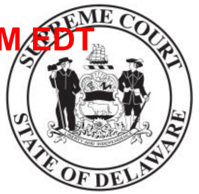
EFiled: Jul 22 2019 02:14PM EDT
Filing ID 63552516
Case Number 238,2019



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEE LEVINE and CHESTER COUNTY EMPLOYEES' RETIREMENT FUND, Plaintiffs-Below, Appellants,	§	No. 238, 2019
v.	§	Court Below: The Court of Chancery of the State of Delaware
ENERGY TRANSFER L.P., LE GP, LLC, KELCY L. WARREN, JOHN W. MCREYNOLDS, MARSHALL S. MCCREA III, MATTHEW S. RAMSEY, K. RICK TURNER, WILLIAM P. WILLIAMS, RAY DAVIS, and RICHARD D. BRANNON, Defendants-Below, Appellees.	§	Cons. C.A. No. 12197-VCG

APPELLANTS' OPENING BRIEF

OF COUNSEL:

KESSLER TOPAZ MELTZER & CHECK, LLP
Marc A. Topaz
Lee D. Rudy
Eric L. Zagar
Michael C. Wagner
Grant D. Goodhart III
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

PRICKETT, JONES & ELLIOTT, P.A.
Michael Hanrahan (Del. No. 941)
Paul A. Fioravanti, Jr. (Del. No. 3808)
Kevin H. Davenport (Del. No. 5327)
Samuel L. Closic (Del. No. 5468)
Eric J. Juray (Del. No. 5765)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Plaintiffs-Below/Appellants

Dated: July 22, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

NATURE OF PROCEEDINGS 1

SUMMARY OF THE ARGUMENT 4

STATEMENT OF FACTS 5

- A. Defendants 5
- B. Operative Provisions of the LPA 6
- C. ETE Agrees to a Merger that Quickly Becomes Unattractive 7
- D. ETE Devises the CPUs as a Hedge Against Distribution Cuts 8
- E. The Public Offering Faces a Williams Roadblock 9
- F. The Private Placement 11
- G. Defendants Engage in a Sham Process and Falsify Records 12
- H. ETE Distributes the CPUs 13

ARGUMENT 15

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY DENYING RELIEF 15

- A. Question Presented 15
- B. Scope of Review 15
- C. Merits of the Argument 15
  - 1. Section 7.6 of the LPA Prohibits Conflicted Transactions 16
  - 2. The Court of Chancery Held the Issuance Was Not Fair and Reasonable 17
    - a. The Court of Chancery Found an Unfair Process 18
    - b. The Court Below Found Unfair Price 19
  - 3. Denial of Relief Based on Considering CPU Terms in Isolation Was Legally and Financially Erroneous 20
  - 4. The Court of Chancery Improperly Required Proof of Damages at the Time of Conversion 25
  - 5. The Court Below Erroneously Held that Plaintiffs Only Sought Cancellation of the Entire Issuance 27

6. The Court's Denial of Relief Was Premised on Inconsistent Determinations Concerning the Public Offering 30

II. THE COURT OF CHANCERY COMMITTED LEGAL ERROR BY HOLDING "DISTRIBUTION" WAS UNAMBIGUOUS 32

A. Question Presented 32

B. Scope of Review 32

C. Merits of Argument 32

1. The Court of Chancery's "Unambiguous" Definition Is Not Supported by the LPA 32

2. The Court of Chancery Misconstrued the Interrelationship Between Section 5.8 and Section 5.10(a) 34

3. The Court of Chancery's Percentage Interest Construction Was Incorrect 35

4. The Court of Chancery's Reliance on a Dictionary Definition Was Error 38

5. The Vice Chancellor's Evaluation of Consideration Was Erroneous 41

6. Post-Board Approval Changes Invalidated Amendment 5 and the CPUs 42

CONCLUSION 44

In re Energy Transfer Equity, L.P. Unitholder Litig.,
2018 WL 2254706 (Del. Ch. May 17, 2018) .... Exhibit A

In re Energy Transfer Equity, L.P. Unitholder Litig.,
Cons. C.A. No. 12197-VCG
Order and Final Judgment (May 6, 2019) .... Exhibit B

In re Energy Transfer Equity, L.P. Unitholder Litig.,
Cons. C.A. No. 12197-VCG
Transcript on Motions to Compel and the Court's Rulings
(August 23, 2016) .... Exhibit C

4834-7639-7725, v. 1

In re Energy Transfer Equity, L.P. Unitholder Litig.,
Cons. C.A. No. 12197-VCG
Order in letter form to Counsel from Vice Chancellor Glasscock re: Clarification to telephonic bench ruling on Plaintiffs' Motion to Compel (August 24, 2016)....................Exhibit D

In re Energy Transfer Equity, L.P. Unitholder Litig.,
Cons. C.A. No. 12197-VCG
Telephonic Rulings of the Court on Motions in Limine and Motions to Compel Productions and Pretrial Conference (February 13, 2018) .... Exhibit E

In re Energy Transfer Equity, L.P. Unitholder Litig.,
2019 WL 994045 (Del. Ch. Feb. 28, 2019)....................Exhibit F

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. El Paso Pipeline GP Co.,
90 A.3d 1097 (Del. Ch. 2014) 27

Auriga Capital Corp. v. Gatz Properties, LLC,
40 A.3d 839 (Del. Ch.) 27

Brinckerhoff v. Enbridge Energy Co.,
159 A.3d 242 (Del. 2017) ....passim

Brinckerhoff v. Enbridge Energy Co.,
2016 WL 1757283 (Del. Ch. Apr. 29, 2016)..43

Cantor Fitzgerald, L.P. v. Cantor,
2001 WL 536911 (Del. Ch. May 11, 2001)..29

Clarke v. Clarke,
2013 WL 4505370 (Ill. App. Ct. Aug. 20, 2013) 34

CompoSecure, L.L.C. v. CardUX, LLC,
206 A.3d 807 (Del. 2018) 15

Comrie v. Enterasys Networks, Inc.,
837 A.2d 1 (Del. Ch. 2003) 25

Dieckman v. Regency GP LP,
155 A3d 358 (Del. 2017) 27

In re Dollar Thrifty S'holder Litig.,
14 A.3d 573 (Del. Ch. 2010) 41

Duncan v. Theratx, Inc.,
775 A.2d 1019 (Del. 2001) 26

In re Energy Transfer Equity L.P. Unitholder Litig.,
2017 WL 3500224 (Del. Ch. July 31, 2017) 1

In re Energy Transfer Equity L.P. Unitholder Litig.,
2017 WL 782495 (Del. Ch. Feb. 28, 2017)...passim

In re Energy Transfer Equity, L.P. Unitholder Litig.,
2018 WL 2254706 (Del. Ch. May 17, 2018)....................passim

In re Energy Transfer Equity, L.P. Unitholder Litig.,
2019 WL 994045 (Del. Ch. Feb. 28, 2019)....................3, 20

Feldman v. Soon-Shiong,
2018 WL 2124063 (Del. Ch. May 8, 2018)....................25

Fox v. CDX Holdings, Inc.,
2015 WL 4571398 (Del. Ch. July 28, 2015)....................26

Gatz Properties, LLC v. Auriga Capital Corp.,
59 A.3d 1206 (Del. 2012)....................29

Genecor Int'l, Inc. v. Novo Nordisk A/S,
766 A.2d 8 (Del. 2000)....................26

Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.,
817 A.2d 160 (Del. 2002)....................17, 29

Guth v. Loft, Inc.,
5 A.2d 503 (Del. 1939)....................29

Kahn v. Kolberg Kravis Roberts & Co., L.P.,
23 A.3d 831 (Del. 2011)....................29

La. Mun. Police Emps. Ret. Sys. v. Crawford,
918 A.2d 1172 (Del. Ch. 2007)....................41

Levine v. Energy Transfer Equity, L.P.,
2016 WL 2347982 (Del. Ch. May 3, 2016)....................1

In re Loral Space & Commc'ns, Inc.,
2008 WL 4293781 (Del. Ch. Sept. 19, 2008)....................29

Lorillard Tobacco Co. v. American Legacy Foundation,
903 A.2d 728 (Del. 2006)....................38, 39

Madison Ave. Inv. Partners, LLC v. America First Real Estate Inv. Partners,
L.P., 806 A.2d 165 (Del. Ch. 2002)....................33

Nash v. Schock,
1998 WL 474161 (Del. Ch. July 23, 1998) 16

Norton v. K-Sea Transp. Partners L.P.,
67 A.3d 354 (Del. 2013) 17, 40

Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC,
202 A.3d 482 (Del. 2019) 15

SI Management L.P. v. Wininger,
707 A.2d 37 (Del. 1998) 32

Siga Techs., Inc. v. PharmAthene, Inc.,
132 A.3d 1108 (Del. 2015) 25

Strassburger v. Earley,
752 A.2d 557 (Del. Ch. 2000) 28

Thorpe v. CERBCO, Inc.,
676 A.2d 436 (Del. 1996) 29

Valeant Pharm. Int'l v. Jerney,
921 A.2d 732 (Del. Ch.) 29

Weinberger v. UOP, Inc.,
1985 WL 11546 (Del. Ch. Jan. 30, 1985)..16

The Williams Cos. v. Energy Transfer Equity, L.P.,
2016 WL 3576682 (Del. Ch. June 24, 2016)..3, 8, 14

The Williams Cos. v. Energy Transfer Equity, L.P.,
159 A.3d 264 (Del. 2017) 3

STATUTES

6 *Del. C.* § 17-604..41

15 *Del. C.* § 15-101(4) 39

4834-7639-7725, v. 1

NATURE OF PROCEEDINGS

Plaintiff/Appellant Lee Levine ("Levine") filed this action on April 12, 2016, asserting that the issuance (the "Issuance") of Series A Convertible Preferred Units ("CPUs") of Energy Transfer Equity, L.P. ("ETE" or the "Partnership")[1] to selected ETE unitholders, most of whom were Affiliates of ETE's general partner, breached ETE's Third Amended and Restated Agreement of Limited Partnership (the "LPA" or "Partnership Agreement").[2]

In September 2016, all parties cross-moved for partial summary judgment on whether the Issuance was a prohibited distribution under Section 5.10(a) of the LPA and whether the Issuance had received Special Approval under Section 7.6(f) of the LPA. Defendants also sought partial summary judgment on other grounds. In two opinions, the Court of Chancery denied the cross-motions, concluding the issues should be decided on a full factual record.[3]

After document discovery, multiple motions to compel[4] and sixteen depositions, the court below held a three-day trial.[5] The Court of Chancery's May

---

[1] ETE was recently renamed Energy Transfer, L.P.

[2] Plaintiff Chester County Employee's Retirement Fund joined the action on May 3, 2016. *Levine v. Energy Transfer Equity, L.P.*, 2016 WL 2347982 (Del. Ch. May 3, 2016) (ORDER).

[3] *In re Energy Transfer Equity L.P. Unitholder Litig.*, 2017 WL 782495 (Del. Ch. Feb. 28, 2017) ("*ETE I*") and *In re Energy Transfer Equity L.P. Unitholder Litig.*, 2017 WL 3500224 (Del. Ch. July 31, 2017) ("*ETE II*").

[4] *See* A2002-A2047; A2095-A2099; A2645-A2658; Ex. C at 12-16; Ex. D ¶ 3; Ex. E at 7-8.

17, 2018 Memorandum Opinion rejected Plaintiffs' claim that the CPUs were a non Pro Rata Distribution of Partnership Securities in breach of Section 5.10(a).[6]

However, the court held that the director defendants caused ETE's General Partner, LE GP, LLC ("LE GP" or the "General Partner"), to breach Section 7.6(f) of the LPA by issuing CPUs to its Affiliates.[7] The court found the Issuance (1) did not receive Special Approval by a duly constituted Conflicts Committee, (2) was not on terms no less favorable to the Partnership than those generally provided to or available from unrelated third parties and (3) did not satisfy Section 7.6's fair and reasonable standard.[8]

The court below acknowledged multiple times that the LPA "gives [ETE] protection against conflicted transactions with [LE GP] and affiliates, prohibiting them unless they are objectively fair and reasonable."[9] Nevertheless, the court concluded defendants' breach of the LPA warranted no remedy, permitted the *prohibited* conflict transaction to stand and allowed the CPUs to convert into common units when the market price of common units was $10.46 greater than the

---

[5] *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *2 (Del. Ch. May 17, 2018) ("*ETE III*") (Ex. A).
[6] *Id*. at *15-18.
[7] *Id*. at *22-25.
[8] *Id*. at *19-22.
[9] *Id*. at *20; *see also id.* at *19 n.308 ("the General Partner is prohibited from conflicted transactions unless 'fair and reasonable'").

$6.56 conversion price, causing a wealth transfer to insiders and their cronies of $545.64 million.[10]

As in prior litigation, ETE's controller Kelcy L. Warren ("Warren") won the lottery under the Court of Chancery's opinion.[11] However, as Chief Justice Strine observed in *Williams*, "you do not get credit for rigging the game."[12] Here, the Court of Chancery held the defendants rigged the lottery with an unfair process and unfair price, including with a downside hedge that made them winners either way. Yet, the Court of Chancery refused to provide equitable relief that denied defendants their ill-gotten winnings.

Despite awarding no relief, the Court of Chancery admitted that Plaintiffs "prevailed in the substantive litigation," and awarded Plaintiffs attorneys' fees and expenses representing roughly half of Plaintiffs' counsel's actual time and expenses.[13]

The Court of Chancery entered an Order and Final Judgment on May 6, 2019 (the "Final Order") (Ex. B). Plaintiffs timely filed their Notice of Appeal on June 5, 2019. Defendants did not cross-appeal.

---

[10] *Id*. at *25-28; A1907-A1909; A3665-A3667; A3382-A3383 (Trial 42-48).

[11] *The Williams Cos. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *2 (Del. Ch. June 24, 2016), *aff'd,* 159 A.3d 264 (Del. 2017).

[12] *Williams*, 159 A.3d at 284 (Strine, C.J., dissenting).

[13] *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2019 WL 994045, at *2, 5-6 (Del. Ch. Feb. 28, 2019) "(*ETE IV*") (Ex. F). Plaintiffs appeal the fee award only to the extent it was limited by the Court of Chancery's no distribution and no remedy holdings.

SUMMARY OF THE ARGUMENT

1. The Court of Chancery erred as a matter of law by denying any remedy for defendants' breach of Section 7.6(f) of the LPA, relying on an erroneous hindsight assessment of lack of "damages" at the time of CPU conversion in May 2018, rather than evaluating the appropriate remedy as of the time of the breach, 26 months earlier. The court misapplied the fair and reasonable standard by holding that elimination of downside risk was only valuable if distributions were cut after the breach and did not affect the fairness of the 5% discount and other CPU terms. The court further erred by holding that Plaintiffs only sought cancellation of the CPUs *in toto*. Plaintiffs sought partial rescission and/or cancellation of CPUs issued to the General Partner's Affiliates. Finally, the court erred in viewing the scope of the remedy too narrowly.

2. The Court of Chancery erred as a matter of law by holding that the Issuance was not a non Pro Rata distribution prohibited by Section 5.10(a) of the LPA. Its holding that "distribution" had only one unambiguous meaning based on a dictionary definition was an error of law. The court below misconstrued (i) the interrelationship between Sections 5.8 and 5.10(a), (ii) the Percentage Interest clause of Section 5.10(a), and (iii) the consideration purportedly given for the Issuance. The court also erred by validating post-Board approval changes to Amendment 5 and the CPUs.

4834-7639-7725, v. 1

STATEMENT OF FACTS

A. Defendants

ETE is a Delaware master limited partnership ("MLP") that owns and operates gas pipelines.[14] LE GP is ETE's General Partner. LE GP's board of directors (the "Board") manages ETE and appoints ETE's executive officers.[15]

Warren is Chairman of the Board.[16] As of February 12, 2016, he held 187,739,220 ETE common units, representing about 18% of ETE's outstanding common units, and 81.2% of the membership interests in LE GP.[17] John W. McReynolds ("McReynolds"), ETE's president and a Board member, held over 25 million common units and Ray Davis ("Davis"), a co-founder of ETE, held over 67 million common units.[18]

William P. Williams ("Mr. Williams"), K. Rick Turner, Marshall S. McCrea III ("McCrea"), Matthew S. Ramsey ("Ramsey"), and former defendant Ted Collins, Jr. ("Collins")[19] were Board members and held other positions in ETE and its affiliates when the Issuance occurred.[20]

---

[14] *ETE III*, 2018 WL 2254706, at *2.
[15] *Id*.
[16] *Id*.
[17] *Id.*; A2815.
[18] *ETE III*, 2018 WL 2254706, at *2-3.
[19] Collins died in January 2018, before trial.
[20] McCrea, Ramsey and Richard D. Brannon ("Brannon"), who joined the Board after it approved the Issuance, also received CPUs. A2832-A2833.

4834-7639-7725, v. 1

B. Operative Provisions of the LPA

Section 5.8(a) authorizes the issuance of Partnership Securities for such consideration and on such terms and conditions as the General Partner determines.[21]

Section 5.10 authorizes Pro Rata distributions of Partnership Securities to all Record Holders, subject to Section 5.8(d).[22]

Section 5.8(d) provides for rounding up if a distribution would result in the issuance of fractional units.[23] Thus, Section 5.8(d) establishes that a distribution is a form of an issuance.

Section 7.6(f) provides that:

> Neither the General Partner nor any of its Affiliates shall sell, transfer or convey any property to, or purchase any property from, the Partnership, directly or indirectly, except pursuant to transactions that are fair and reasonable to the Partnership . . . .[24]

This provision "gives the Partnership protection against conflicted transactions with [LE GP] and its affiliate, prohibiting them unless they are objectively fair and reasonable."[25] Under Section 7.6(f), a conflicted transaction is fair and reasonable if "Special Approval" is provided "by the sole member or by a

---

[21] A162.
[22] A150, A163.
[23] A162.
[24] A171.
[25] *ETE III*, 2018 WL 2254706, at *20; *see also id.* at *18, 19 n.308, 22.

4834-7639-7725, v. 1

majority of the members of the Conflicts Committee."[26] A Conflicts Committee must be composed entirely of:

> directors who are not (a) security holders, officers or employees of the General Partner, (b) officers, directors or employees of any Affiliate of the General Partner or (c) holders of any ownership interest in the Partnership other than Common Units.[27]

A conflicted transaction is also fair and reasonable if its terms are "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties."[28]

Section 7.8(a) provides that all "Indemnitees" – including the General Partner, its Affiliates, and all Board members – cannot be liable for monetary damages absent bad faith, fraud or willful misconduct.[29]

C. ETE Agrees to a Merger that Quickly Becomes Unattractive

On September 28, 2015, ETE and The Williams Companies, Inc. ("Williams") agreed to a merger (the "Merger") where Williams stockholders would receive stock of an ETE affiliate and $6.05 billion in cash for their Williams shares.[30] ETE would have to borrow the cash and assume approximately $4.2

[26] A151.
[27] A147.
[28] A171.
[29] A172; *ETE III*, 2018 WL 2254706, at *18 n.300.
[30] *ETE III*, 2018 WL 2254706, at *3.

billion of Williams's outstanding debt.[31] ETE projected the Merger would increase its consolidated debt by $30 billion.[32]

In September-December 2015, the energy markets declined and ETE's unit price fell by more than 65%.[33] Credit ratings agencies downgraded Williams and were concerned about ETE's credit outlook.[34]

The industry decline rendered the Merger financially unattractive to ETE. If the Merger closed, ETE would need to reduce its debt by approximately $2 billion or risk a credit rating downgrade.[35] ETE began considering deleveraging options.[36]

D. ETE Devises the CPUs as a Hedge Against Distribution Cuts

In early 2016, ETE and its advisors considered reducing leverage through common unit distribution cuts.[37] ETE considered other measures,[38] but they were less effective because ETE could not implement any of them unilaterally.

Though ETE did not explicitly tell the market or ratings agencies that it was considering distribution cuts, market participants expected that ETE would cut distributions.[39] Warren publicly admitted distribution cuts were "certainly

---

[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*. at *4; *see also Williams*, 2016 WL 3576682, at *1-2; A604; A606-A611.
[35] *ETE III*, 2018 WL 2254706, at *4; A1877-A1878.
[36] *ETE III*, 2018 WL 2254706, at *4-5.
[37] *Id*.
[38] *Id*.
[39] *Id*. at *5.

possible."[40] ETE's directors and insiders (specifically Warren) devised the CPUs as a hedge against distribution cuts.[41]

E. The Public Offering Faces a Williams Roadblock

Defendants initially contemplated a public offering for all ETE common unitholders to receive CPUs on the condition that they forgo all cash distributions on their common units for a two-year period (the "Public Offering").[42] However, because defendants decided to make the CPUs unregistered and not transferable, many unitholders would not want the CPUs because of lack of liquidity.[43]

By February 8, 2016, Warren had already committed to participate with all of his 187,739,220 common units.[44] Under a term sheet the Board considered on February 8, 2016, if ETE made a distribution of greater than $0.11, CPU holders would receive $0.11 in cash and the balance of the distribution would accrue and convert into common units at the end of the term.[45] If common units received no cash distribution, the CPU holders would still receive an $0.11 distribution.[46] During the proposed eight-quarter term, both the CPUs and corresponding

---

[40] *Id*.
[41] *Id*. at *24.
[42] *Id*. at *5.
[43] *Id*. at *22; A650; A659; A3363-A3366 (at 73-79, 95-96); A3443 (Trial 285). Both the Public Offering and the private Issuance were designed to have far less than full participation by Partners. *ETE III*, 2018 WL 2254706, at *23 n.346. Indeed, the CPUs had value only if participation was not universal. *Id*.
[44] A678; *see also* Ex. C at 14.
[45] *ETE III*, 2018 WL 2254706, at *5.
[46] *Id*.

4834-7639-7725, v. 1

common units would be non-transferrable. The conversion price would be a 5% discount to the market price for common units when the offering closed.[47]

On February 12, 2016, ETE's CFO Tom Long sent Williams's CFO Don Chappel a draft S-3 registration statement for the Public Offering.[48] Williams asserted that the Public Offering required Williams's consent, which it would not provide.[49]

On February 15, ETE's lawyers changed the minimum quarterly accrual on the CPUs from $0.11 per unit to $0.285 per unit.[50] "That is, the updated S-3, for the first time, contained a massive accrual increase, which would be a lucrative hedge for subscribers in the event of distribution cuts."[51]

The court below found that Williams had the power to veto the Public Offering (and did so) and the Board knew on February 15 that Williams had refused to consent to the Public Offering.[52] Nevertheless, the court found that on February 15, 2016, the Board approved a Public Offering it knew would not happen.[53]

---

[47] A678; A690; *ETE III*, 2018 WL 2254706, at *23, 27.
[48] *ETE III*, 2018 WL 2254706, at *5.
[49] *Id*. at *6. The Court of Chancery rejected as not credible Long's testimony that he had been "floored" to learn from Chappel on February 18 that Williams would not consent to the Public Offering. *Id.*
[50] *Id*.
[51] *Id*.
[52] *Id*. at *6, 23.
[53] *Id*. at *6-7.

There is no record evidence regarding the reason for changing the accrual rate from $0.11 to $0.285 per unit or whether or how that revised term came before the Board on February 15.[54] The revised S-3, Amendment 5 and the February 15 Board minutes were all redacted.[55] The Board resolution purportedly approving the Public Offering said the approval was on substantially the terms set forth in the February 8 term sheet that did not have the changed accrual term, while the term sheet the Board purportedly approved on February 15 had that new term.[56]

The court below held that "[n]othing in the record indicates that the directors found the new accrual term fair and reasonable, or … considered its consequences should distributions be cut. Nothing indicates that they determined that the term was necessary to the success of the public offering."[57]

F. The Private Placement

By February 22, 2016, the Public Offering had morphed into a private placement of CPUs to Warren and his friends.[58] The CPUs were to have the new accrual provision, a nine-quarter term and uncabined discretion for the General Partner to waive the transfer restrictions.[59] The General Partner's ability to waive the lack of liquidity was "a boon to insiders, but cold comfort to independent

[54] *Id*. at *6, 24.
[55] *Id*.
[56] *Id*. at *5-6.
[57] *Id*. at *24.
[58] A911-A912.
[59] *ETE III*, 2018 WL 2254706, at *8, 24.

4834-7639-7725, v. 1

parties."[60] The draft S-3 for the Public Offering was shortened into a private placement memorandum ("PPM").[61]

G. Defendants Engage in a Sham Process and Falsify Records

Because the Issuance was a conflicted transaction, ETE sought Special Approval by a Conflicts Committee. The Court of Chancery made findings that ETE did not obtain Special Approval by a duly constituted Conflicts Committee.

First, only one member (Mr. Williams) of the three-person Conflicts Committee that ETE created purported to give Special Approval.[62] The lawyers for ETE and the committee fabricated, and the Board approved, false resolutions that Mr. Williams had been appointed as the sole member of the Conflicts Committee.[63]

Second, Mr. Williams was uninformed and "his actions [were] short of the kind of deliberations that should be undertaken in consideration of a conflicted transaction."[64] The Vice Chancellor found:

> Williams' own testimony makes clear that he did not understand several important aspects of the transaction he approved. For example, Williams did not understand how the quarterly distributions worked, and he did not know how the $0.11 preferred payment term had been

---

[60] *Id*. at *22.
[61] A913-A1114.
[62] *ETE III*, 2018 WL 2254706, at *8-12, 20.
[63] *Id*. at *9, 11, 12, 21 (citing A912, A1115, A1117, A1123-A1126, A1128-A1129, A1147, A1282).
[64] *Id*. at *21.

> determined. Williams apparently believed that the securities had no cost to ETE; when asked to provide a basis for that belief, he explained that he "just felt like it didn't cost ETE anything to do this." Notably, Williams never considered how the securities would affect ETE if the company cut its common distributions.[65]

H. ETE Distributes the CPUs

On February 28, 2016, the full Board, following Mr. Williams's purported Special Approval, supposedly approved the Issuance, the PPM and Amendment 5 to the LPA.[66] However, after the Board's approval, Amendment 5 and the PPM were altered, including changing the tax allocation to favor the CPU holders, eliminating registration rights, branding and legending the CPUs and the common units issuable upon conversion as restricted securities and setting $6.56 as the conversion price.[67]

ETE issued CPUs to Warren, McReynolds, McCrea, Ramsey, Davis and Brannon. "[A]t least 70% of the individuals on the 'LIST FOR PPM' were either affiliated with ETE in some capacity or related to individuals with such an affiliation," including "some aunts&uncles."[68] On March 8, 2016, when the CPUs were issued, ETE's common units closed at $7.32.[69]

---

[65] *Id*. at *12.
[66] *Id*.
[67] A1458; A1567-A1568; A1574-A1576; A1589-A1590; A1605-1606; A1641; A1666; A1687-A1689; A1692-A1702; A1704.
[68] *ETE III*, 2018 WL 2254706, at *13.
[69] A1876-A1877; A1955.

4834-7639-7725, v. 1

Only three of ETE's over 400 institutional investors were on the PPM list, and two of them declined the CPUs.[70] This selective offering to a few investors was "too cute by half" and did not satisfy Section 7.6(f)'s safe harbor that the terms of the CPU Issuance be "no less favorable to the Partnership than those generally being provided to or available from unrelated third parties."[71]

On April 18, 2016, ETE filed an updated S-4 for the Merger, announcing that if the Merger closed, ETE did not expect to make any quarterly distributions until March 2018.[72] In June 2016, however, the Court of Chancery ruled that ETE could terminate the Merger because ETE's lawyers could not render a tax opinion before the termination date.[73] ETE then reversed course. Common unit distributions were not cut and the energy industry boomed.[74] When the CPUs converted into common units on May 18, 2018 at $6.56 per unit, common units closed at $16.92.[75] The issuance of additional common units upon conversion diluted the common unitholders who did not hold CPUs.[76]

---

[70] *ETE III*, 2018 WL 2254706, at *13.
[71] *Id*. at *21-22.
[72] *Id*. at *14.
[73] *Williams*, 2016 WL 3576682, at *2; *ETE III*, 2018 WL 2254706, at *14.
[74] *ETE III*, 2018 WL 2254706, at *14, *27.
[75] A3664.
[76] *ETE III*, 2018 WL 2254706, at *23 n.346.

ARGUMENT

I. THE COURT OF CHANCERY ERRED AS A MATTER OF LAW BY DENYING RELIEF

A. Question Presented

Did the Court of Chancery err in denying Plaintiffs relief after finding defendants breached the LPA? This issue was preserved for appeal[77] and results from the Court of Chancery's post-trial opinion, Final Order and discovery rulings.[78]

B. Scope of Review

This Court reviews questions of law and interpretation of alternative entity agreements *de novo*.[79]

C. Merits of the Argument

Given the court's conclusion that the process and price of the CPU Issuance were not fair and reasonable, the court committed legal error because its failure to provide any relief is inconsistent with Section 7.6 of the LPA, which prohibits conflict transactions. Based on an erroneous hindsight conclusion that subsequent events somehow fixed the unfair process and unfair price, the court below awarded

---

[77] A2724-A2730; A2961-A2966; A3138-A3142; A3237-A3241.

[78] *ETE III*, 2018 WL 2254706, at *20-28; Ex. B ¶ 4; Ex. C at 12-16; Ex. D ¶ 3; Ex. E at 7-8.

[79] *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018); *see also Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502, 509 (Del. 2019) (vacating remedy decision that was inconsistent with LLC agreement).

4834-7639-7725, v. 1

absolutely no relief. As the court repeatedly – and correctly – stated, the LPA *prohibited* issuing CPUs to Affiliates of LE GP because that conflict transaction was not fair and reasonable. "Equity must right that wrong by an appropriate remedy."[80] "Quite simply, equity will not suffer a wrong without a remedy."[81] Cancellation of CPUs (or now the common units into which they have converted) is the appropriate remedy.

1. Section 7.6 of the LPA Prohibits Conflicted Transactions

The Issuance was "a conflicted transaction … which under [the LPA] must be fair and reasonable."[82] Section 7.6(f) is not merely a permissive safe harbor. It is prohibitive:

> **Neither** the General Partner **nor** any of its Affiliates **shall** sell, transfer or convey any property to, or purchase any property from, the Partnership, directly or indirectly, **except pursuant to transactions that are fair and reasonable to the Partnership** . . . .[83]

Under Section 7.6(f), "the General Partner is prohibited from conflicted transactions unless 'fair and reasonable.'"[84] This provision imposes an affirmative

---

[80] *Nash v. Schock*, 1998 WL 474161, at *2 (Del. Ch. July 23, 1998), *aff'd*, 732 A.2d 217 (Del. 1999).
[81] *Weinberger v. UOP, Inc.*, 1985 WL 11546, at *9 (Del. Ch. Jan. 30, 1985).
[82] *ETE III*, 2018 WL 2254706, at *2, 19.
[83] A171 (emphases added).
[84] *ETE III*, 2018 WL 2254706, at *19 n.308.

4834-7639-7725, v. 1

obligation that the General Partner and its Affiliates will not engage in a transaction with the Partnership unless the transaction is fair and reasonable.[85]

2. The Court of Chancery Held the Issuance Was Not Fair and Reasonable

Section 7.6(f) is "a contractual fiduciary standard similar if not identical to entire fairness."[86] It creates a contractual fiduciary duty to meet the entire fairness standard.[87] The trial court correctly concluded that the LPA placed the burden on defendants to demonstrate fairness.[88] The court below held that the defendants did not satisfy the "safe harbors" for establishing that the conflicted transaction was fair and reasonable.

Because the fair and reasonable standard is akin to entire fairness review, the "analysis must consider both fair process and fair price, unifying those considerations to reach a single result."[89] The Court of Chancery held that "the defendants have failed to show that the Private Offering was entirely fair to the Partnership," finding both process and price were unfair.[90] Defendants have not

---

[85] *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 364 (Del. 2013); *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 254-57 (Del. 2017).
[86] *Brinckerhoff*, 159 A.3d at 262.
[87] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002); *Brinckerhoff*, 159 A.3d at 262.
[88] *ETE III*, 2018 WL 2254706, at *2.
[89] *Id*. at *19, 22. *See also Gotham Partners*, 817 A.2d at 175.
[90] *ETE III*, 2018 WL 2254706, at *22-25.

appealed the Court of Chancery's holding that Section 7.6(f) prohibited the Issuance.

a. The Court of Chancery Found an Unfair Process

The Court of Chancery found no proper Conflicts Committee was created, and the purported one-person committee did not conduct "the kind of deliberations that should be undertaken in consideration of a conflicted transaction."[91] The Vice Chancellor found that the $0.285 accrual on the CPUs if there was no common unit distribution made the Issuance unfair:[92]

> 10) The Defendants, who bear the burden of proof, were unable to explain how this additional downside hedge originated or came to be placed before the Board. A reasonable supposition, which I adopt, was that Long informed insiders that a public offering to all unitholders would be unlikely, given Williams Co.'s lack of consent; that a Private Offering would be an alternative; **that a substantial risk of distribution cuts or cancellations loomed**; and that **the insiders seized the opportunity to eliminate downside risk for themselves and their cronies.**
>
> 11) The Board was presented with the new $0.285 accrual term for the first time at the February 15 meeting. Perella personnel attended the meeting, but the record is silent as to how, if at all, the financial advisor explained this change to the Board. Subsequently, internal emails indicate that Perella recognized that **in case of a suspension of distributions, the new accrual term would represent a substantial transfer of wealth to subscribers**. Nothing in the record indicates that the

[91] *Id.* at *20-21.
[92] *Id*. at *24.

> directors found the new accrual term fair and reasonable, or (despite the internal Perella email) considered its consequences should distributions be cut. Nothing indicates that they determined that the term was necessary to the success of the public offering. In other words, **the imposition of the new accrual term was not fair in terms of process, and nothing in the Board's actions indicates that it was fair as to price**.[93]

The court below further found that nothing in the documentation and testimony, including the Conflicts Committee and Board proceedings, improved the process or reflected a determination that the CPU terms were fair.[94]

b. The Court Below Found Unfair Price

The Court of Chancery recognized that fair price implicated the probability of the Merger occurring, the probability that common unit distributions would be cut, how much in cash distributions might be forgone, and the price ETE would ultimately pay in common units when the CPUs converted.[95] The Vice Chancellor recognized that the revision of the accrual term changed the fair price calculus:

> The Private Offering, by contrast, included the $0.285 accrual term, which would be **substantially more valuable than the initial term** to subscribers in case distributions were cancelled, and would in that case be **substantially more expensive to the Partnership**. … The record simply does not exist to support the $0.285 accrual term as fair.[96]

---

[93] *Id*. (footnotes omitted; emphases added).
[94] *Id.* at *20.
[95] *Id*. at *26.
[96] *Id*. at *24 (footnotes omitted; emphasis added).

The court held that "[t]he Defendants must also demonstrate fair price, **as of the time of the offering**."[97] While fair price was a complex matter, the court found that:

> Nonetheless, the cost to ETE of switching from an $0.11 to a $0.285 accrual, in case distributions were cut, was massive. Again, the benefit of the switch to ETE, if any, is undocumented in the record.[98]

The court held that defendants did not meet their burden of demonstrating fair price, finding that:

> The $0.285 accrual guarantee looks like a gift to the insiders who subscribed to the securities, a massive hedge against distribution cuts.[99]

3. Denial of Relief Based on Considering CPU Terms in Isolation Was Legally and Financially Erroneous

The Court of Chancery's denial of relief was based on a series of legally and financially incorrect conclusions including:

1. The wealth transfer the CPU holders received on conversion was "unrelated to" and "does not arise from" the unfair accrual hedge

---

[97] *Id.* at *26 (emphasis added); *see also ETE IV*, 2019 WL 994045, at *2 ("[I]nsiders crafted a transaction that benefited themselves at the expense of the Unitholders, in breach of the contractual analog of fiduciary duties by which the partners were bound.").

[98] *ETE III*, 2018 WL 2254706, at *26.

[99] *Id.*

which "had value … only in case of a (never made) distribution *cut*."[100]

2. "[T]he conversion price arose in the Initial Terms; it is an artifact of the original term sheet from the aborted public offering, which I have found fair."[101]

The Court of Chancery failed to consider the impact of the unfair accrual and other favorable terms added to the CPUs in the private Issuance (such as the tax allocation) on the fairness of other terms of the CPUs, and the entire fairness of the overall transaction.

The Vice Chancellor adopted the financially and legally erroneous assumption that the accrual term must be viewed in isolation from the 5% discount in the conversion price. However, the court below admitted that both the accrual rate and conversion rate had value to the CPU holders.[102]

The court found the 5% discount was determined in connection with the Public Offering and reflected that the CPUs "entailed risk" and required "a sufficient return."[103] However, the unfair accrual term "eliminated downside risk" for the CPU holders.[104] In contrast, the accrual hedge greatly increased the risk for

---

[100] *Id*. (italics in original).
[101] *Id*. at *27.
[102] *Id*. at *23 & n.346.
[103] *Id*.
[104] *Id*. at *24.

4834-7639-7725, v. 1

ETE and the Partners who did not receive CPUs. If distributions were canceled, which was likely at the time of the breach, the CPUs would be "substantially more expensive to the Partnership" – "the cost to ETE [of the accrual hedge] was massive."[105] The Vice Chancellor found that the Board never considered how the accrual term affected fairness.[106] Therefore, the Board never considered the fairness of the 5% discount in light of the reduced risk to CPU holders and the increased risk to ETE resulting from the accrual hedge. Yet the Court of Chancery just assumed the 5% discount remained fair because it was "an artifact of the original term sheet from the aborted public offering."[107] The fact that the 5% discount was left over from a term sheet from before the accrual change actually proves the discount was unfair.

The Court of Chancery also found the addition of the power of the General Partner to waive the transfer restrictions was a "boon to insiders."[108] This term, which was not part of the initial Public Offering, also reduced the insiders' "risk" in holding the CPUs. Yet the Board and the Court of Chancery never considered the fairness of the CPUs, particularly the 5% discount, in light of this reduced risk. Similarly, the Board never approved and the Vice Chancellor, with no explanation, dismissed as ministerial, the favorable tax allocation for the CPUs, which was

---

[105] *Id*. at *24, 26.
[106] *Id*. at *24-25.
[107] *Id*. at *27.
[108] *Id*. at *22.

added after the Board approved Amendment 5 and the Issuance.[109] Thus, there was no consideration of how this change affected the fairness of the 5% discount or the overall fairness of the CPUs.

The Court of Chancery's further assumption that CPU holders bore risks akin to the risks of the other holders of common units[110] is inconsistent with its findings that CPU holders had a downside hedge and a significant upside. The other common unitholders had neither.

In short, the Court of Chancery's assumption that its hypothetical and advisory opinion on whether the abandoned Public Offering was fair meant that any terms of that offering that remained in the Issuance were fair was an error of law. The court's decision to deny relief because the $0.285 accrual downside hedge did not result in "damages" was also erroneous. The court below focused solely on whether the revised accrual was triggered during the CPUs' nine-quarter term, rather than whether the accrual term affected the fairness of the other terms of the CPUs and rendered the Issuance unfair as a whole at the time of the breach. Whether the hedge was triggered or not, it had value when the CPUs were issued. The court found the "insiders seized the opportunity to eliminate downside risk for themselves and their cronies" by adding the downside hedge just before the CPUs

---

[109] *Id*. at *12 n.228 & 26 n.365; A1640-A1641.
[110] *ETE III*, 2018 WL 2254706, at *25.

were issued.[111] The record does not show ETE received anything in exchange for assuming the massive potential cost of the accrual.[112] The accrual was a "gift to the insiders who subscribed to the securities, a massive hedge against distribution cuts."[113] In an arm's-length negotiation, the addition of the downside hedge should have resulted in a change to the 5% discount or other financial terms or the addition of some other term that benefited ETE. That did not occur.

The court's segregation of the downside hedge from the other CPU terms was its rationale for allowing defendants to retain their unfair gains. The downside hedge guaranteed CPU holders would accrue $0.285 for nine quarters ($1.575 total) if distributions were eliminated. If distributions were not eliminated, the common unit price would rebound during the CPU term and the accrual on the CPUs would convert into common units at the 5% discount to the depressed market price when the CPUs were issued – an upside "hedge."[114] The upside and downside hedges were two sides to the same "heads I win, tails you lose" coin.

The court said that if distributions had been cut and defendants benefited from the downside hedge, it would require the benefits to be disgorged.[115] However, the defendants should not be allowed to keep their unfair benefit, which

---

[111] *Id*. at *24.
[112] *Id*. at *26.
[113] *Id*.
[114] A3381 (trial 39-40) (explaining the depressed ETE common unit price); A1886-A1889.
[115] *ETE III*, 2018 WL 2254706, at *28.

Plaintiffs' expert valued at $545.64 million, simply because the coin came up heads.[116]

4. The Court of Chancery Improperly Required Proof of Damages at the Time of Conversion

The Court of Chancery denied relief because "[t]he Plaintiffs have established a breach, but not shown that the breach caused damage to ETE."[117] The court below required Plaintiffs to prove the Partnership suffered damages in order to obtain relief – even though the LPA would not permit recovery of damages. Moreover, though the Vice Chancellor acknowledged that defendants had the burden to demonstrate fair price at the time of the Issuance,[118] he decided to deny relief because he believed nine quarters of forgone distributions had made the price fair. The court below's time of measurement and the yardstick it used were both legal error.

"Breaches occur at the time of the alleged wrongdoing . . . ."[119] Defendants' breach occurred when the CPUs were issued on March 8, 2016.[120] The remedy for the breach should be based on the parties' expectations at the time of the breach.[121] "It is a basic principle of contract law that remedy for a breach should seek to give

---

[116] A1907-A1909; A3382-A3383 (Trial 42-48); A3665-A3667.
[117] *ETE III*, 2018 WL 2254706, at *28.
[118] *Id*. at *26.
[119] *Feldman v. Soon-Shiong*, 2018 WL 2124063, at *6 (Del. Ch. May 8, 2018).
[120] *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003).
[121] *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1132-33 (Del. 2015).

the nonbreaching [] party the benefit of its bargain by putting that party in the position it would have been but for the breach."[122]

The Court of Chancery stated that "the usual remedy for contract breach is damages," but as its quotation from *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001), recognizes, the remedy is to be "based on the reasonable expectations of the parties *ex ante*."[123] The LPA (like most Delaware limited partnership agreements of public companies) contains exculpation provisions that eliminate damages for breach.[124] Therefore, the reasonable expectation could not have been an award of damages.[125] However, the unavailability of monetary damages does not limit equitable remedies.[126]

The reasonable expectations with respect to the CPU Issuance are expressly set forth in Section 7.6(f)—the General Partner and its Affiliates *shall not* engage in a conflicted transaction that is not fair and reasonable. Having found that the Issuance was not fair and reasonable, the court was required to grant relief that

---

[122] *Genecor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000); *Fox v. CDX Holdings, Inc.*, 2015 WL 4571398, at *36 (Del. Ch. July 28, 2015), *aff'd*, 141 A.3d 1037 (Del. 2016).
[123] *ETE III*, 2018 WL 2254706, at *26 & n.366.
[124] *Id*. at *26. The Vice Chancellor's suggestion of nominal damages as a potential remedy (*id*. & n.367) was plainly wrong, because the court "hadn't focused on the fact that the agreement precludes money damages" so that none of the defendants could be made to pay even nominal damages. A3351.
[125] Plaintiffs' expert did purport to show damages, but calculated the wealth transfer that would occur upon conversion of the CPUs as part of Plaintiffs' showing in support of equitable relief. *Cf. ETE III*, 2018 WL 2254706, at *26.
[126] *Brinckerhoff*, 159 A.3d at 262.

most closely hued to the language of Section 7.6(f) and the LPA's non-monetary remedial framework. That relief was cancellation of CPUs.[127]

Conflict provisions in a limited partnership agreement do not solely help insulate the partnership from conflicted transactions. They "also operate[] for the unitholders' benefit."[128] Thus, where the "express terms of the partnership agreement naturally imply certain corresponding conditions, unitholders are entitled to have those terms enforced according to the reasonable expectations of the parties to the agreement."[129] Any uncertainty as to a remedy is construed against the disloyal fiduciary.[130] Having found liability for a breach of Section 7.6(f), the Court of Chancery improperly "refused to craft a remedy to address the wrong."[131]

5. The Court Below Erroneously Held that Plaintiffs Only Sought Cancellation of the Entire Issuance

In refusing equitable relief cancelling CPUs, the court below erroneously held that Plaintiffs only sought cancellation of the entire CPU Issuance:

---

[127] *See Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097, 1111 (Del. Ch. 2014) ("If the plaintiff succeeds in proving that the IDRs caused the harm, then possible remedies might include enjoining the General Partner from receiving benefits from some or all of its IDRs, invalidating a portion of the General Partner's IDRs or common units, or addressing the matter through changes to the partnership agreement.").

[128] *Dieckman v. Regency GP LP*, 155 A3d 358, 361 (Del. 2017).

[129] *Id.*

[130] *Auriga Capital Corp. v. Gatz Properties, LLC*, 40 A.3d 839, 877 (Del. Ch.), *aff'd*, 59 A.3d 1206 (Del. 2012).

[131] *Brinckerhoff*, 159 A.3d at 262.

> The Plaintiffs seek only cancellation of the securities *in toto*, and associated injunctive relief, which I have rejected.[132]

Plaintiffs specifically argued that, because most of the CPUs were issued to Affiliates of the General Partner, "[t]heir CPUs can be canceled."[133] At post-trial argument Plaintiffs' counsel agreed with the Vice Chancellor's suggestion of the possibility of "some middle relief" that would not apply to the non-defendant CPU holders.[134] In adopting an "all or nothing" approach, "the Court of Chancery viewed its remedial authority too narrowly."[135]

The Court of Chancery found the Issuance violated Section 7.6(f), which prohibits the Partnership's Issuance of CPUs to Affiliates of the General Partner unless the Issuance was fair and reasonable.[136] As the Court of Chancery held:

> The securities, **to the extent they were transferred to the General Partner or its affiliates**, breached the LPA, and I find the Defendant Directors caused the General Partner to breach the LPA by issuing those securities.[137]

Relief for such a violation would necessarily be against the Affiliates who were issued the CPUs in breach of the LPA and would not apply to the other recipients of the CPUs.

---

[132] *ETE III*, 2018 WL 2254706, at *2, 28. *See also id*. at *1, 15, 25.
[133] A2964 (citing *Strassburger v. Earley*, 752 A.2d 557, 578-79 (Del. Ch. 2000), as authority for partial rescission of an issuance of securities).
[134] A3238-A3239.
[135] *Brinckerhoff*, 159 A.3d at 262.
[136] *ETE III*, 2018 WL 2254706, at *18-19.
[137] *Id*. at *25 (emphasis added).

Canceling CPUs (or the common units into which they converted) held by the conflicted Affiliates of the General Partner would be the appropriate relief for their breach of their contractual duty of loyalty.[138] As this Court stated in reversing a trial court's narrow remedy for breach of a general partner's contractual fiduciary duty:

> Where there is 'a breach of the duty of loyalty, as here, 'potentially harsher rules come into play' and 'the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly [because t]he strict imposition of penalties under Delaware law are designed to discourage disloyalty.'[139]

Equitable relief can be fashioned to deprive those who breached their fiduciary duty of unfair benefits they obtained.[140]

---

[138] *See Gotham Partners*, 817 A.2d at 175 (holding that breach of contractual fiduciary duty in limited partnership agreement "permits broad, discretionary and equitable remedies"); *accord Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1220 n.74 (Del. 2012). "Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly." *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996); *accord Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 840 (Del. 2011).

[139] *Gotham Partners*, 817 A.2d at 176 (alterations in original) (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 2001 WL 536911, at *3 (Del. Ch. May 11, 2001)); *accord Brinckerhoff*, 159 A.3d at 262.

[140] *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); *see also Valeant Pharm. Int'l v. Jerney*, 921 A.2d 732, 751-52 (Del. Ch.), *appeal dismissed*, 929 A.2d 784 (Del. 2007). On remand, the Court of Chancery can fashion relief that deprives defendants of all profit by, among other things, canceling ETE common units obtained in the conversion of CPUs. *See In re Loral Space & Commc'ns, Inc.*, 2008 WL 4293781, at *32 (Del. Ch. Sept. 19, 2008) (imposing remedy of modifying defendant's stock holdings that were obtained in a transaction that failed the entire fairness test).

6. The Court's Denial of Relief Was Premised on Inconsistent Determinations Concerning the Public Offering

The court below denied relief based on its improper advisory opinion that it would find the abandoned Public Offering met the fair and reasonable test.[141] The Vice Chancellor's determination that terms of the CPUs were fair because the aborted Public Offering was fair is inconsistent with the court's denial of discovery concerning how the Public Offering was created, purportedly approved and transformed into the private Issuance.

The court repeatedly recognized that the evolution of the Public Offering into the private Issuance and how and when the accrual term was changed is unclear in the record.[142] The record was unclear because the Vice Chancellor denied Plaintiffs' motions to compel discovery into these matters,[143] accepting defendants' argument that the Public Offering was a different transaction than the CPU Issuance.[144] Despite having precluded discovery on the grounds that the

---

[141] *ETE III*, 2018 WL 2254706, at *27.

[142] *Id*. at *6 (redacted February 15 minutes do not include discussion of accrual change), 24 (defendants "were unable to explain how this additional downside hedge originated or came to be placed before the Board"), 25 (the record does not show who suggested the accrual change and is equally opaque as to why).

[143] Ex. C at 12-16; Ex. D ¶ 3; Ex. E at 7-8.

[144] Ex. C at 12 (defendants' counsel: "And there are a number of documents in this section . . . that all relate to the public offering and not to the offering that's at issue in this litigation"); *id.* at 13, 14; A2095 (defendants' counsel: the Public Offering documents "are not documents that relate to the transaction"); A2106 (defendants' counsel: explaining that documents that Plaintiffs moved to compel "include[d] a

Public Offering was a different, abandoned transaction, the court denied relief based on its conclusion that the 5% discount to market was fair because it was "an artifact of the original term sheet from the aborted public offering, which I have found fair."[145] This was error.

substantial number of documents related to the proposed public offering that is not challenged in this litigation").

[145] *ETE III*, 2018 WL 2254706, at *27.

II. THE COURT OF CHANCERY COMMITTED LEGAL ERROR BY HOLDING "DISTRIBUTION" WAS UNAMBIGUOUS

A. Question Presented

Did the Court of Chancery err by holding that "distribution" in Section 5.10(a) of the LPA could only have one unambiguous meaning? This issue was preserved for appeal[146] and results from the Court of Chancery's post-trial opinion and Final Order.[147]

B. Scope of Review

Construction of a limited partnership agreement is a question of law reviewed *de novo*.[148]

C. Merits of Argument

1. The Court of Chancery's "Unambiguous" Definition Is Not Supported by the LPA

Section 5.10(a) provides:

> Subject to Section 5.8(d), the Partnership may make a Pro Rata distribution of Partnership Securities to all Record Holders or may effect a subdivision or combination of Partnership Securities so long as, after any such event, each Partner shall still have the same Percentage Interest in the Partnership as before such event, and any amounts calculated on a per Unit basis as a number of Units are proportionately adjusted.[149]

---

[146] A2691-A2707; A2930-A2946; A3082-A3096; A3224-A3236; A3241-A3243; A3247-A3258; A3328-A3331.

[147] *ETE III*, 2018 WL 2254706, at *15-18; Ex. B ¶ 1.

[148] *SI Management L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

[149] A163. Pro Rata means apportioned "in accordance with their relative Percentage Interests;" Record Holder is the Person in whose name the security is registered in the Partnership's books; Partnership Securities includes any class of

Though the LPA contained over 250 definitions,[150] defendants did not define "distribution."[151] Defendants as drafters could have avoided future disputes by including such a definition.[152] Nevertheless, the Court of Chancery held that "distribution" in Section 5.10(a) is unambiguous, stating:

> The use of the term "distribution" in the LPA, read as a whole, refers to something *transferred* to the unitholders, as, for instance, a payment; rather than something that is *offered* to the unitholders for sale, which they may accept or reject.[153]

The Vice Chancellor offered no citation to the LPA and no authority or explanation for the highlighted terms "transferred" and "offered." These words are not used in Section 5.10(a). The dictionary definition that the trial court said "accords" with its definition also does not refer to "transferred" or "offered."[154]

The LPA nowhere contrasts "something [that is] *transferred* to the unitholders" with "something that is *offered* to the unitholders for sale." "Offer" is not defined in the LPA. The term "transfer" is defined in Section 4.4 to include a

---

equity interest and General Partner Units (including Common Units and Class B Units). A150.

[150] A144-A152; A202-A204; A216; A220-A226; A255-A259; A1849-A1851.

[151] *ETE III*, 2018 WL 2254706, at *15; *ETE I*, 2017 WL 782495, at *12, 14, 15.

[152] *Madison Ave. Inv. Partners, LLC v. America First Real Estate Inv. Partners*, L.P., 806 A.2d 165, 173 (Del. Ch. 2002).

[153] *ETE III*, 2018 WL 2254706, at *17 (italics in original).

[154] *Id.*

4834-7639-7725, v. 1

sale, a gift and any other disposition.[155] Under this definition, a transfer may or may not (i) involve consideration, (ii) be a sale or (iii) involve "giving … something to … unitholders."[156]

2. The Court of Chancery Misconstrued the Interrelationship Between Section 5.8 and Section 5.10(a)

In declaring its definition was "consonant with the LPA as a whole," the Court of Chancery construed Sections 5.8 and 5.10(a) as follows:

> Section 5.8(a) allows the Partnership to issue Partnership Securities. The General Partner is given discretion to determine the terms and other conditions of an issuance, including the right to share in distributions, in Sections 5.8(a) and (b). The Plaintiffs' interpretation would make nonsense of this provision. It would provide that an issuance of securities would be constrained as a pro rata distribution under Section 5.10(a); a condition that such an issuance, practically, could never meet.[157]

Sections 5.8(a) and (b) are general provisions that apply to all securities issuances, including issuances to third parties and issuances to officers, who may also be limited partners, as compensation.[158] In contrast, Section 5.10(a) is a specialized provision relating to issuance of Partnership Securities to Partners in their capacity as Partners. It constrains the power to issue securities only when the

[155] A156. Plaintiffs pointed out the term "offering" does not appear in Sections 5.8 or 5.10(a). A2940.
[156] *ETE III*, 2018 WL 2254706, at *17.
[157] *Id*.
[158] *See Clarke v. Clarke*, 2013 WL 4505370, at *27 (Ill. App. Ct. Aug. 20, 2013) (payment as compensation was not a distribution because it was not made to partners "in their capacity as such").

4834-7639-7725, v. 1

issuance is to Partners, *qua* Partners. Section 5.8(d) demonstrates that a distribution is a type of issuance.[159]

Construing Section 5.10(a) to prevent the issuance of Units to some Partners in their capacity as Partners to the exclusion of other Partners does not make nonsense of Section 5.8(a) and (b). It provides protection for Partners against discrimination by the General Partner in issuing securities based on Partnership Interests, such as the CPU Issuance.

3. The Court of Chancery's Percentage Interest Construction Was Incorrect

The Court of Chancery concluded that the Issuance could not be a distribution because Section 5.10(a) requires that after a distribution, each Partner shall have the same Percentage Interest as before the distribution.[160] The Vice Chancellor reasoned that if a single partner could decline the CPUs, the transaction was not a distribution. Under that logic, no issuance of Partnership Securities to Partners in their capacity as Partners would be a "distribution" if (i) a single partner might decide not to accept those securities, or (ii) there were any conditions to the issuance, which a single partner might not satisfy.

---

[159] *ETE III*, 2018 WL 2254706, at *15-16. Section 5.8(d) provides: "No fractional Partnership Securities shall be issued by the Partnership. If a **distribution**, subdivision or combination of Units pursuant to Section 5.8 **would result** in the **issuance** of fractional Units, each fractional Unit shall be rounded to the nearest whole Unit (and a 0.5 Unit shall be rounded to the next higher Unit)." A162 (emphases added).

[160] *ETE III*, 2018 WL 2254706, at *17.

The Vice Chancellor's flawed reasoning is shown by the very terms of the CPUs. The CPUs required that the Partner not transfer either its CPUs or common units without the General Partner's consent.[161] However, many Partners could not, or would not want to, hold illiquid investments because of their status as closed end funds, their investment policies or liquidity concerns.[162]

Under the trial court's interpretation of Section 5.10(a), ETE's issuance of CPUs to <u>all</u> Partners on a Pro Rata basis would not be a distribution "if certain partners *reject* the securities" because they could not or did not want to hold illiquid securities.[163] "The failure of a *single* partner" to accept the CPUs would, under the Vice Chancellor's reasoning, mean the issuance was not a distribution because all Partners would not hold their same Percentage Interest.[164] Thus, whether a Pro Rata issuance to Partners in their capacity as Partners was a distribution would turn on the after-the-fact decision of each individual Partner whether to accept the Partnership Securities. If a single Partner declined the securities, the distribution would no longer be a distribution. Even though Section 5.8(a) provides for the issuance of Partnership Securities imposing conditions, the Vice Chancellor's interpretation would read a "no conditions" requirement into

---

[161] *Id.* at *7; A1824.
[162] A650; A656; A663; A664; A3364; A3369 (at 87-89); A3384 (Trial 49); *ETE III*, 2018 WL 2254706, at *22.
[163] *ETE III*, 2018 WL 2254706, at *17 (emphasis added).
[164] *Id.* (emphasis in original).

Section 5.10(a), because a single partner could refuse to accept the conditions. In short, an issuance of Partnership Securities to Partners in their capacity as Partners could never be a distribution unless there was unanimous acceptance by all Partners.

The CPUs' effect on cash distributions also disproves the Vice Chancellor's "same Percentage Interest" interpretation. Section 6.3 of the LPA, both before and after Amendment 5, required cash distributions "in accordance with [the Partners'] respective Percentage Interests."[165] However, the CPUs contemplated that Partners holding CPUs would decline all cash distributions on their common units during the nine quarters before the CPUs converted. Yet defendants (and the Court of Chancery) did not conclude these cash disbursements were not "distributions" because some Partners did not accept their Percentage Interest of the distribution.

Section 5.10(c) provides that "following any such distribution" the Partnership "may" issue Certificates or the General Partner "may" adopt necessary and appropriate procedures, but that in a combination, the Partnership "shall" require surrender of existing Certificates "as a condition" to delivery of a new Certificate.[166] Just as the condition automatically applies to a combination, the General Partner's power to adopt procedures for distributions permits conditions on the delivery to Record Holders of Certificates reflecting a distribution,

[165] A167.
[166] A163.

including acceptance of transfer restrictions and other terms of the distributed Partnership Securities, or compliance with procedures with respect to Partnership Securities.[167] If a Partner refused to accept the conditions or comply with the procedures, the Partnership could decline to issue a Certificate. However, that would not mean that no distribution had occurred.

The Partnership discharges its obligation under Section 5.10(a) if it makes a Pro Rata distribution to Record Holders, which would preserve the same Percentage Interest following the distribution. The fact that subsequently one or more partners may decline securities or fail to meet conditions does not mean the issuance is not a distribution.

4. The Court of Chancery's Reliance on a Dictionary Definition Was Error

Citing *Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728, 740 (Del. 2006), the court held that it could use the "ordinary dictionary meaning" in interpreting the term "distribution" in the LPA and repeatedly relied on Black's Law Dictionary, which defines a partnership distribution as "[a] partnership's payment of cash or property out of earnings or as an advance against future earnings, or a payment of the partners' capital in partial or complete

[167] Defendants imposed such a condition on the CPUs. To get CPUs, Partners had to agree not to transfer any of the CPUs or their underlying common units. A1739; A1807; *see also* A1708; A1717; A1733; A1741.

liquidation of the partner's interests."[168] This was a legal error for multiple reasons.

First, *Lorillard* actually said resorting to dictionary definitions is appropriate only when there is "no 'gloss' in the [relevant] industry."[169] The Court of Chancery ignored definitions of "distribution," as used in partnership agreements, that are far more relevant in the partnership context than the dictionary definition the court adopted. The Delaware Revised Uniform Partnership Act (DRUPA) and the Revised Uniform Limited Partnership Act (RULPA) both define distribution as a "transfer of money or other property from a partnership [or limited partnership] to a partner in the partner's capacity as a partner."[170] These definitions do not say the transfer must be "one-way" or exclude transfers characterized as an "exchange" involving consideration.[171] Rather, the critical requirement, which is absent from the Court of Chancery's definition and Black's definition, is that the transfer is "to a partner in the partner's capacity as a partner."

Second, the Black's definition is inconsistent with a distribution of Partnership Securities under Section 5.10(a). A distribution of Units is not "out of

---

[168] *ETE III*, 2018 WL 2254706, at *15-17.
[169] 903 A.2d at 740.
[170] 15 *Del. C.* § 15-101(4); RULPA (2001) § 102(5). Distribution is not defined in the Delaware Revised Uniform Limited Partnership Act. *ETE I*, 2017 WL 782495, at *14.
[171] *Cf. ETE III*, 2018 WL 2254706, at *16-18.

earnings" or "an advance against future earnings." Nor is it "a payment of the partner's capital in partial or complete liquidation of the partner's interest."

Third, the Court of Chancery acknowledged that the term distribution is unambiguous only if it is not susceptible to two or more reasonable interpretations,[172] but ignored that defendants' own shifting interpretations of the LPA demonstrate the LPA did not have a single unambiguous meaning even to defendants. For example, defendants first contended that an "issuance" of the CPUs under Section 5.8(a) was mutually exclusive of a "distribution" of CPUs as used in Section 5.10(a).[173] However, Plaintiffs demonstrated, and even the Court of Chancery accepted, that Section 5.8(d), which provides for rounding up "[i]f a **distribution** … of Units pursuant to Section 5.8 would result in the **issuance** of fractional units," establishes that a distribution is a type of issuance.[174] Defendants' expert admitted there may be various definitions of "distribution" in the MLP space, and cited the DRUPA definition.[175] Defendants also asserted that a distribution is "akin to a corporate dividend" because "a partnership, *without receiving anything in return*, gives its assets or earnings to its partners by virtue of

---

[172] *Id.* at *16 (quoting *Norton*, 67 A.3d at 360).
[173] *ETE I*, 2017 WL 782495, at *14; A2333-A2338; A2427-A2445.
[174] *ETE I*, 2017 WL 782495, at *13-15 (in a section titled "Distribution v. Issuance," the court accepted Plaintiffs' "unremarkable observation" that, read together, Sections 5.8(d) and 5.10(a) "demonstrate conclusively that an issuance of equity securities can be a distribution," while noting defendants' contention that the CPUs were an Issuance of securities, not a distribution).
[175] A3370-A3371 (at 92, 95); A3599 (Trial 690); A1950.

4834-7639-7725, v. 1

their status as equity holders."[176] However, a cash dividend paid to stockholders as part of the merger consideration in return for surrender of their shares is still a dividend.[177] Indeed, defendants recognized that a dividend, which they say is akin to a distribution, could be part of a two-way exchange. In the Williams Merger, a special dividend was to be paid to Williams stockholders conditioned on the exchange of their Williams stock for the Merger consideration.[178]

5. The Vice Chancellor's Evaluation of Consideration Was Erroneous

The court's determination that the Issuance was not a distribution also assumed the CPUs were issued in exchange for "$518 million in forgone distributions."[179] The court evaluated the consideration given by the CPU recipients by hindsight based on the economic outcome at the time of the conversion of the CPUs, not the "consideration" those recipients purportedly gave when the CPU Issuance occurred.

The CPU recipients would only forgo common distributions if such distributions were made. At the time of the Issuance, "a substantial risk of

---

[176] *ETE I*, 2017 WL 782495, at *14.

[177] *La. Mun. Police Emps. Ret. Sys. v. Crawford*, 918 A.2d 1172, 1191 (Del. Ch. 2007); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 613-14 (Del. Ch. 2010); A2604.

[178] A280 (§ 2.01(c)). *See also* 6 *Del. C.* § 17-604 (distribution on withdrawal in exchange for partnership interest).

[179] *ETE III*, 2018 WL 2254706, at *18.

distribution cuts or cancellations loomed."[180] "[I]f ETE cut common distributions to zero during the plan period, each [CPU] would still receive a quarterly accrual of $0.285,"[181] and the CPU holders would not forgo any distributions at all.

If the Merger did not close, common distributions would be paid, and the CPU holders would get $0.11 in cash distributions each quarter plus quarterly accruals, a combination that would be worth far more than any forgone distributions on their common units. The "heads I win, tails you lose" structure defendants gave the CPUs was not "an exchange for value." Distributing a security with terms that if the common unitholders get nothing, Warren gets $100 and if the common unitholders get $100, Warren gets $200 is a $100 gift to Warren, not an exchange for value.

6. Post-Board Approval Changes Invalidated Amendment 5 and the CPUs

In a footnote, the court acknowledged Plaintiffs' claim that Amendment 5 and the CPUs were invalid because defendants made changes to Amendment 5 and the CPU terms, <u>after</u> the Board approved Amendment 5 and the CPU Issuance.[182] A later footnote claimed the court had already ruled that "ministerial changes to the

---

[180] *Id*. at *24.
[181] *Id*. at *7 (emphasis added).
[182] *Id*. at *12 n.228.

establishing documents after board approval" did not render Amendment 5 or the CPUs void.[183] However, the trial court had made no such previous ruling.

The numerous post-approval changes, which reduced Amendment 5 from 21 pages to 12 pages, were not "ministerial."[184] The allocation of Unrealized Gain, which is not currently taxable, to the CPU holders first, with allocation of income and gain to them only "to the extent necessary," conferred a substantial tax advantage on the CPU holders.[185]

The elimination of registration rights and legending of certificates for Common Units issued upon conversion of the CPUs were also was not ministerial.[186] Limitations on liquidity made the CPUs less attractive to the handful of investors who were not insiders.[187] The Court of Chancery erred as a matter of law by holding that the altered Amendment 5 (reflecting revised CPU terms) not approved by the Board was valid amendment of the LPA.

---

[183] *Id*. at *26 n.365.

[184] A2927-A2928 (citing A1414-A1434; A1458; A1685; A1687-A1689; A1693-A1702; A1704; A1824; A1829-A1840; A1847-A1858; A3367 (at 136-37)).

[185] A1458; A1704; A1275; A2927-A2929; A1781-A1782. The allocation of gains, losses and income has significant impact on tax liability amongst partners in a limited partnership. *Brinckerhoff v. Enbridge Energy Co.*, 2016 WL 1757283, at *5, 16 (Del. Ch. Apr. 29, 2016), *rev'd on other grounds*, 159 A.3d 242 (Del. 2017).

[186] A1692-A1702.

[187] *ETE III*, 2018 WL 2254706, at *22.

CONCLUSION

The portions of the Court of Chancery's judgment that denied any remedy and held there was no violation of Section 5.10(a) of the LPA should be reversed. The case should be remanded for determination of a remedy, which should include cancellation of common units issued to Affiliates upon conversion of the CPUs. The Court of Chancery should be directed to determine whether to increase its award of attorneys' fees and expenses in light of this Court's decision and the determination of remedy.

OF COUNSEL:

KESSLER TOPAZ MELTZER & CHECK, LLP
Marc A. Topaz
Lee D. Rudy
Eric L. Zagar
Michael C. Wagner
Grant D. Goodhart III
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

Dated: July 22, 2019

PRICKETT, JONES & ELLIOTT, P.A.

/s/ Michael Hanrahan
Michael Hanrahan (Del. No. 941)
Paul A. Fioravanti, Jr. (Del. No. 3808)
Kevin H. Davenport (Del. No. 5327)
Samuel L. Closic (Del. No. 5468)
Eric J. Juray (Del. No. 5765)
1310 N. King Street
Wilmington, Delaware 19801
(302) 888-6500

Attorneys for Plaintiffs-Below/Appellants

CERTIFICATE OF SERVICE

I, Michael Hanrahan, hereby certify that on July 22, 2019, I caused a copy of the foregoing to be served upon the following counsel of record via File & Serve*Xpress*:

Rolin P. Bissell, Esq.
Elena C. Norman, Esq.
Tammy L. Mercer, Esq.
James M. Yoch, Jr., Esq.
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

David E. Ross, Esq.
Benjamin Z. Grossberg, Esq.
ROSS ARONSTAM & MORITZ LLP
100 S. West Street, Suite 400
Wilmington, Delaware 19801

/s/ Michael Hanrahan
Michael Hanrahan (Del. No. 941)