EFiled: Sep 05 2019 04:25PM EDT
Filing ID 64133432
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,	§	Cons. C.A. No. 12197-VCG
Defendants-Below, Appellees.	§	

APPELLANTS' REPLY BRIEF

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

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: September 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

OTHER AUTHORITIES

ARGUMENT ON REPLY

I. THE COURT OF CHANCERY COMMITTED LEGAL ERROR BY DENYING EQUITABLE RELIEF

A. Standard of Review

"Whether or not an equitable remedy exists or is applied using the correct standards is an issue of law and reviewed *de novo*."[1] The Court does not defer to the trial court on embedded legal issues, but reviews such issues *de novo*.[2] Interpretation of Sections 7.6, 7.7 and 7.9 of the LPA is a question of law reviewed *de novo*.[3]

B. The Court Below Erred by Requiring Proof of Damages as a Condition of Equitable Relief for Defendants' Breach of Section 7.6(f)

Defendants violated the express language of Section 7.6(f) prohibiting the General Partner and its Affiliates from engaging in self-dealing transactions unless they are fair and reasonable.[4] Broad equitable remedies are appropriate where the general partner breached its contractually created fiduciary duty of loyalty by failing

---

[1] *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999); *Vandeleigh Indus., LLC v. Storage Partners of Kirkwood, LLC*, 901 A.2d 91, 96 n.6 (Del. 2006); c*f.* Defendants/Appellees' Answering Brief at 15 ("DAB").

[2] *North River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380-81 (Del. 2014).

[3] Plaintiffs/Appellants' Opening Brief at 15 ("POB"). Capitalized terms have the meaning ascribed to them in Plaintiffs' opening brief.

[4] *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *19, 25 (Del. Ch. May 17, 2018).

to establish fairness.[5] The Court of Chancery committed legal error by requiring Plaintiffs to show damages in order to obtain equitable relief:

> Adding the unfair term has caused the Partnership no damages.
>
> * * *
>
> Rescinding the issuance, therefore, is not required in equity.
>
> * * *
>
> Plaintiffs have established a breach, but not shown that the breach caused damage to ETE. The equities, therefore, do not require pre-distribution injunctive relief here.[6]

Proof of damages is not an element of the standards for a permanent injunction or rescission.[7] Indeed, damages could not be a required element for equitable relief because unavailability, unascertainability or inadequacy of damages as a remedy is a requirement for a permanent injunction or rescission.[8] The court below misapplied the standard for equitable relief by imposing a Catch-22 test that Plaintiffs could not get equitable relief unless they proved damages, which proof would disqualify them from getting equitable relief. The Court of Chancery's discretion in fashioning

---

[5] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002); *accord Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 262 (Del. 2017).
[6] *ETE III*, 2018 WL 2254706, at *28; *see* DAB 17-18 (citing same).
[7] Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, §§ 16.02[e], 16.04 (2018).
[8] Wolfe & Pittenger, §16.04; *Russell v. Univ. Homes, Inc.*, 1991 WL 94357, at *2 (Del. Ch. May 23, 1991); *Wayne Cty. Empls. Ret. Sys. v. Corti*, 954 A.2d 319, 329 & n.16 (Del. Ch. 2008).

equitable remedies does not authorize imposing new requirements for issuance of a permanent injunction or rescission.

The lower court recognized, and defendants admit, that the exculpation provision of Section 7.7 only permits damages for bad faith acts.[9] Section 7.6(f) does not require proof of bad faith; Section 7.9 does.[10] By requiring Plaintiffs to prove damages in order to obtain equitable relief under Section 7.6(f), the Court of Chancery committed legal error by reading into Section 7.6(f) the bad faith standard of Section 7.9 and the requirement of proving bad faith to recover damages of Section 7.7.[11] The contractual good faith standard of Section 7.9 does not modify Section 7.6(f), and Section 7.7 only immunizes against monetary damages for good faith actions and does not affect the availability of equitable relief, including rescission, for breach of Section 7.6(f).[12] Because Section 7.7 precludes an award of damages for defendants' breach of Section 7.6(f), engrafting a damages requirement rendered the "specific requirements [of Section 7.6(f)] a nullity."[13]

---

[9] *ETE III*, 2018 WL 2254706, at *26; DAB 21-22.

[10] A171, A173. *See Brinckerhoff*, 159 A.3d 254-55 (discussing comparable provisions of a limited partnership agreement).

[11] *Brinckerhoff*, 159 A.3d at 254-55.

[12] *Id.*

[13] *Id.* at 255-56. Like the court below, defendants repeatedly mischaracterize as a "damages analysis" the report of Plaintiffs' expert showing the wealth transfer effect of conversion of the CPUs. A1898-A1903; A3665-A3666; AR4; *cf.* DAB 21, 27-28; *ETE III*, 2018 WL 2254706, at *26.

The Court of Chancery also ignored the restitutionary aspects of rescission, which prevent unjust enrichment by requiring return of unfair gains.[14] Proof of demonstrated losses to the plaintiffs or the partnership is not required for restitutionary relief.[15]

The Court of Chancery acknowledged its obligation "to employ equity to compel the Defendants, at least, to disgorge the benefits they received through their breach of contractual responsibilities."[16] The court below failed to fulfill that obligation when it held that, because distributions were made, it would not require defendants to disgorge the CPUs and conversion rights resulting from their contractual breach.

C. The Trial Court Erred in Failing to Consider the CPUs' Interrelated Terms

Defendants cite no authority supporting the trial court's erroneous denial of rescission based on a hindsight view of the accrual term in isolation.[17] Neither *J.P. Morgan* nor *PLX* involved the denial of equitable relief after the Court of Chancery found that self-interested defendants violated the entire fairness standard.[18] In *Ross*

---

[14] Wolfe & Pittenger, §§ 16.01[b], 16.04.
[15] *Id*. at § 16.01[b]; *Kahn v. Kohlberg Kravis Roberts & Co.*, 23 A.3d 831, 837-38 (Del. 2011); *Schock*, 732 A.2d at 232-33.
[16] *ETE III*, 2018 WL 2254706, at *28.
[17] *Cf.* DAB 17, 23.
[18] *In re J.P. Morgan Chase & Co. S'holder Litig*., 906 A.2d 766, 773 (Del. 2006) (upholding dismissal of proxy disclosure claim for damages); *In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018), *aff'd*, 2019 WL

Holding, plaintiffs sought only money damages from a reorganization, not disgorgement or rescission.[19]

The court below should have considered the LPA as a whole (including the terms of the CPUs)[20] and determined how the change to the accrual term affected the fairness of other terms. Contrary to defendants' erroneous contention, Plaintiffs argued below that the 5% discount to market was unfair and that the accrual term fundamentally altered the balance of the CPU terms in the aborted Public Offering.[21]

Defendants do not address the financial and legal reasons showing the error of the trial court's interpretation that the accrual hedge "had value . . . only in case of a (never made) distribution *cut*" and, therefore, the wealth transfer defendants received on conversion was "unrelated" to and "does not arise from" that hedge.[22] The accrual term had immediate value because it eliminated defendants' risk of a distribution cut. It caused immediate harm by substantially increasing the cost of a

2144476 (Del. May 16, 2019) (where plaintiff did not prove damages, the only relief sought).

[19] *Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *35 (Del. Ch. Sept. 4, 2014).

[20] *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 104 (Del. 2013); *Norton v. K-Sea Transp. Partners, L.P.*, 67 A.3d 354, 360 (Del. 2013).

[21] A3119 (and evidence cited therein); A3112-A3113 (and evidence cited therein).

[22] POB 20-21.

distribution cut to ETE, while preserving the substantial upside resulting from the accrual term.[23]

The addition of the accrual term turned the CPUs into a no-lose proposition. Defendants were protected against a distribution cut "[r]ight from the beginning," because the CPUs would get both their preferential $0.11 cash distribution plus the accrual.[24] If the Williams Merger did not close and there was no distribution cut, the ETE common unit price would recover and the CPU holders would receive cash preferred distributions plus common units upon conversion with a value nearly double what nonparticipating unitholders received.[25]

Contrary to defendants' misleading, partial quotation,[26] *Genencor* recognized that a "remedy for breach of contract should seek to give the nonbreaching party the benefit of its bargain by putting that party in the position it would have been but for the breach."[27] But for the breach of Section 7.6(f)'s prohibition of unfair insider transactions, the CPUs would not have been issued to the Affiliates. Rescission and

[23] *See* AR2 (stating analysts' consensus is that "Kelcy has ring fenced the insiders distributions and is more likely to cut the ETE common unit distribution now that the insider interest has been Preferred"); *see also* A1887-A1889.
[24] A3382 (Trial 41-43).
[25] A3382-A3383 (Trial 43-45).
[26] DAB 27.
[27] *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000).

cancellation of their CPUs were necessary to provide a remedy "faithful to the bargain struck in the [a]greement."[28]

D. Cancellation of the CPUs of Affiliates Was Requested, and Is a Viable and Appropriate Remedy

Defendants incorrectly assert that Plaintiffs "never advanced a partial-rescission theory below" and that Plaintiffs do not and cannot "cite to a single pleading or brief in which they advanced a partial-rescission theory of relief."[29] Plaintiffs' post-trial opening brief specifically sought partial rescission and cancellation of the 85% of the CPUs issued to the Affiliates of the General Partner who are defendants.[30] Plaintiffs reiterated the point at oral argument.[31]

Because the court below only found a breach of Section 7.6(f), any cancellation necessarily would only apply to the CPUs held by Affiliates of the General Partner. Therefore, the trial court's concern about canceling CPUs held by non-parties was not a basis for denying relief.[32]

Plaintiffs also demonstrated that the CPUs could be cancelled and that ETE could pay CPU recipients their forgone cash distributions.[33] Thus, defendants' argument that Plaintiffs "failed to provide the court with any *ex ante* basis from

---

[28] *Id.*
[29] DAB 18.
[30] A2964.
[31] A3238-A3239.
[32] *Cf.* DAB 19-20; *ETE III*, 2018 WL 2254706, at *28.
[33] A3140-A3141.

which to fashion an 'appropriate remedy as of the time of the breach'" is inaccurate.[34]

The court below did not find that rescission was inappropriate because the transaction was not so one-sided.[35] It merely observed that the Issuance "'was not so one-sided' that all securities were subscribed[.]"[36] Moreover, this statement conflicts with earlier factual findings that the offering was "*designed* to have less than full subscription," and the illiquidity of the unregistered and nontransferable CPUs made them unattractive to institutional investors.[37]

E. Meaningful Relief Is Still Available

This Court can still order the Court of Chancery to fashion an appropriate remedy for defendants' self-interested breach of the LPA that deprives wrongdoers of all profit in order to discourage disloyalty.[38] Defendants do not address Plaintiffs' specific arguments and cases.[39]

Ravenswood does not support the trial court's denial of cancellation or equitable rescission.[40] *Ravenswood* found a breach of the duty of loyalty when

---

[34] DAB 20.
[35] *Id.* at 19.
[36] *ETE III*, 2018 WL 2254706, at *28.
[37] *Id*. at *22, 23 n.346 (emphasis added).
[38] POB 29; *cf.* DAB 20.
[39] POB 29.
[40] *See* DAB 20, 25, 28.

insiders awarded themselves options at an unfair price.[41] However, trial occurred more than a decade after the options had been exercised and plaintiff presented no evidence allowing the court to fashion a remedy.[42] Under the "unique circumstances," cancellation was unavailable because the small, family-run company could not afford to repay what the defendants had paid to exercise the options.[43]

The court below made no finding that ETE could not restore the parties to their pre-CPU positions. On remand, the Court of Chancery can fashion relief by cancelling a proportionate number of ETE common units held by the Affiliates to deprive them of all profit.

F. The Court of Chancery's Reliance on the Public Offering Requires Reversal of Its "No Remedy" Holding

A central premise of the lower court's denial of relief is that the Public Offering was fair.[44] Defendants admit that the ambiguity in the record, which the Court of Chancery acknowledged,[45] as to when, how and why terms were changed

---

[41] *Ravenswood Inv. Co. v. Estate of Winmill*, 2018 WL 1410860, at *19 (Del. Ch. Mar. 22, 2018), *aff'd*, 210 A.3d 705 (Del. 2019).
[42] *Id.* at *20-24. *Zimmerman v. Crothall*, 62 A.3d 676, 713 (Del. Ch. 2013), is also inapposite, because the Court of Chancery concluded that none of the challenged transactions were unfair and the plaintiff did not seek equitable rescission.
[43] *Ravenswood*, 2018 WL 1410860, at *20.
[44] *ETE III*, 2018 WL 2254706, at *7, 24 & n.362, 25, 27.
[45] *Id.* at *6, 24, 27.

from the Public Offering to the private placement should be interpreted against them because they have the burden of proving fairness.[46]

That defendants produced some documents concerning the Public Offering proves Plaintiffs' point.[47] Based on its erroneous conclusion that the Public Offering was a different transaction than the private placement, the Court of Chancery denied access to the critical term sheets and portions of the minutes that would reflect how the Public Offering evolved into the private placement.[48]

[46] DAB 29.
[47] *Id.* at 28-29.
[48] POB 30-31.

II. THE COURT OF CHANCERY'S HOLDING THAT "DISTRIBUTION" HAS ONLY ONE UNAMBIGUOUS MEANING WAS LEGAL ERROR

A. Plaintiffs' Reasonable Construction of Sections 5.8 and 5.10 Establishes that "Distribution" Is Not Unambiguous

Whether "distribution" in Section 5.10(a) of the LPA is unambiguous is an issue of law, not "a mixed question of law and fact."[49] As defendants admit, "[t]he court's interpretation of the LPA is reviewed *de novo*."[50]

Because the LPA does not define "distribution," reliance on the language of Sections 5.10(a), 5.8(a) and 5.8(d) in determining the word's meaning is appropriate.[51] Plaintiffs' straightforward construction of these sections is not difficult to comprehend, circular or nonsensical.[52] Section 5.8(d) demonstrates that a distribution of Partnership Securities to Partners under Section 5.10(a) is an issuance of securities under Section 5.8(a). Section 5.8(a) authorizes the issuance of Partnership Securities "for such consideration and on such terms and conditions as the General Partner shall determine."[53] Sections 5.8 and 5.10(a) do not say that the

---

[49] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 90 (Del. Ch. 2009), *aff'd in part, rev'd in part sub nom In re Viking Pump, Inc.*, 148 A.3d 633, 645 (Del. 2016); *cf.* DAB 30.

[50] DAB 30; *see also* POB 32.

[51] POB 32-35; *cf.* DAB 32 n.110.

[52] *Cf.* DAB 37 & n.124. Defendants cite colloquy at argument as reflecting rulings by the Vice Chancellor, who on this very point commented that "if I get to the point that I am citing as authority for a final decision a comment I made in colloquy, it's time for me to go out to pasture." A3247-A3248.

[53] A162.

power to set consideration or impose terms and conditions does not apply to a distribution pursuant to Section 5.10(a) (*i.e.*, an issuance of Partnership Securities to Partners in their capacity as Partners). Defendants admit they are asking the Court, in the guise of construing the LPA, to rewrite Section 5.10(a) to impose "no consideration" and "no conditions" as terms the drafters did not include.[54]

Because Plaintiffs' construction of Sections 5.8 and 5.10(a) is reasonable, the trial court should have held that distribution is ambiguous, applied *contra proferentem* and entered judgment for Plaintiffs that the CPU Issuance violated Section 5.10(a).[55] Defendants argue that "distribution" is not ambiguous simply because it is not defined,[56] but do not dispute that the LPA defines hundreds of other terms and defendants could have defined distribution but did not.[57] Distribution is ambiguous because it is "obscure in meaning [due to defendants'] indefiniteness of expression."[58] The Court of Chancery erred because of defendants' failure to avoid

[54] DAB 39-40. *See Harris v. Frank-Harris*, 86 A.3d 1118, at *2 (Del. 2014) (Table).
[55] *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40-42 (Del. 1998) (where terms in partnership agreement "were not drafted with the clarity necessary to avoid disagreement over their meaning," *contra proferentem* requires that the terms "be construed against the General Partner as the entity entirely responsible for the articulation of those terms").
[56] DAB 32.
[57] POB 33.
[58] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 784 (Del. 2012).

future disputes by establishing the meaning of distribution in advance required application of *contra proferentem*.[59]

Unable to grapple with the plain language of Sections 5.8 and 5.10, defendants claim various LPA and DRULPA provisions show that partners must have a "right" to distributions.[60] However, the cited provisions do not say any right to receive distributions cannot be qualified or subject to conditions.[61] Defendants say that if any partner can decline a distribution, then it "was not a distribution to begin with."[62] By defendants' logic, because CPU recipients declined cash distributions on their common units while the CPUs were outstanding, those distributions were not distributions. Indeed, because CPU holders had no "right" to receive common unit distributions, their units would no longer be "partnership interests."[63] It is defendants' arguments that are circular and nonsensical.

---

[59] *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, 65 A.3d 539, 551-52 (Del. 2013).
[60] DAB 32-34.
[61] *See, e.g.*, 6 *Del. C.* § 17-601 (a partner's entitlement to distributions is subject to the provisions of DRULPA and only exists "to the extent and at the times or upon the happening of events specified in the partnership agreement); A167 (LPA Section 6.3 (the right to cash distributions is "subject to Section 17-607 of the Delaware Act")).
[62] DAB 39.
[63] *Id.* at 34 (quoting 6 *Del. C.* § 17-101(15)).

B. Defendants' Conduct Concedes Distribution Does Not Have One Unambiguous Meaning

Defendants' own conduct and shifting interpretations prove that distribution does not have the one unambiguous meaning the lower court assigned to it. Defendants' lead argument is not based on the lower court's opinion, but on the Vice Chancellor's comment during post-trial argument that in "common English usage" a distribution "doesn't mean sale" because "[t]he local Ford dealership doesn't have a President's Day distribution."[64] Defendants say this offhand comment about the auto industry establishes that this "common understanding of 'distribution' carries forward into the LPA, Delaware law, and the MLP industry."[65] The Vice Chancellor recognized that his observations during argument are just comments, not any basis for a decision.[66] Far more pertinent is Plaintiffs' counsel's response, which pointed out that ETE's Private Placement Memorandum contained a section on "Plan of Distribution" that said ETE "will distribute newly issued Convertible Units."[67] Defendants' characterization of the CPU Issuance as a distribution in the very document governing that issuance is an admission "distribution" does not unambiguously exclude the CPU Issuance.

---

[64] *Id.* at 30 & n.106.
[65] *Id.*
[66] A3248.
[67] A3235-A3236 (referring to A1795).

Defendants do not deny that they adopted different definitions of distribution.[68] Through most of the litigation, they said the CPU private placement could not be a "distribution" of Partnership Securities under Section 5.10(a) because it was an "issuance" of Partnership Securities under Section 5.8(a).[69] However, because Section 5.8(d) recognizes that a distribution of Partnership Securities is an issuance,[70] defendants' definition by comparison to an issuance is untenable.[71]

Nevertheless, defendants still claim that "Plaintiffs' interpretation would eviscerate the distinction between an issuance and a distribution."[72] However, on the very next page of their brief, they concede a distribution is an issuance, arguing that "the presence or absence of consideration [] separates a distribution from another form of issuance (*e.g.*, an offering) authorized by § 5.8(a)."[73] Section 5.8(a) authorizes issuances of Partnership Securities for such consideration and on such conditions as the General Partner sets and does not mention "offering."[74] It makes no distinction among issuances based on "the presence or absence of consideration."

---

[68] POB 40-41.
[69] *In re Energy Transfer Equity L.P. Unitholder Litig.*, 2017 WL 782495, at *14 (Del. Ch. Feb. 28, 2017); A2333-A3238; A2427-A2445.
[70] A162.
[71] *ETE I*, 2017 WL 782495, at *13 (reading Sections 5.10(a) and 5.8(d) together to "demonstrate conclusively that an issuance of equity can be a distribution" is an "unremarkable observation").
[72] DAB 39.
[73] *Id.* at 40.
[74] A162.

It does not restrict the General Partner's power to set consideration and conditions to issuances that are "offerings," or indicate that the General Partner has no power to set consideration and conditions for an issuance that is a distribution.

The court below and defendants repeatedly say a distribution is a "transfer" to partners, not something "offered" to partners.[75] Section 5.10(a) and the *Black's Law Dictionary* definition the lower court relied on do not use either term.[76] The definition of "transfer" in Section 4.4 of the LPA includes a sale for consideration or a gift for no consideration.[77] Similarly, 6 *Del. C.* § 15-101(4) does not say that a distribution "from" the partnership "to" a partner cannot be conditional on consideration or compliance with other terms.[78]

Defendants also have defined distribution as akin to a corporate dividend.[79] However, they provide no response to Delaware cases or the Williams Merger terms defendants drafted which show that dividends can be conditional on receiving something in return.[80]

---

[75] DAB 30, 31, 33, 34, 36, 41; *ETE III*, 2018 WL 2254706, at *17.
[76] Defendants do not address Plaintiffs' argument that the *Black's Law Dictionary* definition is inapplicable to the CPUs because a distribution of units is not "out of earnings" or "an advance against future earnings" or "a payment of the partner's capital in partial or complete liquidation of the partner's interests." POB 39-40; c*f. ETE III*, 2018 WL 2254706, at *15; DAB 36-37.
[77] POB 33-34; A156.
[78] *Cf.* DAB 34.
[79] *Id.* at 36.
[80] POB 40-41.

Defendants' own assertion of different definitions at different times establishes that distribution is reasonably susceptible to more than one meaning.[81] Indeed, even defendants' expert conceded there are various definitions of "distribution" in the MLP space.[82]

C. The CPUs Were Issued to Partners in Their Capacity as Partners

Because the court below did not accept defendants' argument that the CPUs were not issued to Partners in their capacity as Partners,[83] Plaintiffs' opening brief did not cite *ESG Capital Partners II, LP v. Passport Special Opportunity Master Fund, LP*, 2015 WL 9060982 (Del. Ch. Dec. 16, 2015). *ESG* held that the partnership's transfer of securities to favored limited partners, on a one-for-one basis to the number of units they owned, violated the partnership agreement's ratable distribution provision, which "contemplated distributions to the partners as a class, not as one-off transfers to certain limited partners."[84]

Like the distribution in *ESG*, the CPUs were directly tied to the recipient's status as a Partner. Partners were issued one CPU for each common unit that Partner owned. The purported "consideration" for the CPUs was forgoing possible

[81] *GMG Capital*, 36 A.3d at 784.
[82] POB 40.
[83] DAB 34-35 & n.117.
[84] *ESG*, 2015 WL 9060982, at *4.

distributions on that Partner's existing common units. The Partners were required to remain Partners by not transferring their existing common units.[85]

Based on their heavily edited combination of several partial quotations from Plaintiffs' motion to compel production of term sheets defendants withheld as privileged, defendants misleadingly claim that "Plaintiffs previously acknowledged, Electing Unitholders 'participat[ed] in [their] capacity as . . . counterpart[ies],' and not as partners."[86] Plaintiffs argued that Warren, not Electing Unitholders, did not have a common interest with ETE "in January 2016" because he was a transactional counterparty in the negotiation of the term sheets.[87] Defendants argued he was not a counterparty. The court below denied Plaintiffs' motion, holding Plaintiffs had not shown that Warren was a counterparty.[88] Therefore, the Court of Chancery actually rejected the "counterparty" argument defendants now assert.

Compensation for services is paid in the capacity of an employee, regardless of whether the employee is also a Partner.[89] Significantly, while 6 *Del. C.* § 17-607(a) provides that compensation shall not be a "distribution," neither DRULPA nor the LPA provides that an issuance of securities to partners based on their existing

[85] *ETE III*, 2018 WL 2254706, at *7, 13, 22. A1824.
[86] DAB 35-36.
[87] A2655-A2656.
[88] POB Ex. E at 8.
[89] *Cf.* DAB 34-35.

partnership interests shall not be a distribution unless there are no conditions and no consideration.[90]

D. The Court of Chancery's Hindsight Evaluation of Consideration

Based on defendants' supposed "projection" that dividends would remain at $0.285/quarter and unsupported speculation that "CPU holders expected to forgo more than $518 million in cash distributions over the plan period,"[91] defendants argue that the CPU holders gave $518 million in forgone distributions as consideration when the CPUs were issued. This argument is inconsistent with the Court of Chancery's findings that:

(i) the market believed ETE would cut distributions;

(ii) ". . . a substantial risk of distribution cuts or cancellations loomed; and . . . the insiders seized the opportunity to eliminate downside risk for themselves and their cronies,"

[90] *Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at *9 (Del. Ch. Jan. 24, 2005), held a breach of partnership agreement claim was barred by laches. Whether the withdrawal agreement was a distribution under 6 *Del. C.* § 17-607 "does not affect the question of whether the plaintiffs' claims are time-barred." *Id*. In dicta, the court said delayed payment of an amount equal to withdrawal distributions, plus additional amounts, plus interest, was pursuant to a separate contract and not a distribution. *Id.* at *5, 9.

[91] DAB 42-43.

(iii) "when ETE approved the issuance, the General Partner directors and their advisors believed that the merger with Williams Co. would close;"

(iv) ETE confirmed there would be no common unit distributions if the Williams Merger closed; and

(v) about four months after the CPUs were issued, an "unlikely event came to pass" when the Williams Merger failed and ETE decided to continue distributions.[92]

Thus, when the CPUs were issued, the expectation was the Williams Merger would close and common unit distributions would be eliminated, so the CPU holders would not forgo any distributions on their common units but would get their $0.11 preferred distribution and a $0.175 accrual. Moreover, there is no evidence the Affiliates intended to transfer or hedge their common units and the General Partner could waive such restrictions.

E. Post-Approval Modifications Invalidate the Issuance

Amendment 5 falsely represents that the Board of the General Partner approved the CPU Plan as described in Amendment 5.[93] After the February 28, 2016 Board meeting, nine pages relating to registration rights were removed from

[92] *ETE III*, 2018 WL 2254706, at *5, 13, 14, 24, 27-28.
[93] A1847-A1848.

Amendment 5, and the tax allocation was changed to allocate Unrealized Gain or Loss to the CPU holders instead of taxable income or deduction, among other changes.[94]

The Board could not and did not give self-interested management authority to revise Amendment 5. The Board resolution defendants cite only authorized management to "execute and deliver" Amendment 5 "on substantially the terms set forth in the form previously provided to the Board."[95] Management's post-approval changes to Amendment 5 were not mere "updates" or "ministerial."[96]

While acknowledging that there were several changes to Amendment 5 that the Board never approved, the Court of Chancery never "rejected these contentions separately."[97] The lower court never even mentioned the nine-page deletion of registration rights. It acknowledged that the tax allocation was changed to Unrealized Gain or Loss "as opposed to taxable income or deduction," but made no finding and provided no analysis showing that this tax benefit was "ministerial."[98]

There is no evidence that the Board "anticipated" these changes.[99] Defendants represent that "nearly all of the Amendment's deletions were bracketed in the draft

[94] A2927-A2929; A3113, A3119, A3135-A3136.
[95] A1454.
[96] *Cf.* DAB 45.
[97] *ETE III*, 2018 WL 2254706, at *12 n.228, 26 n.365.
[98] *See id.*
[99] DAB 45-46 & n.155.

circulated to ETE's directors *before* they approved the Amendment" at a 2 p.m. half hour meeting on February 28, 2016.[100] There is no evidence that the directors were told registration rights were to be deleted or that directors even read the 152 pages placed in the Directors Desk shortly before the meeting, much less noticed two brackets nine pages apart.[101] Indeed, a "NTD" (note to directors) said "Registration Rights to be confirmed by ETE."[102] The change in tax allocation was not in the draft sent to the directors and was put in by management after the Board meeting.[103] The version of Amendment 5 containing the revised allocation and deleting registration rights was not circulated before the February 28 Board meeting,[104] was not generated until 12:48:30 a.m. on February 29, 2016, and was only circulated to managers and advisors, not directors.[105]

[100] *Id.* at 45-46.
[101] A1422, A1430. The documents sent to director Collins at 2:17 p.m. in the middle of the Board meeting did not even include Amendment 5. A1143, A1259.
[102] A1430 (emphasis added).
[103] A1432; A1275.
[104] AR1; A1306-A1307, A1414-A1434.
[105] A1458-A1459, A1684-A1706.

III. THE APPEAL IS NOT MOOT

A. Plaintiffs Could Not and Need Not Make a Pointless Application for an Injunction Pending Appeal

Defendants baselessly fault Plaintiffs for "failing to seek a stay or injunction pending appeal."[106] Plaintiffs sought a permanent injunction against the conversion of the CPUs, which was scheduled to occur on May 18, 2018. The May 17, 2018 post-trial opinion denied "pre-distribution injunctive relief."[107] The opinion was not a final appealable judgment or even an order and directed the parties to confer on "what further issues, including class certification, nominal damages, and remaining requests for equitable relief, if any, remain."[108] An interlocutory appeal would not have met the Supreme Court Rule 42 criteria. The trial court refused to enter an appealable Court of Chancery Rule 54(b) order.[109] After negotiation over several issues and resolution of Plaintiffs' fee application, the Final Order was entered on May 6, 2019.[110]

Defendants cite no authority that an appeal is moot if a stay or injunction pending appeal is not sought, particularly where a trial court has just denied a request for a permanent injunction. Nor do they reference the applicable rules[111] or suggest

---

[106] DAB 47.
[107] *ETE III*, 2018 WL 2254706, at *28.
[108] *Id*.
[109] A3349.
[110] POB Ex. B.
[111] Court of Chancery Rule 62(c) and Supreme Court Rule 32(a) require an initial application to the discretion of the trial court and bond.

the *Kirpat* standards[112] for a stay pending appeal could be satisfied given the Court of Chancery's no-harm finding and ETE's contractual obligation to convert the CPUs.

B. Plaintiffs Sought and Can Still Seek Cancellation of Common Units

Defendants wrongly assert that "Plaintiffs never requested" cancellation of the common units into which the CPUs converted "despite having multiple opportunities to do so."[113] In the Pre-trial Order, Plaintiffs sought "cancellation and rescission of the Convertible Units *and/or all Common Units into which the CPUs converted*."[114] Plaintiffs did not seek cancellation of common units by the Court of Chancery after its May 17, 2018 opinion because "given the Court's opinion" holding there was no distribution and no harm from the CPU Issuance, the court below would not grant such relief.[115] That is why Plaintiffs are pursuing this appeal.

Defendants' assertion, in a sentence that transposes and amalgamates different, out-of-context, snippets from the opinion below, that Plaintiffs represented that no equitable relief would be possible after May 18, 2018, is inaccurate.[116] Plaintiffs only argued that a trial and decision before May 18, 2018 was necessary

---

[112] *Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 357-58 (Del. 1998).
[113] DAB 49.
[114] A2841 (emphasis added).
[115] A3355 (emphasis added); s*ee also* A3349 (the court below inquiring whether there was other equitable relief Plaintiffs could seek "given my decision").
[116] DAB 48 & nn.157-58.

to obtain injunctive relief against conversion of the CPUs and issuance of common units.

The Court of Chancery held that the General Partner and its Affiliates breached Section 7.6 of the LPA,[117] so it is only against those defendants that cancellation of common units would apply. Cancelling common units held by defendants who received CPUs remains possible.[118] ETE insider-defendants still hold many more common units than those issued upon conversion of their CPUs.[119] The conversion of defendants' CPUs into common units raises none of the "scrambling" issues inherent in mergers, tender offers or other transactions involving shares of public stockholders.[120]

[117] *ETE III*, 2018 WL 2254706, at *22-25.
[118] *See, e.g.*, *In re Southern Peru Copper Corp. S'holder Derivative Litig.*, 2011 WL 6866900 (Del. Ch. Dec. 29, 2011) (authorizing cancellation of controller-held shares to satisfy post-trial judgment resulting from all-stock merger).
[119] *See* Statements of Changes in Beneficial Ownership, SEC Forms 4 publicly *available on* Edgar *at* https://www.sec.gov; *see* Delaware Rule of Evidence 201(d) ("The court may take judicial notice at any stage of the proceeding"); *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205 (3rd Cir. 1995) ("Federal Rule of Evidence 201 authorizes a court to take judicial notice . . . including on appeal"); Kenneth W. Graham, Jr., 21B FEDERAL PRACTICE AND PROCEDURE (WRIGHT & MILLER) § 5110 (2d ed. & Aug. 2019 Update) ("any stage of the proceeding" "means both in the trial court and on appeal").
[120] *Cf.* DAB 51 (citing cases).

CONCLUSION

The Court of Chancery's denial of a remedy and holding that the Issuance was not a non pro rata distribution in violation of the LPA Section 5.10(a) should be reversed and the case remanded for determination of a remedy and consideration of attorneys' fees.

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: September 5, 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 September 5, 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)