* expressly negotiate over what would count toward 1.5x, starting with only sale proceeds, then progressing to sale proceeds plus non-tax distributions, and ultimately settling on sale proceeds plus all prior distributions. They did not agree to include top-off payments.[118] Because the court itself found that the parties would *not* have agreed to a top-off right in 2007, the court violated Delaware law by implying such a right here.

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[116] Op.155-56 (A937).

[117] Op.156 (A936-37).

[118] Op.34 (A794-95; A1718; A2115-16 (Art.XIII-§§8(e), 9(b)).

4. The Trial Court Improperly Implied A Covenant To Impose Its Own Subjective Notions Of Fairness

The trial court's decision was also improperly based on its subjective notions of fairness. Despite concluding the Highest Amount Interpretation was the "only reasonable reading" of the contract, the court nonetheless believed that the result mandated by the contract "makes no sense."[119] As the court stated, implying a top-off term avoided a "harsh result" it believed was "commercially unreasonable" based on what it viewed as "issues of compelling fairness."[120]

The trial court's subjective view of "fairness" was an improper basis to rewrite the parties' contract. As this Court has repeatedly warned, wielding the implied covenant is a "cautious enterprise." *Nemec*, 991 A.2d at 1126 (implied covenant may not be used to "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal"); *Nationwide*, 112 A.3d at 896 n.72 ("implied good faith cannot be used to … create a free-floating duty ... unattached to the underlying legal document"). As then-Chancellor Strine explained in *Auriga Capital Corporation v. Gatz Properties, LLC*:

> A generalized "fairness" inquiry under the guise of an "implied covenant" review is an invitation to … inject unpredictability into both entity and contract law, by untethering judicial review from the well-understood frameworks that traditionally apply in those domains.

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[119] Op.138, 162.

[120] Op.5, 108, 161-62, 176.

40 A.3d 839, 854 (Del. Ch. 2012), *aff'd*, 59 A.3d 1206 (Del. 2012). That is exactly the subjective and improper inquiry the trial court engaged in here.

Nor was there anything "unfair" about holding the highly sophisticated Minority Members to the bargain they struck as to when they could—and could not—force an Exit Sale. The Minority Members have received enormous cash distributions worth over twice their investment. And they had the opportunity to seek to vary the Small Holders' rights with respect to the 1.5x requirement, but did not do so.[121] The unfairness here is that the trial court contravened the intent of the parties as expressed in their written agreement. *See Gildor v. Optical Solutions*, 2006 WL 4782348, at *7 n.17 (Del. Ch. June 5, 2006) (it is "imperative that contracting parties know that a court will enforce a contract's clear terms and will not judicially alter their bargain.").

That agreement was the product of substantial negotiation and compromise on both sides resulting in a complex package of rights and obligations among Oxbow's Members. Delaware law does not empower the trial court to alter one specific aspect of that bargain. And while the court justified its holding by invoking the size of the Small Holders' investment, it wholly undermined this justification by

[121] Op.162.

concluding that "[t]he language of the Exit Sale Right does not turn on the size of the members' interest or how they became members."[122]

By impermissibly rewriting the parties' bargain, the trial court's holding also undermines the predictable governance of Delaware LLCs. LLCs are "creatures of contract," and the law of contract, not principles of equity or fairness, governs their interpretation. *See Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 880 (Del. Ch. 2009). The court, however, effectively found that a grant of permissive authority to a board constitutes a *per se* contractual "gap" allowing for judicial second-guessing of a board's exercise of that authority. If that were so, every permissive board action would be subject to a given judge's concept of "fairness" in the guise of "implied covenant" analysis.

The trial court's improper and purposeful insertion of unpredictability into both contract and entity law under the guise of "fairness" requires reversal.

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[122] Op.137.

II. The Trial Court Erred By Finding A "Gap" In The Small Holder Admission Process

A. Question Presented

Whether the trial court erred by (i) finding a gap in the LLCA as to the rights and obligations of subsequently-admitted members; (ii) treating the process by which the Small Holders were admitted as Members of Oxbow by the Board as leaving a "gap" in the LLCA that should be filled by an implied term permitting an Exit Sale to proceed if the Minority Members make a "top-off" payment to the Small Holders, where that admission occurred years after the parties agreed to the underlying contract; and (iii) finding for the Minority Members on this admission process "gap" theory, which they abandoned (and therefore waived). This issue was preserved below. *See* A1292-1305.

B. Scope Of Review

The trial court's legal conclusions are reviewed *de novo*; its factual findings should be reversed if "clearly erroneous." *Nationwide,* 112 A.3d at 889.

C. Merits Of Argument

The trial court erroneously concluded that the LLCA contained an "intentional gap" concerning the rights of subsequently-admitted Members, since the LLCA expressly addresses that issue.[123] In addition, the court's effort to sidestep the clarity

[123] Op.149.

of the LLCA by finding a "gap" in the process by which the Small Holders were admitted to Oxbow in 2011 was foreclosed as a matter of law. Implied covenant analysis must focus on the "time of contracting," as the Minority Members conceded.[124] The admission of new Members four years after the contract was signed was not a "time of contracting" among Oxbow's Members, but rather was an action taken by the Oxbow Board pursuant to admission terms previously agreed upon by Oxbow's Members. Moreover, none of the grounds for the supposed "gap" in the admission process supports the implication of a non-contractual term. And this argument was abandoned by the Minority Members after it was raised pre-trial, but not post-trial.

1. The LLCA Expressly Addresses The Rights Of New Members

The trial court's holding that there was an "intentional gap" in the LLCA as to "the question of what rights and obligations subsequently admitted members would have" was erroneous under Delaware law.[125]

The LLCA expressly defines the process by which new Members may be admitted. It gives the Board the authority to admit new Members "on such terms and conditions as the Directors may determine at the time of admission."[126] As the

[124] A689.
[125] Op.149.
[126] A2093 (Art.IV-§5).

trial court noted, under the LLCA, "the Board had the power under the New Member Provision to issue units to the Small Holders on the condition that they not be able to invoke the 1.5x Clause" or "could have created a new class or series of units that did not possess the right to invoke the 1.5x Clause."[127] That is a grant of Board authority, not a "gap." The LLCA also expressly defines "Member" to include "any Person subsequently admitted as a Member" and treats Members and "Additional Members" identically when defining "Member Interest" and "Percentage Interest," meaning new Members have the same rights as other Members unless varied by the Board.[128]

Thus, there is no "gap" in the LLCA as to the rights and obligations of subsequently-admitted members. The Court's holding to the contrary violated Delaware law, because the implied covenant "does not apply when the contract addresses the conduct at issue." *Nationwide*, 112 A.3d at 896.

2. Admission Of The Small Holders Was Not A "Time Of Contracting" To Which Implied Covenant Doctrine Applies

Because the LLCA plainly addresses new Members' rights, the trial court focused its analysis on the process by which Oxbow's Board admitted the Small Holders in 2011. But implied covenants fill gaps *in contracts*. *See Allen*, 113 A.3d at 183 ("[A] court [evaluating an implied covenant claim] first must engage in the

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[127] Op.150.

[128] A2080-81 (Art.I ("Member"; "Member Interest"), A2093 (Art.IV-§5).

process of *contract construction* to determine whether there is a gap that needs to be filled"). Thus, "[w]hen conducting [an implied covenant] analysis, [the court] must assess the parties' reasonable expectations at the time of contracting." *Nemec*, 991 A.2d at 1126. Consequently, any "gap" to be filled here must have occurred when the LLCA was either first agreed or amended. Despite this requirement, the trial court improperly concluded: "Because the gap in this case concerns the terms on which Oxbow admitted the Small Holders as members, the time of contracting is *not* 2007, when the parties executed the LLC Agreement, but rather 2011, when the issue of admitting the new members arose."[129]

Labeling the Small Holder admission process in 2011 as an act of "contracting" was legal error. Indeed, it violated the trial court's own prior rulings, which this Court adopted as the law of Delaware in *Gerber*, 67 A.3d at 418, holding:

> *The temporal focus is critical*. . . . An implied covenant claim … looks to the past. It is not a 'free-floating duty unattached to the underlying legal documents.' It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but rather *what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting.*

ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC, 50 A.3d 434, 440 (Del. Ch. 2012), *rev'd on other grounds*, 68 A.3d 665 (Del. 2013).

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[129] Op.151.

Moreover, admitting new Members is not an act of contracting by the Members, but an exercise of authority the Members conferred on the Board in the LLCA.[130] Because it is the Directors who determined the admission of new Members, the Members (the parties to the LLCA) engaged in no act of contracting. Therefore, the Directors could not possibly have created any gap to be filled. By holding that the member admission process was an act of contracting, the court committed reversible error.

3. The Trial Court Erred By Finding the Board's Decision Not To Impose Additional Conditions On The Small Holders Somehow Constituted A Gap

Even if it were somehow proper to undertake an implied covenant analysis regarding the 2011 Small Holder admission process, the trial court committed numerous errors in finding a "gap" in that process.

a. The Board's Decision Not To Vary The Terms of Membership For The Small Holders Did Not Constitute A "Gap"

The LLCA provides that new Members "may be admitted … on such terms and conditions as the Directors may determine at the time of admission."[131] This contractual language is permissive, not mandatory. *See Blaustein*, 84 A.3d at 959 (provision providing the Company "*may* repurchase Shares" was "permissive" not

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130 A2093 (Art.IV-§5).

131 *Id.*

mandatory). Thus, the Board may, but need not, impose different "terms and conditions."

The Board exercised its authority to issue Units to the Small Holders on the same terms and conditions as all other Units, except for price. No new class of membership Units was ever discussed. Instead, the Directors were well-aware Oxbow was issuing Units equivalent to those of other Members based on multiple communications the Directors received prior to voting: "Newco would become a member of Oxbow, *owning the same class of units as currently exists*."[132] The Board confirmed this arrangement when it took no action to impose different terms and conditions (besides price), and did not create a different class of units.

As noted, the trial court held, "the Board had the power under the New Member Provision to issue units to the Small Holders on the condition that they not be able to invoke the 1.5x Clause" or "could have created a new class or series of units that did not possess the right to invoke the 1.5x Clause."[133] It is undisputed that the Board *did not exercise* that permissive power; nor did the Minority Members ever suggest that the Board take such action. Instead, all directors, including the three Minority Member-affiliated directors, voted for issuances on these terms.[134]

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[132] Op.35 (A1807-08); *supra* Statement of Facts, §B.

[133] Op.150.

[134] The Minority Members consistently treated the Small Holders as Members for five years up until this litigation, as this Court found. Op.111, 114-19 (A1936; A810-11, A817; A1938).

The trial court's holding that a "gap" existed because the resolution authorizing the Small Holders' admission purportedly did not "specif[y] the rights"[135] has it exactly backwards. Because the Board did not exercise its power to vary the Small Holders' rights, their Units are equivalent to all others. This occurred by clear operation of the LLCA, which defines "Member" to include "subsequently admitted" Members like the Small Holders.[136] Thus, the "gap" in the 2011 Small Holder admission process the trial court purported to identify simply did not exist.

In fact, under the trial court's approach, if Oxbow's Board failed to "specify" the rights of new Members, then *all* of the subsequently-admitted Members would have *no* rights unless and until a court implied them. That would be an absurd outcome, and there is nothing in the record to suggest it was the intent of the parties or that the Small Holders agreed to pay $35 million to buy Units that gave them *no* fixed rights as Members.

The trial court also mistakenly relied on the fact that the resolutions admitting the Small Holders "spoke of 'shares of Company stock'" rather than of "Units"[137] to conclude that "this reference implied a common-stock like instrument without special rights … such as a preferential right to receive 1.5 times invested capital

[135] Op.145.
[136] A2080 (Art.I ("Member")).
[137] Op.145-46.

before being forced to engage in a sale."[138] But nothing about the 1.5x return right is "preferential," since every Member forced to sell has the same right. Nor is there evidence that the use of "share" was somehow meaningful, much less intended to exclude the new Units from equal treatment in an Exit Sale. Indeed, the Minority Members themselves used the terms "Unit" and "share" interchangeably.[139] For example, while conspiring to strip Koch of control in February 2015, Volpert wrote Hurst: "[We offer to] bring in a new investor to purchase enough of ***[Koch's] shares*** to give Crestview plus the new investor a majority interest."[140]

The trial court also erred in implying a covenant because the text of the LLCA made it foreseeable in 2011 (and at the time of contracting in 2007) that if Oxbow's Board did not vary the 1.5x rights of new Members at the time of their admission, their 1.5x threshold would affect the required price in an Exit Sale. That follows directly from the text of the LLCA, which provides that (i) the Board could vary the rights of the Small Holders' "at the time of admission," and (ii) that subsequently-admitted members were "Members" within the meaning of the contract.[141]

As the court noted on summary judgment, at the time the Board—including the Minority Member directors—voted unanimously in 2011 to issue new Member

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[138] Op.145.
[139] Op.55 (A1941); A1899.
[140] Op.55
[141] A2080 (Art.I ("Member")); A2093 (Art.IV-§5).

Units to the Small Holders, the Minority Members "could have anticipated the implications of that event for their Exit Sale right and addressed it as a condition of the Small Holders' investment," but did not do so.[142] In sum, had the Board wanted to vary the status of the Small Holders' Units versus other Units, it needed to do so affirmatively. The Board did so with respect to price, but not any other terms. Accordingly, the Small Holders' Units have the same status as all others with respect to the Exit Sale Requirements, and no gap may be found.

b. The Holding That The Koch Parties Created A Gap "By Failing To Follow Proper Formalities" Was Erroneous

The trial court also erred in holding the "Koch Parties created a gap regarding the terms on which the Small Holders became members" by supposedly "failing to follow proper formalities"[143] The court declared that "the implied covenant *only has a role* because of the poorly documented admission of the Small Holders…."[144]

As an initial matter, the trial court's holding that the *Koch Parties* created a gap misreads Delaware law and the contract. As noted, the implied covenant addresses matters that "could not be anticipated" by all parties to the contract, *Nemec*, 991 A.2d at 1126, not by purported poor documentation or the unilateral action (or inaction) *of a single party*. Nor was it the responsibility of the Koch

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142 A546.

143 *See* Op.6-7, 148, 176.

144 Op.158.

Parties under the LLCA to ensure that the Board, which includes three Minority Member directors, observed any "formalities" governing admission. The Minority Members never demanded or even discussed such "formalities."

Moreover, these "formalities" have nothing to do with the terms of the Small Holders' admission. Indeed, the trial court found that it is "impossible to know what would have happened if Koch and his team had documented the issuances properly."[145] Consequently, it could not find that the parties "must have intended" the implied top-off right, as required to imply a term. *See Dieckman*, 155 A.3d at 368.

In any event, the trial court's holding that Oxbow did not comply with the LLCA's preemptive rights provision, that additional approvals were required to address that provision, and that this "failure" was brought to the Company's attention by one of its then-executives are manifestly incorrect. Rather, its findings establish that the Company fully complied with the preemptive rights provision. Article XIII, Section 5 requires only that the Company give notice of the issuance, which it did.[146] Despite this notice, no Minority Member exercised preemptive rights. To the contrary, as detailed above, the evidence establishes Crestview considered selling some of its stake to harvest its enormous profits.[147]

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[145] Op.150.

[146] Op.34-37 (A1809; A1887; A2111 (Art.XIII-§5(b))).

[147] Op.41-42 (A1894; A1909; A799).

Nor do the trial court's other suppositions regarding the supposed effect of the "Koch Parties' failure to follow proper formalities"[148] support the conclusion that the admission of the Small Holders somehow created a gap. These "formalities" included requiring newly admitted Members to execute joinders to the LLCA as of the date of admission[149] and amending "Exhibit A" of the LLCA to document the Percentage Interest and Capital Contribution of newly admitted Members.

In its zeal to invoke the implied covenant, the trial court overlooked the undisputed fact that Family LLC executed the required joinder in 2011.[150] Likewise, the court wrongly concluded the supposed failure to follow these "formalities" violated the Supermajority Vote requirement.[151] This conclusion is contradicted by the court's finding that the Small Holders' issuance followed a unanimous vote of all the directors.[152] Nothing more was needed.

The trial court's finding regarding the import of the Supermajority Vote requirement is also contradicted by its other findings. The court stated that, had formalities been observed, the Minority Members would have been alerted to the effect of selling units at $300. Thus, "[t]he Supermajority Vote requirement meant that [the Minority Members] could have blocked the issuance and forced a

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148 Op.148.
149 Op.43-44.
150 A1911.
151 Op.148.
152 Op.37; A2083 ((Art.I ("Supermajority Vote")).

negotiation."[153] This is incorrect and impermissible hindsight bias. There is no record evidence the Minority Members lacked any material information about the issuance. To the contrary, the court found "there is some reason to think that Crestview's principals were not overly concerned with the issuances to the Small Holders because of the valuation that they placed on Oxbow," which far exceeded 1.5x the price the Small Holders were paying for their Units.[154] Nothing precluded the Minority Members from using their supermajority rights to negotiate variations to the Small Holders' rights.

Finally, the trial court's conclusion the Minority Members "reasonably could have believed" they would be able to "weigh in" on the Small Holders' rights after their admission is without record support and makes no sense.[155] Varying the status of the new Units *after* admission is foreclosed by the plain text requirement that the Board impose any terms and conditions "*at the time of admission*."[156] Moreover, the Small Holders paid $35 million for their Units, and the Minority Members promptly received $11 million as a distribution.[157] As sophisticated investors, the Minority Members could not reasonably have expected to vary the terms of membership after taking the new investors' money.

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[153] Op.150.
[154] Op.41; *supra* Statement of Facts, §B.
[155] Op.147.
[156] A2093 (Art.IV-§5).
[157] Op.40 (A1912; A1938).

4. The Trial Court Erred By Relying On An Argument That Had Been Abandoned By The Minority Members

In addition to the numerous substantive errors of Delaware law, the court erred by relying on an argument that the Minority Members made before, but abandoned after, trial. In their pre-trial brief, the Minority Members argued that the admission process for the Small Holders created a gap that the court should fill.[158] The Minority Members abandoned this argument in both of their post-trial briefs, and instead advanced their frivolous theory that "[t]he LLC Agreement contains a gap because the Exit Sale provisions do not expressly permit or prohibit a top up."[159] Neither post-trial brief says a word about any supposed "gap" based on the admission of the Small Holders.

Because this argument was made pre-trial, but not pursued at or after trial, it was waived.[160] *See SinoMab Bioscience Ltd. v. Immunomedics, Inc.*, 2009 WL 1707891, at *12, n.71 (Del. Ch. June 16, 2009) ("Before trial Immunomedics also asserted claims . . . . [but] did not address those claims in post-trial briefing, and they are waived."); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

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[158] A702-03.

[159] A1477; A1581-82; A1238.

[160] The only argument made by the Minority Members post-trial regarding the admission process was that the Small Holders were not Members of Oxbow, which was correctly rejected by the trial court, not whether a gap existed in the LLCA for purposes of the implied covenant. *See* A1262-68; Op.5.

III. The Trial Court Erroneously Concluded That Oxbow Holdings Breached The Cooperation Covenant

A. Question Presented

Whether the trial court erred by holding that Oxbow Holdings breached its obligation to use reasonable efforts to effect an Exit Sale where the preconditions to such a sale had not been met. This issue was preserved below. *See* A1336-39.

B. Scope Of Review

De novo review applies to the trial court's legal conclusions. *Nationwide*, 112 A.3d at 889.

C. Merits Of Argument

The trial court's finding that Oxbow Holdings breached its obligation to use reasonable efforts to pursue an Exit Sale was error.

As an initial matter, reversal of the reasonable efforts ruling is required because it is premised on the trial court's erroneous implied covenant holding. Because there was no Exit Sale available that could satisfy the LLCA's express requirements under prevailing market conditions, there was no Exit Sale for Oxbow Holdings to use reasonable efforts to effectuate. Thus, there was no breach, causation, or damages as a matter of law.

Nor did the Reasonable Efforts Clause require the Koch Parties to adopt the Minority Members' unreasonable interpretation of the LLCA, and their decision to contest that incorrect interpretation did not breach the LLCA. *See Nemec*, 991 A.2d

at 1128 ("A party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party"). No Delaware authority supports finding Oxbow Holdings liable for breach for taking a contractual position that the trial court upheld as a matter of plain meaning.

Indeed, the trial court's decision rests on the assumption Oxbow Holdings should both have anticipated the court would imply a term into the LLCA, and acted consistently with that anticipated term. This assumption is ironic in light of the court's finding that the Minority Members reasonably did not anticipate the court's top-off ruling.[161] The court did not explain why the Koch Parties should have anticipated that same ruling, and acted accordingly, when the Minority Members did not.

Finally, the trial court held that "[b]ut for Koch's actions, Oxbow would have entered into" the "ArcLight Offer." But that "Offer" was only a non-binding indication of interest subject to numerous and standard transactional contingencies.[162] *See McMillan v. Intercargo Corp.*, 1999 WL 288128, at *9 (Del. Ch. May 3, 1999) (a "'non-binding preliminary indication of interest'" was "not meant to be an offer; but only a preliminary estimation of the price [the Acquirer]

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[161] Remedy Decision 30.
[162] Op.167; A2043-46; A2180.

might be willing to pay"). The court made no findings that the ArcLight Indication was, in fact, final and binding.

Moreover, the ArcLight Indication surreptitiously secured by Crestview did not comply with three of the Exit Sale Requirements. *First*, it failed to meet the 1.5x Return Requirement and the Equal Treatment Requirements in light of the Highest Amount Interpretation. *Second*, it violated the All Securities Requirement because (i) as the trial court found, Crestview's principals planned to "roll a good chunk of [their] stake" into the new transaction;[163] and (ii) as a result, that transaction would violate the LLCA's requirement that that an Exit Sale include a transfer "of all, but not less than all" Units. *Third*, it violated the Equal Treatment Requirements since, given Crestview's principals' undisclosed intention to roll over their Units, it was not on the "same terms and conditions" for all Members.[164]

Because no Exit Sale was available that satisfied the LLCA, there was no "Exit Sale" lost.[165]

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[163] Op.77 (A2003), 89.

[164] A2114 (Art.XIII-§7(d)).

[165] Op.94 (A2027).

IV. The Trial Court Erred By Awarding Remedies That Were Legally Improper And Had Been Waived

A. Question Presented

Whether the trial court erred by awarding (i) contingent "backstop" damages in the event specific performance of an Exit Sale did not yield at least the ArcLight Indication price; and (ii) a pro rata share of the Mintz Levin legal fees and expenses paid by Oxbow in connection with this litigation. These issues were preserved below. *See* A1693-96, A1704-08, A1709-11.

B. Scope Of Review

The trial court's legal conclusions are reviewed *de novo*. *Nationwide*, 112 A.3d at 889.

C. Merits Of Argument

Because the trial court's liability decision should be reversed, all of the remedies it awarded should likewise be vacated. However, if the Court affirms on liability, it should reverse the imposition of remedies unsupported by Delaware law.

As an initial matter, the trial court erred by awarding contingent "backstop" damages for any shortfall in the proceeds to the Minority Members from a court-ordered Exit Sale as against the ArcLight Indication.[166] That request for relief was waived; the Minority Members did not seek it in their pleadings, in the Pre-Trial

[166] Remedy Decision 27-31.

Order, or in their pre- and post-trial briefs.[167] Instead, they sought only the alternatives of specific performance of the Exit Sale process or a court-ordered redemption of their Units at the ArcLight Indication. Thus, their request for backstop damages had been waived by the time they first sought it in their remedies briefing. *See Miller v. HCP Trumpet Investments, LLC*, 2018 WL 4600818, at *2 (Del. Sept. 20, 2018) (ORDER) (theory waived where "the plaintiff did not attempt to advance" it below).

Nor were such damages permissible under Delaware law, which does not permit specific performance of a contract and a non-contractual guarantee of that specific performance. None of the cases cited by the trial court awarded such damages. The court cited a 25 year-old Superior Court case, Remedy Decision 28 n.66 (citing *Mills v. Gosling Creek, Inc.,* 1993 WL 485901, at *3 (Del. Super. Ct. Oct. 6, 1993)), but *Mills* concerned subject matter jurisdiction in the context of a motion to transfer to the Court of Chancery. It did not grant both specific performance and a non-contractual guarantee of that specific performance. Nor did it address the situation in which a party elected specific performance but also sought insurance in the form of "backstop" damages.[168]

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[167] *See* A1175-79; A733-36; A741-44; A646-47; A1276.

[168] The trial court's reliance on *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002) was misplaced. That case does not speak to whether a court may award insurance on specific performance not found in the contract.

Likewise, the trial court erred in awarding the Minority Members their pro rata share of Mintz Levin's legal fees.[169] *First*, there was no authority for the court's holding that the Company had an obligation to remain neutral in this case.[170] Oxbow had a legitimate interest in ensuring the proper interpretation of its operating agreement—an interpretation found to be the "only reasonable" one by the court. *Second*, Oxbow was a party to this case beginning in June 2016, and the Minority Members never asserted until post-trial in 2018 that it lacked standing to prosecute its claims. By the time it was raised post-trial, any such challenge was waived. *See Emerald Partners*, 726 A.2d at 1224. *Third*, the court's decision to pierce the corporate veil to hold the Koch Parties liable for the Company's debts violated bedrock Delaware law and the LLCA. The Minority Members never alleged, let alone proved, that Oxbow "through its alter ego, has created a sham entity designed to defraud investors and creditors." *Crosse v. BCBSD, Inc.*, 836 A.2d 492, 497 (Del. 2003).

Finally, the claim for fees is derivative and could not be asserted in this litigation. Under *Tooley v. Donaldson, Lufkin & Jenrette,* 845 A.2d 1031, 1033 (Del. 2004), the fee claim could only be brought derivatively, because Oxbow is the only

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[169] Remedy Decision 2-3, 31-37.

[170] *Id.* 32.

party that was allegedly harmed and could seek recovery. Neither case cited by the trial court supports its decision that the claim could be brought directly.

CONCLUSION

This Court should reverse the judgment of the Court of Chancery and enter judgment for the Koch Parties.

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Dated: October 31, 2018