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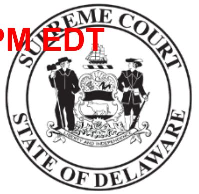

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADRIAN DIECKMAN, on behalf of Himself and all others similarly situated, Plaintiff Below, Appellant, v. REGENCY GP LP, REGENCY GP LLC, ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER PARTNERS, L.P., ENERGY TRANSFER PARTNERS, GP, L.P., MICHAEL J. BRADLEY, JAMES W. BRYANT, RODNEY L. GRAY, JOHN W. McREYNOLDS, MATTHEW S. RAMSEY and RICHARD BRANNON, Defendants Below, Appellees,	)	No. 92, 2021 Court Below: Court of Chancery C.A. No. 11130-CB

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NATURE OF PROCEEDINGS

This Court should affirm the Court of Chancery's (the "court's") post-trial Opinion, which comprehensively detailed "three fundamental conclusions" that are each independently fatal to Plaintiff's claims for breach of express and implied terms in Regency's Limited Partnership Agreement ("LPA") arising from the 2015 merger of Regency and ETP (the "Merger"):

(1) Defendants "demonstrated that the Merger was fair and reasonable to Regency and its unitholders" under §7.9(a)(iv),[1] despite timing missteps in the appointment of Regency Conflicts Committee ("Committee") member Richard Brannon that precluded application of two optional safe harbors in §7.9(a);

(2) Defendants are exculpated from monetary damages under §7.8(a) because "plaintiff failed to prove that the general partner acted in bad faith or engaged in willful misconduct or fraud;" and

(3) Plaintiff "failed to prove damages" because his "apples-to-oranges" framework—comparing the *dividend discount model ("DDM") value*

[1] Section numbers without a preceding *infra* or *supra* refer to the LPA.

of Regency units to the *market value* of ETP units—was "unreliable" and every apples-to-apples valuation "yielded no damages."[2]

Plaintiff dooms his appeal by failing to challenge the court's findings that the Merger was "fair and reasonable," and that Regency's board of directors (the "Board") "firmly believed the Merger was in Regency's best interests."[3] Plaintiff's opening brief ("OB") also avoids engagement with the court's voluminous, foundational findings regarding Regency's troubled financial condition and the Merger's merits. Because it is unappealed law-of-the-case that the Merger was "fair and reasonable," Defendants cannot be liable for breaching the LPA. *See* §7.9(a). Additionally, Defendants cannot be responsible for money damages because it is unappealed law-of-the-case that they approved the Merger in good faith. *See* §7.8(a).

Instead of challenging these dispositive findings, Plaintiff's appeal reduces to the untenable claim that any misstep when invoking optional safe harbors under §7.9(a) can be bootstrapped into astronomical damages for a Merger that was fair, reasonable and approved in good faith. Given the Merger's many benefits to Regency, it is no accident that Plaintiff could attempt to show damages only through an unsound methodology, and it is unsurprising that Plaintiff now attempts to

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[2] Op.:2. Plaintiff badly mischaracterizes the first of these "three fundamental conclusions" (OB:27-28) by completely omitting the court's fair-and-reasonable finding.
[3] Op.:2, 113.

sidestep the Merger's fairness (and Defendants' good faith in approving it). But those attempts are contrary to the LPA's language, Delaware caselaw, economic logic and the record.

SUMMARY OF ARGUMENT

1. Issue One: Denied. The court correctly held that violations of implied terms in two of §7.9(a)'s four disjunctive options precluded Defendants from relying on *those* safe harbors but did not establish liability because Defendants satisfied the fourth option by demonstrating that the Merger was fair and reasonable.[4] Under well-settled Delaware authority and §7.9(a)'s plain language, a transaction "shall not constitute a breach of [the LPA]" if it satisfies any of §7.9(a)'s four options, and unsuccessfully invoking one option does not prevent Defendants from satisfying another option. *Infra* §I.C.1. The implied covenant cannot override §7.9(a)'s express terms, or convert optional safe harbors into affirmative standards of conduct. *Infra* §I.C.2. Thus, the court's unappealed fairness finding is dispositive.

2. Denied. Plaintiff, not Defendants, seeks to "weaponize" the two unfulfilled safe harbors ("Special Approval" and "Unitholder Approval") by arguing that any misstep in invoking them establishes liability regardless of Defendants' good faith or the Merger's fairness. The court's analysis faithfully followed this Court's earlier *Regency* opinion, which held that Plaintiff's implied covenant allegations could preclude application of the Special Approval and Unitholder Approval safe harbors, but never suggested that they could independently establish

[4] Op.:53-54, 62, 95.

liability.[5] *Infra* §I.C.2. And Plaintiff's other primary authority, *Enterprise Products*, explains that a breach of implied terms in an optional safe harbor "does not end the analysis" if defendants "independently satisfied [an option] in Section 7.9(a)."[6] *Id.*

3. Issue Two: Denied. The court applied the correct legal standard in concluding Defendants are exculpated for monetary damages under §7.8(a) because they did not "act[] in bad faith or engage[] in fraud [or] willful misconduct." *Infra* §II.C.1.

4. Denied. The court did not ignore the "reckless indifference" standard for establishing fraud. Rather, the court quoted this standard before analyzing Plaintiff's arguments, all of which turned on Defendants' actual knowledge rather than reckless indifference. *Id.*

5. Denied. The court did not abuse its discretion in rejecting Plaintiff's claim that Defendants acted with *scienter* in (1) appointing Brannon to the Committee shortly before he resigned from an affiliate board (as required for Committee eligibility) and (2) publishing a proxy (the "Proxy") stating he was "independent." The court properly credited the directors' testimony that they believed Brannon had become qualified when required.[7] Nor did the court err in finding (1) Regency's directors "logically" relied on counsel to ensure the

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[5] *Dieckman v. Regency GP LP*, 155 A.3d 358, 361-62, 369 (Del. 2017).
[6] *Gerber v. Enter. Prods. Hldgs. LLC*, 67 A.3d 400, 423 (Del. 2013).
[7] Op.:105-08.

Committee satisfied technical eligibility requirements, and (2) the context surrounding Brannon's appointment indicated Regency's efforts to *comply* with the LPA's requirements, not *flout* them. *Infra* §II.C.2.

6. Denied. Under the LPA's terms and this Court's precedent, the court correctly concluded that exculpation under §7.8(a) "logically should turn on Defendants' state of mind on the issue that provides the rationale for damages: the fairness of the Merger."[8] *Infra* §II.C.1. Plaintiff does not appeal the court's finding that the Board approved the Merger in good faith, and he fails in arguing that the court should have instead focused narrowly on Defendants' state of mind in appointing Brannon to the Committee and publishing the Proxy.

7. Denied. §7.8(a) provides exculpation "for losses…*as a result of any act* or omission of an Indemnitee unless…*in respect of the matter in question*, the Indemnitee acted in bad faith…."[9] The act for which Plaintiff seeks damages is Defendants' approval of the Merger. As the court held, for Brannon's appointment to establish bad faith and support damages, his appointment must have "contributed to an unfair exchange ratio."[10]

8. Denied. Regardless, Plaintiff's "wrong focus" argument is moot because the court *did* focus on the issues requested by Plaintiff and found that Regency's

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[8] Op.:111.
[9] A2401.
[10] Op.:111.

directors acted in good faith with respect to Brannon's appointment and the Proxy's publication. *Infra* §II.C.2. Plaintiff's arguments that the court should have drawn different inferences from the record do not establish clear error. Further, the Board's awareness of the Committee members' histories with Warren likewise is not evidence of bad faith because these distant histories were "plainly insufficient" to undermine their independence.[11] *Id.*

9. Issue Three: Denied. The court did not abuse its discretion in rejecting Plaintiff's "unreliable" and "illogical" damages model that "equate[d] two different standards of value" without any principled basis.[12] *Infra* §III.C.1. On appeal, Plaintiff abandons his failed, ever-changing efforts below to justify valuing Regency with a DDM model and valuing ETP with its market price. Without a valid justification, Plaintiff's damages model is contrary to logic, Delaware precedent and the record.

10. Denied. The court's damages analysis did not constitute "legal error" or conflate "contract damages [with] corporate law tort damages principles."[13] Plaintiff's purported distinction between breach-of-duty and breach-of-contract cases is undermined by his heavy reliance on *Southern Peru*[14]—a fiduciary-duty

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[11] Op.:77-81.
[12] Op.:114, 120, 124.
[13] OB:11-12.
[14] *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

case—to support his apples-to-oranges damages methodology.[15] *Infra* §III.C.2. Further, Plaintiff never explains what that distinction is or how it would change the outcome. These two categories of cases apply substantively similar principles, and using tort principles would have (if anything) benefited Plaintiff. *Id.*

11. Denied. Plaintiff seeks $1.6 billion because the Committee was improperly constituted and the Proxy contained "false" statements about the Committee. But Plaintiff fails to demonstrate how these breaches resulted in any harm to Regency. The principles Plaintiff invokes regarding *factual* certainty about the *quantum* of damages are not license to manufacture harm—where none exists—through an illogical *methodology*. *Infra* §III.C.2. And, as Plaintiff's damages expert acknowledged, his apples-to-oranges methodology is the ***only*** way Plaintiff can claim damages.

12. Issue Four: Denied. Plaintiff's tortious interference claim was correctly dismissed because his few cursory allegations on this issue failed to adequately allege that ETE or ETP had the requisite mental state or committed any wrongful act that induced an LPA breach. *Infra* §IV.C. Further, Plaintiff's tortious interference claim cannot satisfy two essential elements: an underlying breach of contract and damages.

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[15] *E.g.*, OB:47.

STATEMENT OF FACTS

After a five-day trial with fourteen witnesses and over 1,300 exhibits submitted,[16] the court found the following:

A. Regency was vulnerable to commodity-price swings, while ETP was much better positioned.

Regency Energy Partners ("Regency") and Energy Transfer Partners ("ETP") were Delaware master limited partnerships ("MLPs") operating in the "midstream" sector of the energy industry.[17] Energy Transfer Equity ("ETE") owned Regency's and ETP's general partners.[18]

Boosted by favorable commodity prices, in 2013-2014 Regency doubled in size through $9 billion in acquisitions, often with ETE's support.[19] Additionally, Regency committed to significant future growth projects.[20] Regency's operations became increasingly concentrated in the gathering-and-processing ("G&P") midstream subsegment, which accounted for over 60% of Regency's 2014 EBITDA.[21] G&P is more commodity sensitive than other midstream subsegments because (1) G&P fees are often tied to commodity prices, and (2) producers reduce

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[16] Op.:3
[17] Op.:3-4, 9-10; A1152-53 ¶¶36-38, 41-42, 45.
[18] Op.:5; A1153-54 ¶¶39, 44.
[19] Op.:9, 119; A1191-92 ¶¶211-15; A1323[418:24-420:9]; A1539[1274:5-1275:21]; B2976.
[20] Op.:93, 120; A3483 fig.41; A1339[485:14]-A1340[486:10].
[21] Op.:72; B2144.

production (and G&P volumes correspondingly decline) during downturns.[22] Given its G&P focus, Regency was among the "MLPs with the most commodity price exposure."[23] Even amongst G&P-focused peers, Regency had above-average leverage and commodities exposure, below-average distribution coverage and a non-investment grade credit rating.[24]

In contrast, "ETP was much better positioned than Regency to handle [an] energy market downturn."[25] Earnings from ETP's business segments were more evenly distributed, its "main business segments did not rely heavily on high commodity prices" and it "was better positioned to secure additional capital" due to its investment-grade rating and lower leverage.[26]

B. The OPEC announcement sent energy markets—and Regency—into a tailspin that was expected to (and did) last for years.

Oil and gas prices dramatically declined in late 2014, accelerated by a November 27 announcement that the Organization of the Petroleum Exporting Countries ("OPEC") would not reduce production to stabilize oil prices.[27] This "watershed" announcement caused "one of the largest oil-price shocks in modern

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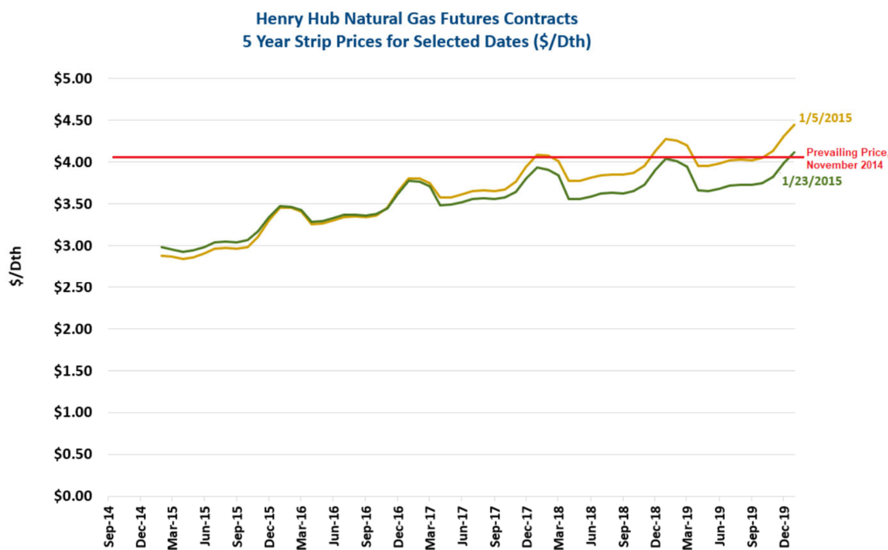
[22] Op.:8, B1334.
[23] Op.:72 (quoting B1328); B1462.
[24] Op.:72-73; B1328; B1857; B1498; B2066.
[25] Op.:73.
[26] Op.:10, 73; B2144; B1154, B1156, B1174; B2101; B1548; A1183 ¶¶173-78; B2222; A3510 fig.57.
[27] Op.:14-15; A1341[493:10]-A1342[494:20]; A1457[952:2-12]; A1231[55:5-10].

history,”[28] falling approximately 10% in the two days post-announcement and 40% between this announcement and the January 2015 Merger announcement.[29] In the six months preceding the Merger announcement, natural gas and natural gas liquids prices fell by roughly 25% and 50%, respectively.[30] Oil and gas producers responded by curtailing new drilling; in several of Regency’s key regions, drilling declined by half in the six months following OPEC’s announcement.[31] The market expected the downturn to continue for years.[32] Futures prices indicated it would take five years or more for natural gas prices to return to 2014 levels.[33]



[28] Op.:14 (quoting B1323; B2289).
[29] Op.:15; B2773; B1409-13.
[30] Op.:15; B2774; B2562.
[31] Op.:15; B2560-61; B1715, B1720, B1727; A1348[519:18-521:12], A1351[530:23-531:20].
[32] Op.:74; B1323-24.
[33] Op.:74; A3457 fig.23; A1261[173:10]-A1262[180:21]; B1545.

Regency struggled in this environment. The downturn "squeez[ed] Regency from both sides—its operations and growth projects simultaneously suffered from reduced revenue expectations and became increasingly expensive to fund [due to rising capital costs]."[34] Regency's Q4 2014 actual results confirmed its troubles—distributable cash flow was 25.5% below budget and distribution coverage fell to 0.81x, meaning Regency had only $0.81 in distributable cash for every $1.00 it planned to distribute.[35] This presented the dilemma of either cutting distributions—a devastating step for MLPs—or issuing equity to pay distributions.[36]

ETP, by contrast, weathered the storm due to its much lower cost of capital, stronger balance sheet, lower leverage ratio, superior diversification and stronger credit rating.[37] In Q4 2014 and Q1 2015, ETP's distributable cash flows exceeded median analyst estimates by approximately 5%.[38] ETP's Q1 2015 distributable cash flow also exceeded its own projections by 7.6%.[39]

[34] Op.:73-74; B1662, B1687, B1689; A1499[1119:9-21].
[35] Op.:73-74; B1363; B1640-41.
[36] Op.:73-74, n.321; B1063; B1690.
[37] Op.:73; B2144; B2107; B1581; B2076; B2160; B1548; A1183 ¶¶173-78; B2222; A3510 fig.57.
[38] A1329[443:22-444:1]; A3778-79; A1754 n.170.
[39] A3663 ¶100, A3779.

Unsurprisingly, these divergent results and commodity exposure levels were reflected in Regency's and ETP's unit prices.[40] Between October 2014 and January 2015 Regency fell 27.4%,[41] while ETP rose 2.3%.[42]

C. ETP made a reasonable initial offer to acquire Regency.

On January 16, 2015, ETP offered to acquire Regency.[43] Kelcy Warren, ETE's Chairman and ETP's CEO, delivered the proposal to Regency's CEO Mike Bradley and CFO Tom Long.[44] ETP proposed a unit-for-unit transaction (0.4044

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[40] Op.:124 (finding Regency and ETP both traded in efficient markets); A3624 ¶ 34.
[41] Op.:70; B0528-30; B1851.
[42] Op.:70; B0543-45; B1851.
[43] Op.:17-18; A1163-64 ¶¶98-100; A2498.
[44] Op.:18; A1363[578:5-18]; A1491[1088:9]-1492[1089:2]. "The record does not indicate that Long or Bradley's judgment…was tainted by the prospect of [post-

ETP units per Regency unit) and $0.36 cash per Regency unit.[45] The offer also included $300 million ($60 million/year for five years) in incentive distribution right ("IDR") "givebacks" from ETE to benefit the combined entity.[46] As the court found, ETP "opened with a reasonable offer."[47]

D. The Board authorized a committee of two highly qualified directors to negotiate.

Later that day, the Board met and tasked the Committee with evaluating ETP's proposal.[48] The Committee had previously consisted of James Bryant and Rodney Gray.[49] Bryant founded Regency's predecessor in 2004,[50] had served on the Committee since 2010[51] and had six decades of industry experience.[52]

In December 2014, before the Merger was contemplated, the Board began evaluating replacing Gray on the Committee because he became CFO of a minor

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Merger] employment opportunities." Op.:76-77. And Plaintiff's claims that Warren corrupted the process generally (OB:14-25) are contradicted by findings that "Warren did not dictate the composition of the conflicts committees" and "played no role in the process…after ETP made its first proposal…except for the negotiation of IDR givebacks by ETE." Op.:76.

[45] Op.:17-18; A1163-64 ¶¶98-100; A2498.

[46] Op.:18; A2489. At this time most MLPs, including Regency and ETP, had IDRs, which typically entitle the general partner to receive increasing percentages of the incremental cash flow as distributions increase, meant as an incentive to grow the partnership. Op.:10-11; A3423 ¶25.

[47] Op.:82.

[48] Op.:18-19; A2509.

[49] Op.:19; A2509.

[50] Op.:83; A1163 ¶95; A1456[948:20]-A1457[950:15].

[51] *Id.*

[52] Op.:82; B0654; A1453[937:7]-A1455[943:11].

Regency customer—threatening his independence under stock-exchange rules and, therefore, his eligibility for Committee service under the LPA.[53] Regency's counsel vetted Brannon's eligibility to replace Gray as an independent director.[54] Brannon had 35 years of industry experience, was president of two energy companies, negotiated more than 15 energy transactions over $100 million and had experience with the Energy Transfer companies through his role as a director of Sunoco (whose general partner was owned by ETP) since September 2014.[55]

To address Gray's potential issue, the Board determined on January 16 that Brannon should replace Gray on the Committee.[56] The next day Regency's in-house counsel circulated written consents to that effect—which directors Bryant, Bradley, John McReynolds and Matt Ramsey executed.[57] On January 20, "before any substantive negotiations concerning the Merger had begun," Brannon "submitted a formal [Sunoco board] resignation letter" to ETE's General Counsel.[58] Brannon "believed that he did not need 'to do anything more' to resign."[59] However, the court held that Brannon's appointment to the Committee before his resignation from an

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[53] Op.:19, 103-05; A1356[552:4-13]; A2509; B1391.
[54] Op.:105; B1392-93; B1394-96; A1564[1377:20]-A1565[1378:3].
[55] Op.:82; A1158 ¶61; A1405[746:22]-A1407[752:24].
[56] Op.:19; A2509; A1163 ¶96.
[57] Op.:20; A2517; A2519-20; A2524-27; B1572; A1437[874:8-19].
[58] Op.:112-13; A1410[765:12-766:20]; A1439[879:2-880:20]; B1570-71.
[59] Op.:21 (A1410[766:10-12], A1439[882:3-16]).

affiliate's board, and his failure to directly notify Sunoco's board, violated the LPA's "Qualification Provision," precluding Special Approval.[60]

This timing misstep did not impugn the Board's good faith or impair the Committee's ability to negotiate a fair transaction. As the court confirmed: (i) Regency's directors approving Brannon's appointment "did not intend to violate the Qualification Provision and…subjectively believed they were acting in Regency's best interests when they appointed Brannon to take Gray's place;"[61] (ii) "failure to secure Brannon's resignation from the Sunoco board before his appointment to the Conflicts Committee was not intentional;"[62] (iii) there was no evidence of ill-motive by Brannon;[63] and (iv) the misstep "did not taint [Brannon's] ability to make decisions with only the best interests of Regency in mind."[64]

Further, while Brannon and Bryant had personal and professional histories with Warren, these were fifteen-years stale by 2015 and "plainly insufficient" to compromise their independence.[65] Brannon exited his earlier co-investments with Warren by 2001, and had no further dealings with Warren until taking one trip to

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[60] Op.:50 (citing *Dieckman v. Regency GP LP*, 2019 WL 5576886, at *9-11 (Del. Ch. Oct. 29, 2019)).
[61] Op.:108.
[62] Op.:108.
[63] Op.:112-13.
[64] Op.:113.
[65] Op.:77-81.

Warren's ranch before joining Sunoco's board in 2014.[66] Bryant was "not particularly close to Warren," spent little time with him and had one "decades-old past business relationship" that was "too far removed…to call into question his independence."[67]

E. Assisted by capable advisors, the Committee negotiated at arms-length and secured a fair price for Regency.

Substantive negotiations began on January 20, and the next day Regency and ETP convened at an isolated location to expedite negotiations.[68] The Committee "reach[ed] ETP's bottom line in short order," given "that ETP had opened with a reasonable offer" and because the "Committee members and their advisors had extensive experience in the industry and were deeply familiar with Regency and ETP."[69] The Committee "met formally eleven times, worked before, between, and after meetings, and exchanged four proposals with ETP's conflicts committee."[70] The Committee's advisors were J.P. Morgan, Akin Gump and Morris Nichols.[71]

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[66] Op.:77-78 (A1411[769:8-770:10]); A1435[863:24]-A1436[867:12].
[67] Op.:79; A1460[961:1-8]; B2468[15:17-16:20].
[68] Op.:23-24, 81-82; B1576; A1445[905:1]-A1446[910:22]; A1166 ¶111; A2509; A1356[550:3-551:24]; B1605.
[69] Op.:82. Plaintiff criticizes the length of negotiations, but the two companies were deeply familiar with one another, the relevant parties were secluded together (thereby improving efficiency), and "a longer period would not have achieved a better result for [Regency]." Op.:81-82.
[70] Op.:81 (alteration omitted); A1165-68 ¶¶106-07, 109, 112-13, 119; A1170-74 ¶¶126-27, 130, 133, 136-37, 141, 144; A1412[771:2-773:18]; A1422[814:5-12].
[71] Op.:83; A1413[776:16-777:18]; A1414[780:7-16].

On January 22, J.P. Morgan provided the Committee its thorough analysis of ETP's initial offer,[72] advising the Committee that ETP's initial offer "appeared to be fair based upon J.P. Morgan's initial analyses."[73] The Committee similarly determined that the initial offer was "fair to the unaffiliated unitholders," particularly given the "commodity price environment, [Regency's] high leverage and high cost of capital to fund future growth, limitations on [Regency's] growth due to such high cost of capital, and the expected decline in [Regency's] distribution coverage ratio."[74] Nevertheless, the Committee resolved to seek more and counter-proposed a 0.425 exchange ratio and a two-year cash "make-whole" payment.[75]

The parties exchanged various counterproposals over the next few days.[76] During negotiations, Brannon received Regency's preliminary Q4 2014 results, which were "not pretty."[77] Distribution coverage declined to ~0.80x and December 2014 distributable cash flow fell 54% below budget.[78] Brannon concluded that Regency was deteriorating faster than expected.[79]

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[72] Op.:25; A2562-63; B1609-33.
[73] Op.:25-26; A2562.
[74] Op.:26; A2562-63.
[75] Op.:26; A2563; A2698.
[76] Op.:27-29; A1171-73 ¶¶130, 133, 137; A2698-99; B1746.
[77] Op.:27; B1637; B1363.
[78] Op.:27; B1641.
[79] Op.:27; A1427[833:20-834:9].

"Reflective of their arms-length nature, the negotiations grew heated toward the end."[80] At one point, ETP instructed Jamie Welch, Energy Transfer's CFO, to tell Brannon that ETP's latest proposal was a "take it or leave it" offer.[81] When Brannon refused to accept the counteroffer unless it yielded a 15% premium, Welch yelled "just go it alone and see how you like that in six months."[82] Ultimately, the parties agreed to an exchange ratio of 0.4066 plus $0.32 in cash, which achieved the 15% premium.[83] The parties also secured an increased IDR giveback from ETE of $320 million over five years.[84] This was ETP's reserve price and ETE's maximum willingness to contribute IDR givebacks.[85]

The Committee then discussed that Regency "would potentially need to cut its distribution" without the Merger, and its "long term growth prospects would be significantly better in a combined entity."[86] The next day, J.P. Morgan formally opined that the consideration was fair to Regency's unaffiliated unitholders.[87]

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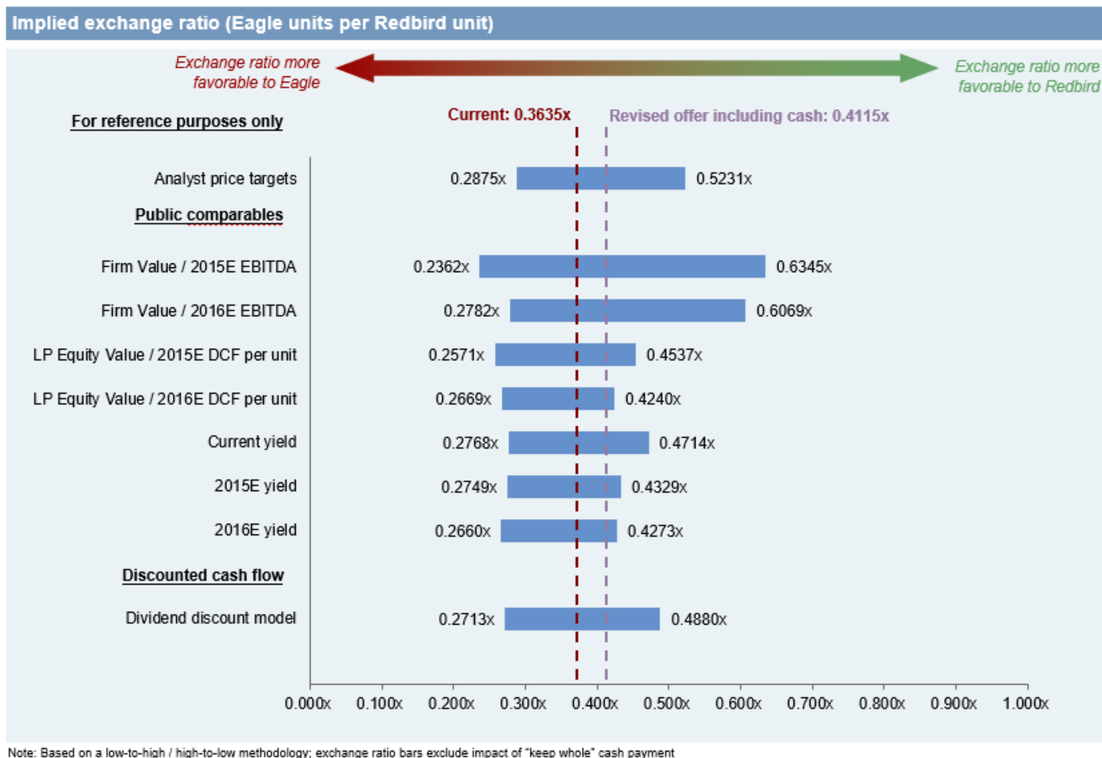
[80] Op.:84; A1429[842:14]-A1430[844:22]; A1511[1166:7-18]; A1512[1171:5-1172:19]; B2840[254:6-14].
[81] Op.:28; A1512[1169:5-23].
[82] Op.:29, 84; A1429[842:14]-A1430[844:22].
[83] Op.:29, 84, 86-87; A1429[842:4]-A1430[844:22]; B1753. The parties later amended the Merger's terms to replace the $0.32 cash payment with $0.32 in ETP units. Op.:90; A1176-77 ¶¶155-58. This amendment "did not change the economics or fairness of the transaction to Regency's common unitholders and [did] not call into question the substance of J.P. Morgan's fairness analysis." Op.:90; B2183.
[84] Op.:28, 86; B1749; B2097.
[85] Op.:28; A1511[1166:11-18]; A1512[1171:24-1172:19]; B2840[254:6-14].
[86] Op.:30; B1754.
[87] Op.:30; B1870-73; A1174 ¶144; B1968-71.

F. The independent Board approved the Merger in good faith.

After determining the Merger was "fair and reasonable and in the best interests of [Regency] and [Regency's] [u]naffiliated [u]nitholders," the Committee recommended that the Board approve the Merger.[88] J.P. Morgan presented its fairness analysis to the Board, summarized in a table comparing the value of Regency and ETP units across numerous financial metrics.[89] This table showed that the Merger consideration fell "comfortably to the right" of almost all financial metrics, indicating an exchange ratio favorable to Regency.[90]

[88] Op.:84-85; A2566; B1970.
[89] Op.:87; B1864. *See also* A1401[727:18-728:12] (explaining that, in stock-for-stock mergers, it is critical to perform a "relative value analysis" comparing the acquiror and target across the same metrics).
[90] Op.:87; B1864; A1403[738:1]-A1404[739:4]; A1424[820:1-821:6].



All four Regency directors who voted determined it was "in the best interests of [Regency] and [Regency's] [p]ublic [u]nitholders" and approved the Merger.[91] As with Brannon and Bryant, Bradley and Gray were independent and well-qualified.[92] They had worked at energy companies for decades; had joined the Board in 2008, before ETE acquired Regency's general partner; and had no previous employment with Warren or ETE.[93]

[91] Op.:31; B1782. McReynolds and Ramsey abstained due to their ETE roles. A2700.

[92] Op.:84-86.

[93] Op.:84-86; A1157 ¶58; A1159 ¶69; A1362[576:6-9]; A3147[25:11]-A3149[33:17]; A2989[32]; A2996[58-59]; B0818-19.

Regency's directors "firmly believed" that (1) "the Merger was in Regency's best interests,"[94] (2) Regency and its unitholders "would be better off as part of a combined entity with ETP" and (3) a 15% premium for Regency's unitholders was fair consideration.[95] In reaching these conclusions, the Committee and the Board were well aware of the expected accretion to ETE that would result from the transaction, and the Merger's distribution dilution impacts on Regency's unitholders.[96] However, Regency's directors made an "informed, impartial decision" that despite these factors, the "terms nevertheless were fair to [Regency] based on legitimate considerations" which included their beliefs that: (i) the industry downturn would be prolonged; (ii) Regency would struggle to meet management's projections and to maintain its distributions; (iii) ETP was better positioned to weather the downturn, and its distributions were less vulnerable; and (iv) Regency's backlog of growth projects could be executed more profitably with ETP's lower cost of debt.[97]

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[94] Op.:113; A1433[855:4-10]; A1458[956:6]-1459[958:12]; A1359[565:5-13]; A3032[203].

[95] Op.:111-12; A1433[855:4-10]; A1458[956:6]-1459[958:12]; A1359[565:5-15]; A3032[203].

[96] Op.:92; B1865; A1227[37:4-6]; A1431[848:14-19]; A1450[926:8]-A1451[927:21]; A1472[1009:8-23].

[97] Op.:92-93; A1426[829:12-830:17]; A1428[837:3]-A1429[839:4]; A1452[933:12-23]; A1458[956:12]-A1459[958:12]; A1423[817:4]-A1424[819:17]; A1399[720:7]-A1400[724:8]; A2562-63; B1857; B1862; B1581; A1419[800:7]-A1420[804:24].

G. Post-signing developments confirmed the Merger was fair and substantially benefited Regency.

The market cheered the Merger's announcement for Regency,[98] analysts unanimously deemed the Merger positive for Regency[99] and proxy advisory services recommended that Regency unitholders vote "for" the Merger.[100] Of Regency's unaffiliated units that voted, 99.37% voted "for" the Merger, which closed on April 30, 2015.[101]

Regency's performance deteriorated further between signing and closing.[102] Regency's Q1 2015 distributable cash flow fell 17% below projections prepared in January 2015 to evaluate the Merger.[103] Its distribution coverage declined to 0.77x, and its leverage ratio climbed to 5.26x.[104] By April 2015, Regency projected that its (1) distributable cash flow would fall 33% below the January 2015 projections, and (2) leverage would rise further, triggering a default of its loan covenants.[105]

As the Board expected, the downturn persisted. As of the trial, natural gas prices were lower than when the Merger closed four years prior.[106] In 2015 and

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[98] Op.:88; B2076; B2133; A3754; A3765.
[99] Op.:88-89; B2084; B2160; B2076; B2136; B2086; B2066.
[100] Op.:89-90; B2250-51, B2253-54, B2258; B2268.
[101] Op.:35; A1178 ¶162; A178.
[102] B2236-38.
[103] Op.:93; B1607-08; B2248-49.
[104] Op.:93; B2248-49.
[105] Op.:93; *compare* B2248-49, *with* B1855; B1751-52.
[106] Op.:37; A1409[762:19-22]; B2774-75.

2016, ETP's midstream business, which included Regency's G&P assets, shrank by a combined 15%, whereas Regency's January 2015 projections had forecasted 28% growth.[107] By contrast, ETP's 2015 EBITDA exceeded forecasts, despite legacy Regency's poor results.[108]

[107] Op.:37; A1504[1138:4]-A1505[1143:18].
[108] Op.:37; A1301[332-33]; B2431[109:25]-B2432[110:20].

ARGUMENT

I. The court's unappealed finding that the Merger was fair and reasonable forecloses Plaintiff's implied covenant claim.

A. Question Presented

Did the court err in holding that Defendants' "breach[of the] implied covenant…in the Special Approval and Unitholder Approval safe harbors…means that the General Partner may not avail itself of [these two] safe harbors" but *does not* entitle Plaintiff to $2 billion in damages for a "fair and reasonable" Merger?[109]

B. Scope of Review

The court's interpretation of the LPA is reviewed *de novo*. *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).

C. Merits of the Argument

1. The court's unappealed finding that the Merger was fair and reasonable under §7.9(a)(iv) forecloses Plaintiff's claims.

§7.9(a) provides that a transaction posing a potential conflict of interest "shall be permitted and…shall not constitute a breach of [the LPA]" if it "is (i) approved by Special Approval, (ii) approved by [Unitholder Approval]…, (iii) on terms no less favorable to the Partnership [than those available from third parties]… ***or*** (iv) fair and reasonable to the Partnership…."[110] Under well-settled authority, this disjunctive framework means there is no LPA breach if ***any*** of §7.9(a)'s four options

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[109] Op.:2, 53-54.
[110] A2401 (emphasis added).

are satisfied; thus, the breach of an implied or express provision in any one or two options is moot if another option is satisfied.[111] Following this precedent and §7.9(a)'s plain language, the court held that Brannon's ineligibility "breached" the Special Approval (§7.9(a)(i)) and Unitholder Approval (§7.9(a)(ii)) provisions, but that "does not mean that the General Partner breached an affirmative standard of conduct applicable to its approval of the Merger."[112] Rather, because Defendants "satisfied their burden to demonstrate that the Merger satisfied the Fair and Reasonable standard [§7.9(a)(iv)]," they are not liable.[113]

Plaintiff does not appeal the court's conclusion that the Merger was fair and reasonable under §7.9(a)(iv). Nor does Plaintiff challenge any of the court's thorough findings supporting this conclusion regarding the Merger's numerous benefits and the business reality facing the Board when it approved the Merger.[114]

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[111] *Gerber*, 67 A.3d at 423; *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 364 (Del. 2013); *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *20 (Del. Ch. May 17, 2018), *aff'd sub nom. Levine v. Energy Transfer L.P.*, 223 A.3d 97 (Del. 2019); *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2015 WL 4975270, at *6, n.2 (Del. Ch. Aug. 20, 2015), *aff'd sub nom. The Haynes Fam. Tr. v. Kinder Morgan G.P., Inc.*, 135 A.3d 76 (Del. 2016); *see also Inter-Mktg. Grp. USA, Inc. v. Armstrong*, 2020 WL 756965, at *6 (Del. Ch. Jan. 31, 2020) ("[C]onditional safe harbor language does not imply a mandatory duty [or] impose affirmative obligations."); *Lonergan v. EPE Hldgs., LLC*, 5 A.3d 1008, 1019-20 (Del. Ch. 2010).

[112] Op.:53.

[113] Op.:53, 62, 95.

[114] *Supra* Facts §G.

Due to §7.9(a)'s disjunctive framework, the court's unappealed conclusion defeats Plaintiff's claim for breach of the LPA, including its implied terms.

2. A breach of implied terms in §7.9(a) cannot change this result, as Plaintiff previously acknowledged.

Rather than challenge the Merger's fairness, Plaintiff contends that a breach of the implied covenant while seeking Special Approval and Unitholder Approval "is itself a breach of contract and ***not*** excused by the purported fairness of the Merger."[115] That contention contradicts §7.9(a)'s express language and well-settled case law (detailed above) that each "safe harbor is optional; falling short of reaching harbor [under Special Approval] does not prevent the Defendants from navigating the straits of fairness."[116]

Plaintiff's primary authority, *Gerber v. Enterprise Products Holdings*, also directly contradicts his contention. There, this Court found an adequately alleged breach of the implied covenant under the "reliance on a financial advisor" safe harbor invoked by the general partner. But this Court explained such a breach "does not end the analysis" because if defendants "independently satisfied the contractual Special Approval safe harbor in Section 7.9(a), then by Section 7.9(a)'s plain language, [defendants] did not breach the LPA." 67 A.3d at 423. Thus, a court does

[115] OB:33.
[116] *Energy Transfer Equity*, 2018 WL 2254706, at *20; *see also supra* n.111.

not "proceed[] to quantifying contract damages" as Plaintiff argues,[117] but instead determines whether defendants satisfied another LPA provision that forecloses liability.[118]

According to Plaintiff, unitholders would not expect that Defendants could unsuccessfully invoke these safe harbors and then "just 'flip back into' another contractual escape hatch."[119] But under §7.9(a)'s disjunctive language, that is exactly what unitholders *would* expect. And §7.9(a)(iv) is anything but an "escape hatch"—it is "similar, if not equivalent to entire fairness review,"[120] Delaware's most demanding standard of review. Further, Plaintiff misplaces reliance on *Brinckerhoff*, which concerned whether defendants could "flip back into" a conclusive good-faith presumption for reliance on financial advisors (under §7.10(b)) after the good-faith presumption for Special Approval had been rebutted (under §7.9(a)).[121] *Brinckerhoff* did not consider whether defendants could rely on §7.9(a)(iv)'s fair-and-reasonable standard if other disjunctive provisions of §7.9(a) had been unsuccessfully invoked. Indeed, the *Brinckerhoff* plaintiff acknowledged:

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[117] OB:34.
[118] This principle applies more forcefully here, where the implied covenant claim itself arises under §7.9(a), not a separate LPA provision.
[119] OB:34.
[120] Op.:68 (citation omitted).
[121] A3819-21 (citing *Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 7141-CS, at 15-17 (Del. Ch. Oct. 26, 2012) (TRANSCRIPT)).

"[t]he LPA required Defendants to obtain 'Special Approval' for conflict-of-interest transactions *or to satisfy one of the other requirements of Section 7.9(a)*…."[122]

Plaintiff here likewise judicially admitted that invalidating Special Approval or Unitholder Approval would not itself establish liability. His operative complaint alleges:

- "Failure to appoint such independent members was a breach of the implied covenant…, and *thus Regency GP is not entitled to rely upon the special approval safe harbor* to insulate itself from liability;"
- "Procuring the unitholder vote through false and misleading information…violated the implied covenant of good faith and fair dealing, and Regency GP is *not entitled to rely on the unitholder vote for safe harbor protection*."
- "Without safe harbor…protection, Defendants are liable for breach of contract *if* they failed to act in good faith in approving the Merger [as defined in §7.9(b)]."[123]

Only after discovery confirmed that the Merger's rationale and merits were unassailable did Plaintiff reverse course and contend that an implied covenant in

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[122] B0676 (*Id.*, Plaintiff's Answering Brief in Opposition to Defendant's Motion to Dismiss at 20 (Sept. 10, 2012) (emphasis added)); B0596 (*Id.*, Plaintiff's Verified Derivative Complaint at 34-36 (Dec. 28, 2011)).

[123] A127 ¶76; A129 ¶82; A138 ¶111 (emphasis added).

§7.9(a) entitled Plaintiff to damages even if the Merger was fair, reasonable and approved in good faith.

Plaintiff attempts to rewrite an LPA "through the backdoor of the implied covenant." *Lonergan*, 5 A.3d at 1019-20 (rejecting argument that "the implied covenant…requires" fulfillment of §7.9(a)(ii)'s Unitholder Approval provision, because this is "one of the four alternative means by which a transaction can be validated" under §7.9(a)). The implied covenant does not create a "free-floating requirement," but instead supplies "a gap that needs to be filled." *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 182-83 (Del. Ch. 2014), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015). Plaintiff fails to explain—because he cannot—how §7.9(a)'s implied terms entitle him to greater relief than its express terms. *See The Liquor Exch. Inc. v. Tsaganos,* 2004 WL 5383907, at *4 (Del. Ch. Nov. 15, 2004) (implied covenant obligated defendant to negotiate in good faith under right-of-first-negotiation provision, but could not convert the provision's obligation to negotiate into an obligation to reach terms).

Plaintiff's reading would turn §7.9(a)'s "or" into an "and," such that one optional safe-harbor in a four-part disjunctive provision could become mandatory and an independent basis for liability. This is precisely what *Lonergan* rejected. 5 A.3d at 1020 ("By using the term 'or,' Section 7.9(a) establishes four alternative standards of review."). "Rather than filling a gap, this application of the covenant

would alter the terms of the [LPA]. The implied covenant cannot do that." *El Paso*, 113 A.3d at 191. "The implied covenant will not infer language that contradicts a clear exercise of an express contractual right." *Nemec v. Shrader*, 991 A.2d 1120, 1127 (Del. 2010). This includes the express term that a fair and reasonable transaction "shall not constitute a breach of [the LPA]."

Lastly, the court did not contravene this Court's earlier *Regency* opinion, as Plaintiff contends.[124] This Court held only that "plaintiff has pled sufficient facts to support his claims that ***those safe harbors were unavailable*** to [Defendants]," and that the implied covenant could vitiate Defendants' "***ability to use the safe harbors*** to shield the [M]erger transaction from judicial review." *Regency*, 155 A.3d at 369 (emphasis added). The opinion does not suggest that unsuccessfully invoking these safe harbors established liability. It is Plaintiff, not Defendants, who seeks to "weaponize" these safe harbors by arguing that any misstep in invoking them establishes liability for a fair transaction that was approved in good faith.

3. The court considered the alternative world in which the implied covenant breach could by itself establish liability.

Even if the court erred in concluding that Defendants' breach of the implied covenant in §7.9(a) "simply means that the General Partner may not avail itself of Special and Unitholder Approval safe harbors,"[125] any error is harmless. For

[124] OB:30 (quoting *Regency*, 155 A.3d at 368).
[125] Op.:53-54.

completeness sake, the court assumed *arguendo* that Plaintiff could obtain damages for an implied covenant breach *regardless of the Merger's fairness*, which is exactly the analysis Plaintiff claims it should have undertaken. The court analyzed (1) whether Defendants were exculpated for any breach,[126] and (2) "Plaintiff's evidence of damages" that could be awarded for an "implied breach of the [LPA]."[127] This analysis led "to the conclusion that no damages would be warranted in any event."[128] Plaintiff "cannot prevail on [his implied covenant] claim" because he "did not receive an unfair price…and thereby w[as] not harmed by the transaction." *Ross Hldg. & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *36 (Del. Ch. Sept. 4, 2014); *supra* Facts §E.[129]

[126] Op.:95.
[127] Op.:113-14.
[128] Op.:114.
[129] Unless Plaintiff prevails on appellate Issues 1, 2, *and* 3, this Court should affirm the court's judgment. If Defendants prevail on Issue 1, there is no liability. And if Defendants prevail on Issues 2 or 3, there are no damages.

II. The court correctly concluded Defendants are exculpated from monetary damages under §7.8(a).

A. Question Presented

In finding that Defendants were exculpated from monetary damages under §7.8(a) because Plaintiff failed to prove Defendants "acted in bad faith or engaged in fraud [or] willful misconduct,"[130] did the court correctly apply the legal standards or clearly err in its factual findings?

B. Scope of Review

The court's interpretation of the LPA is reviewed *de novo*, *Wininger*, 707 A.2d at 40, and its factual findings are reviewed for clear error, *Titan Inv. Fund II, LP. v. Freedom Mortg. Corp.,* 2012 WL 6049157, at *3 (Del. 2012).

C. Merits of the Argument

1. The court applied the correct legal standards in holding Defendants were exculpated under §7.8(a).

Plaintiff mistakenly argues that the court "applied the wrong standard for establishing fraud," because it supposedly assessed whether Defendants *knew* Brannon was ineligible when they appointed him to the Committee and published the Proxy, whereas fraud can be shown by knowledge or "reckless indifference to the truth."[131] But the court expressly quoted the "knowledge…or reckless

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[130] Op.:2.
[131] OB:37-38.

indifference" element that Plaintiff now claims was ignored.[132] To the extent the court's analysis focused on Defendants' actual knowledge, that is because Plaintiff's posttrial briefing made numerous assertions about Defendants' knowledge, but none regarding their reckless indifference.[133]

Without citing a single case, Plaintiff also argues that the court applied the "wrong focus"[134] in concluding that exculpation under §7.8(a) "logically should turn on Defendants' state of mind on the issue that provides the rationale for damages: the fairness of the Merger."[135] Plaintiff contends the court should have instead focused on Brannon's appointment and the Proxy's publication. But the court *did* consider these actions, noting they could be "relevant to [the §7.8(a)] inquiry" if "they were the proximate cause or at least contributed to an unfair exchange ratio."[136] That framework was consistent with the LPA's language, Delaware precedent and the fact that Plaintiff sought damages based on the Merger consideration paid to Regency unitholders. *See* §7.8(a) (providing exculpation "for losses…*as a result of any act* or omission of an Indemnitee unless…*in respect of the matter in question*, the Indemnitee acted in bad faith….");[137] *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d

[132] Op.:96-97 & n.414 (citing *Prairie Cap. III, L.P. v. Double E Hldg. Corp.*, 132 A.3d 35, 49 (Del. Ch. 2015)).
[133] *See* A1680-81; A1683; A1707-08; A1824.
[134] OB:38-40.
[135] Op.:111.
[136] Op.:111.
[137] A2401 (emphasis added).

93, 110 (Del. 2013) (where plaintiff's "only claim is that the Merger was unfair and undertaken in bad faith, [acquirer's] allegedly value-depressing disclosures are relevant only insofar as they resulted in an unfair exchange ratio….").[138] Plaintiff did not—and cannot—establish that the timing of Brannon's appointment or the Proxy's statement that he was "independent" contributed to an unfair exchange ratio. *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773-75 (Del. 2006) (denying damages claim not "logically and reasonably related to the harm").

Regardless, the court also addressed Plaintiff's proposed focus and found that "the directors who approved Brannon's appointment…did not intend to violate the Qualification Provision" and "subjectively believed they were acting Regency's best interests when they appointed Brannon…."[139]

2. The court appropriately found that Defendants had not acted with bad faith, fraud or willful misconduct.

The court's §7.8(a) factual findings were not clearly erroneous. Plaintiff asked the court to find that the four Regency directors who approved Brannon's appointment knew he was still on Sunoco's board when counsel asked them on January 17 to execute a written consent appointing Brannon to the Committee.

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[138] *See also In re Atlas Energy Res. LLC*, 2010 WL 4273122, at *14-15 (Del. Ch. Oct. 28, 2010) (alleging controller interfered with directors' independence was insufficient to show bad faith absent allegations the interference caused directors "to agree to a merger they subjectively believed was not in [the partnership's] best interest").

[139] Op.:108.

Plaintiff points to no evidence establishing such knowledge (let alone clear error), instead citing testimony that the directors knew Brannon resigned *around this time*.[140] The court found, as "directors on the Board at the time testified, [and] as would be entirely logical,… they had or would have relied on Regency's counsel to vet Brannon's qualifications" and to circulate the written consent for signatures only if Brannon met the legal eligibility requirements.[141] While Plaintiff characterizes this inference as "not[] logical,"[142] it is unsurprising for directors to rely in good faith on counsel for the logistics and requirements of committee formation.[143] And it was not clear error for the court to find they did so here.[144]

"[T]he context of Brannon's appointment"—which Plaintiff entirely ignores—"is telling."[145] Brannon joined the Board and Committee after Regency's

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[140] OB:40-43.

[141] Op.:107 & n.441; A3214[291:17-292:14]; A3115[290:25-291:6]; A1564[1377:20]-A1565[1378:3]; A2932[149:8]-A2933[150:1].

[142] OB:40.

[143] *See Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2018 WL 6311829, at *38 (Del. Ch. Dec. 3, 2018) (finding directors were "entitled to rely on their counsel" regarding diligence issues).

[144] Similarly, though the court found "Brannon knew during the Merger negotiations he was violating the provision" and chose "not to reach out to the Sunoco board until after the Merger was announced," the court recognized "there is no evidence suggesting [in-house counsel] had an ill-motive" and "it is understandable [Brannon] would not disregard [counsel's] request to refrain from contacting the Sunoco board about his resignation until it was announced publicly in order to prevent leaks." Op.:112-13. Further, Plaintiff does not appeal the court's determination that an entity's mental state under §7.8(a) "turn[s] on the state of mind of a majority of directors who voted to approve the challenged action." Op.:96-97.

[145] Op.:103.

counsel began vetting his independence in December 2014 when Gray accepted new employment that compromised his Committee eligibility.[146] "Given that context, it is illogical that the Board, having just accepted Gray's resignation to ensure compliance with [LPA] provisions, immediately would turn around and *intentionally* flout those provisions in connection with Brannon's appointment."[147]

Further, even if the Board undisputedly knew Brannon was a Sunoco director on January 17, it would not follow that the Board acted with *scienter* in appointing him to the Committee or publishing the Proxy. The court found that Brannon "submitted a formal resignation letter on January 20, before any substantive negotiations concerning the Merger had begun."[148] It would not be bad faith for a director to believe this was sufficient to resolve any conflict—particularly given the aforementioned context and directors' reliance on counsel. Indeed, in an analogous context, deficiencies in invoking *MFW* can be cured—even after the controller sends an initial offer letter and the controlled company forms a conflicts committee—by correcting the deficiencies "before any economic negotiations commence." *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 756 (Del. 2018); *Swomley v. Schlecht*, 2014 WL 4470947 (Del. Ch. Aug. 27, 2014), *aff'd*, 128 A.3d 992 (Del. 2015) (TABLE).

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[146] Op.:103-05.
[147] Op.:104.
[148] Op.:112-13.

Plaintiff also argues that Defendants are not exculpated because the Board knew of Brannon's and Bryant's personal and professional histories with Warren.[149] But as the court found, these connections were "too far removed" and too "limited" to disqualify them.[150] Thus, they cannot be a basis for finding bad faith.

Because the Proxy's only inaccuracy concerns Brannon's eligibility, the Board's lack of scienter regarding Brannon's eligibility is likewise dispositive of Plaintiff's Proxy argument. The court correctly found there was "no evidence that [Bradley]…was aware [the Proxy] contained the two false statements."[151]

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[149] OB:40.
[150] Op.:77-79.
[151] Op.:109.

III. The Merger caused no damages.

A. Question Presented

Did the court abuse its discretion in rejecting Plaintiff's (1) "unreliable" and "illogical" damages model that "equate[d] two different standards of value" without any principled basis, and (2) "alternative 'damages' theory" (that was likewise "plainly unsound" and "unreliable"), which Plaintiff "advanced for the first time in his post-trial brief"?[152]

B. Scope of Review

Although Plaintiff requests *de novo* review,[153] the court's fashioning of remedies, determination that Plaintiff's primary damages model was unreliable, and finding that Plaintiff's "alternative" damages model was untimely are reviewed for abuse of discretion. *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015); *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 499 (Del. 2001).

C. Merits of the Argument

1. The court correctly rejected Plaintiff's apples-to-oranges damages model as unsound and illogical.

Plaintiff presented one damages framework at trial: the *DDM value* of a standalone Regency unit, minus the *market value* of the ETP units received in the Merger.[154] Plaintiff's damages expert, James Canessa, acknowledged this apples-

[152] Op.:114, 124-25, 127.
[153] OB:44.
[154] Op.:114-15.

to-oranges comparison was the only way Plaintiff could show damages.[155] Canessa's report did not attempt to justify this inconsistent approach. After explaining at length why he eschewed Regency's market price, his report without comment simply relied on ETP's closing-date market price to value the Merger consideration.[156]

When confronted with this inconsistency, Canessa provided shifting and unsound explanations. But as Canessa ultimately conceded, his reasons for disregarding Regency's market price also apply to ETP, and his reasons for disregarding ETP's DDM value also apply to Regency.

Canessa first claimed that the mere presence of a controller (i.e., ETE) created a "value overhang" that justified disregarding Regency's market price,[157] which would indisputably necessitate likewise ignoring ETP's market price.[158] Canessa also claimed there was no need to calculate a DDM value of ETP units because they were publicly traded and had a "known market value," and any ETP DDM value was "fictitious" because nobody can sell units for that price.[159] Of course, Regency

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[155] Op.:117-18 (A1309[363-64]).
[156] A1311[372:11-14].
[157] B2602[151:16-153:3].
[158] A1327[435:16-18]; B2617[211:8-14].
[159] A1276[236:13-22]; A1316[391:13-16].

units were also publicly traded, had a "known market value," and could not be sold for their DDM value.[160]

Canessa next sought to justify his inconsistent methodology by arguing that Regency's market price reflected a unique "valuation overhang" because ETE had a "financial incentive to favor ETP over Regency" due to ETP's higher IDR splits.[161] The court rightly rejected this theory because—unbeknownst to Canessa, who had not bothered to analyze or attempt to measure this issue[162]—"Regency grew through acquisitions at a 'slightly faster' rate than ETP during the three-year period preceding the Merger," including acquisitions facilitated by ETE's financial support.[163] The court also found (as Canessa conceded): "the general partner powers, SEC risk disclosures regarding conflicts, and analyst commentary regarding ETE control"—which Canessa initially invoked to justify disregarding Regency's market price—"are substantively the same for both Regency and ETP."[164] In short, Plaintiff offered "no basis to conclude that [any valuation overhang] affected Regency differently than ETP."[165]

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[160] A1309[364:14-19]; A1316[392:2-24].

[161] Op.:118-19.

[162] A1324[422:12-19].

[163] Op.:119. The court also cited analyst reports showing ETE's support of Regency's growth. *Id.* at 119-20; e.g. B1239.

[164] Op.:120; B2617[211:8-14]; B2618[215:6-24, 217:14-19]; A1279[246:22-247:17].

[165] Op.:120.

Remarkably, Plaintiff does not even mention any of the grounds he advanced at trial to distinguish Regency and ETP for valuation purposes, nor does he appeal the court's findings on this topic. This is fatal to his appeal because even if this Court endorses Plaintiff's preferred legal standard, there still must be a *basis* for valuing two companies in a stock-for-stock merger using different valuation techniques. *See Theriault*, 51 A.3d at 1246-48 (affirming the trial court's rejection of a "relative valuation"—*i.e.*, "apples-to-apples"—methodology where "the Court of Chancery carefully explained its factual findings that the data inputs [used] in the Defendants' relative valuation model for Minera were unreliable"). It is unappealed law-of-the-case that Plaintiff provided no such basis here.

2. The court applied the correct legal standard in rejecting Plaintiff's apples-to-oranges damages model.

Because Canessa now-undisputedly failed to provide "support for drawing a distinction between Regency and ETP," the court correctly concluded that Canessa's methodology was "illogical and at odds with well-established Delaware precedent rejecting similar[ly]" flawed methodologies.[166] Beginning with this Court's decision in *Sterling v. Mayflower Hotel Corp.*, a line of Delaware cases has held that it is "on its face…unsound" and "manifestly…unjustifiable" to manufacture damages in stock-for-stock merger challenges through "attempt[ing] to equate two different

[166] Op.:120.

standards of value" without a principled basis. 93 A.2d 107, 111-13 (Del. 1952) (rejecting comparing acquiror's market value to target's liquidating value); *Rosenblatt v. Getty Oil Co.*, 1983 WL 8936, at *26 (Del. Ch. Sept. 19, 1983) (rejecting comparing acquiror's market value to target's asset value), *aff'd*, 493 A.2d 929 (Del. 1985); *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 509 (Del. Ch. 1990) (rejecting "apples to oranges" damages model that compared "[target's] book value to [acquiror's] market price, rather than valuing [acquiror's] and [target's] shares in the same manner and then comparing those values");[167] *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *36 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003) (rejecting "apples to oranges" damages model that did not value acquiror and target in consistent manner).

On appeal, Plaintiff argues—for the first time, despite addressing these same cases below—that there is a critical distinction between contract-based "expectation damages" and "tort damages…imported from breach of fiduciary duty cases."[168] This newfound contract-versus-tort argument is puzzling because, as the court noted,

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[167] Plaintiff misreads *Citron*, which explained that a market value falling within a financial advisor's DCF range was "pertinent insofar as it establishe[d]" the advisor's thoroughness, and then rejected the very tactic Plaintiff here claims was "tacitly endorsed"—valuing the target and acquiror using different methods. 584 A.2d at 507-09; OB:47 & n.143.

[168] OB:44.

"Plaintiff relie[d] essentially on one case" to support his damages methodology: *Southern Peru*—itself a fiduciary-duty case.[169]

On appeal, Plaintiff again relies heavily on *Southern Peru*, which affirmed the use of different valuation techniques in a stock-for-stock merger.[170] However, the court here did not hold that applying different methodologies is categorically impermissible, but instead found that it was not justified under these circumstances because Canessa "failed to provide a valid rationale."[171] Plaintiff does not grapple with the court's two-page explanation that *Southern Peru* is "readily distinguishable," including that (i) "Regency and ETP were both publicly traded in efficient markets," and (ii) there is no evidence the Committee's financial advisor "manipulated any of its valuation analyses or that the Conflicts Committee eschewed market evidence of Regency's value in favor of a lower valuation."[172] Thus, the court did not impose an "analytical straightjacket"[173] by following the Delaware cases rejecting the self-serving and unprincipled mixing of valuation methodologies.

While hinging his damages appeal on a purported distinction between contract and breach-of-duty damages principles, Plaintiff never explains what that distinction is or why it would affect the outcome. The *Sterling* line of cases, *Southern Peru* and

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[169] Op.:122; *see also* A1044; A1846-47.
[170] OB:47.
[171] Op.:115, 120, 124.
[172] Op.:123-24.
[173] OB:46-47.

this court's analysis reflect Plaintiff's "but for the breach"[174] contract theory by evaluating "damages based on the difference in value between what was paid (the 'give') and the value of what was received (the 'get')." *Theriault*, 51 A.3d at 1252.[175] Moreover, the *Sterling* line of cases are particularly applicable because they addressed whether mergers satisfied entire-fairness review, which (as Plaintiff argued and the court explained) is "akin" to the contractual standard applicable here (§7.9(a)(iv)).[176] But to the extent these standards differ, that worked to Plaintiff's *advantage* because "[c]ourts have traditionally required greater certainty in the proof of damages for breach of contract than in the proof of damages for a tort," Restatement (Second) of Contracts § 352 cmt. A (Am. L. Inst. 1981); *S. Peru*, 52 A.3d at 814 (courts have "broad discretion to fashion…relief" in breach-of-duty cases).

Furthermore, Plaintiff's soundbites from inapposite case law regarding general breach-of-contract damages principles do not support his "unsound" methodology.[177] *El Paso* involved an MLP's purchase of assets *for cash*, so it is

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[174] OB:44.

[175] *See also Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 948513, at *18 (Del. Ch. Feb. 27, 2020) ("Both contract and tort law thus conceive of damages as the pecuniary consequences of the breach or tort…Those damages, in turn, must represent the difference between what the Plaintiffs expected [they would receive]—and what they got….").

[176] A1679; OB:46 n.142; Op.:68.

[177] OB:45.

irrelevant to damages in stock-for-stock mergers.[178] *Genencor* says nothing about valuation or damages.[179] *Siga Technologies* likewise says nothing about valuation and did not concern a stock-for-stock merger.[180] Nor can Plaintiff salvage his damages framework by invoking the "wrongdoer rule" and arguing that "doubts about the extent of damages are generally resolved against the breaching party."[181] Those principles concern the threshold for establishing the damages *amount* or the likelihood of future events materializing;[182] they are not license to manufacture damages through an unsound *methodology*. The court rejected Plaintiff's damages model as methodologically unsound, not as too factually uncertain.[183]

Despite Plaintiff's attempts to separate the court's fair-and-reasonable and damages findings, they are intertwined.[184] As Plaintiff recognizes, contract damages are "measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract."[185] Here, the General Partner

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[178] *In re El Paso Pipeline P'rs*, 2015 WL 1815846, at *9, *12 (Del. Ch. Apr. 20, 2015).
[179] *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000).
[180] *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1110 (Del. 2015).
[181] OB:45-46 (quoting *Siga Techs.*, 132 A.3d at 1130-31). Delaware courts have applied this same principle in tort cases. *See, e.g., Beard Rsch., Inc. v. Kates,* 8 A.3d 573, 613 (Del. Ch. 2010), *aff'd sub nom. ASDI, Inc. v. Beard Rsch., Inc.,* 11 A.3d 749 (Del. 2010).
[182] *Siga Techs.*, 132 A.3d at 1130-36.
[183] Op.:119-20, 124.
[184] Op.:70-94 (noting fairness of Merger "confirmed" by Plaintiff's illogical damages framework).
[185] OB:45.

has performed the LPA if it enters into a fair and reasonable transaction. *Supra* §I.C.1. Plaintiff similarly purports to seek damages "putting [him] in the position it would have been but for the breach."[186] The court correctly found that "but for" the Merger, Plaintiff's standalone position would be *worse*.[187] Plaintiff's use of ETP's market value also conflicts with the fact that he "did not sell" his ETP units because of their "growth of distribution."[188]

Lastly, Plaintiff's unprincipled damages framework, if accepted, would have unsettling implications for merger litigation by allowing stockholders on either side of a stock-for-stock merger to manufacture damages by mixing methodologies in whichever direction undervalued their company's stock. If a Regency unitholder can advance an apples-to-oranges methodology, then an ETP unitholder could advance an oranges-to-apples methodology by comparing Regency's market price to ETP's DDM value; under that comparison, ETP unitholders were harmed by *overpaying* by $7.49/unit.[189] This would lead to the absurd result that both sides of a stock-for-stock merger could be undervalued—and thus, harmed by a merger.

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[186] OB:44.
[187] Op.:115-18.
[188] B2431[109:25]-B2432[110:20].
[189] *See* Op.:118.

3. Plaintiff's post-trial dilution damages theory is waived and fatally flawed.

Tacitly conceding that Canessa's apples-to-oranges theory is unsound, Plaintiff "presented for the first time in its post-trial brief an alternative 'damages' theory" based on his industry expert Matthew O'Loughlin's calculation of the difference in projected 2015-2019 distributions between Regency and pro-forma ETP (discounted to present value for the first time in the post-trial brief using pro-forma ETP's cost of capital).[190] O'Loughlin was not identified as a damages expert and testified that his dilution calculation was "not providing an amount by which [he] believe[s] the Court should enter judgment."[191] Plaintiff's post-trial brief stopped short of expressly asserting it as a damages amount,[192] and at post-trial argument Plaintiff stated "[i]t is not an alternative damages methodology."[193]

The court did not abuse its discretion in finding that this theory was "not fairly raised" and therefore waived.[194] *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *16, *21 (Del. Ch. Dec. 4, 2013) (disregarding "new damages theory" initially raised in post-trial brief "[a]fter the viability of [earlier] theory was undercut at trial"); *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at *16 (Del.

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[190] Op.:125.
[191] Op.:126; A1269[208:3-11].
[192] A1704-05.
[193] A2184[160:8-21].
[194] Op.:126-27.

Ch. May 23, 2008). Plaintiff's dilatory tactics deprived Defendants of the opportunity to offer rebuttal testimony or question O'Loughlin about this calculation's use as a damages figure.[195] That the "inputs used for the mathematical calculation" were "part of the record" does not mean that it was properly raised.[196] Otherwise litigants could indiscriminately add data to the record and reveal their damages calculations only post-trial.

Plaintiff's alternative theory also "suffers at least two obvious deficiencies" that, apart from the waiver, "convince[d] the [C]ourt it is unreliable and must be rejected," neither of which Plaintiff appeals.[197] First, it "does not take into account the 15% ($3.14/unit) premium" based on the companies' last unaffected market prices, "which substantially exceeds the $1.05/unit in damages that Plaintiff projects."[198] Second, as O'Loughlin acknowledged, the dilution calculation assumes that Regency's and pro-forma ETP's distributions were "equally likely to be achieved."[199] But Regency's projected distributions were far riskier than ETP's, as reflected in Regency's higher cost of capital,[200] and "the historic decline in energy

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[195] Op.:126-27.
[196] OB:49.
[197] Op.:127.
[198] Op.:128.
[199] Op.:127 (A1269[207:4-18]).
[200] Op.:72 n.308; Op.:93; A1747; A1771; A1315[387:19-388:17] (Regency's higher distribution yield "reflects a perception of more risk"); A1402[734:22]-A1403[736:20].

prices…that impacted ETP and Regency in dramatically different ways."[201] By discounting ETP and Regency distributions using the same cost of capital, Plaintiff's calculation "fails to account for their differing risk," which is "plainly unsound."[202] *El Paso*, 2015 WL 1815846, at *26 (explaining "an accurate valuation…requires an assessment of the reliability of…future cash flows," and rejecting an "expert [who] did not account for any risk to [the company's] cash flows"). Had Plaintiff applied Regency's and pro-forma ETP's distinct costs of capital, he would have been performing the DDM-to-DDM comparison that Canessa so conspicuously avoided, under which (as Canessa admitted[203]) there are no damages because the risk-adjusted value of pro-forma ETP's projected distributions *exceeded* Regency's.

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[201] Op.:127.
[202] Op.:127.
[203] Op.:117-18; A1309[363:8-364:2].

IV. Plaintiff's tortious interference claim fails.

A. Question Presented

Did the court err in dismissing Plaintiff's tortious interference claims against ETE and ETP due to Plaintiff's failure to adequately allege they had the requisite mental state or committed intentional acts of interference?

B. Scope of Review

This Court reviews a motion to dismiss decision *de novo* but need not "credit conclusory allegations [unsupported] by specific facts." *K-Sea Transp*., 67 A.3d at 359-60.

C. Merits of the Argument

Given the court's findings that the Merger was "fair and reasonable" to Regency and therefore did not breach the LPA, and that any breach resulted in no damages, Plaintiff's tortious interference claims must also fail. A "claim of tortious interference with a contractual right requires, *inter alia*…a breach of that contract" and damages.[204] Thus, whether Plaintiff adequately alleged *scienter* and improper interference with the LPA (two other elements of this claim) is irrelevant unless Plaintiff prevails on all three prior appellate issues. After having failed at trial to show that the Merger breached the LPA or caused damages, Plaintiff cannot now

[204] *Goldman v. Pogo.com, Inc*., 2002 WL 1358760, at *8 (Del. Ch. June 14, 2002).

revive his lawsuit through add-on defendants under a deficient theory that it scarcely briefed here or below.

Moreover, the court properly dismissed Plaintiff's tortious interference claim,[205] which requires allegations that each defendant committed "an intentional act that is a significant factor in causing the breach of such contract…."[206] "'[T]here can be no non-contractual liability to [an] affiliated corporation' for tortious interference unless plaintiffs plead and prove that…the Affiliates and Parents interfered 'not to achieve permissible financial goals but sought maliciously or in bad faith to injure plaintiffs.'"[207]

Plaintiff cites only five paragraphs in his Complaint to support his tortious interference claim:[208]

- ¶4: ETE and ETP "implemented a plan to use their control over Regency" to acquire it "at an unfair price."
- ¶5: ETE and ETP "knew that Brannon was a director of…Sunoco" and was therefore ineligible for the Committee.
- ¶8: *Regency's Board* "knew that Brannon was beholden to ETE and ETP."
- ¶31: two Regency directors "were also directors of ETE."

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[205] B0013-14.
[206] *Goldman*, 2002 WL 1358760, at *8.
[207] *Wallace ex rel. Cencom Cable Income P'rs II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1183 (Del. Ch. 1999).
[208] OB:51 (citing A96-97 ¶¶4, 5, 8; A107-08 ¶31; A158-59 ¶182).

- ¶182: ETP "caused Regency GP LLC to enter into the Merger agreement" and "knew" Brannon was ineligible.

Taken as a whole, Plaintiff's allegations fall far short. ETP is not alleged to have controlled Regency prior to the Merger or to have done anything other than negotiate at arm's-length,[209] which cannot support a tortious interference claim.[210] While Plaintiff alleges that ETE controlled Regency, he does not allege that ETE used that control in an "intentional act of interference." For instance, the Complaint does not mention the two overlapping ETE/Regency directors other than in the section introducing the parties. And allegations that ETE and ETP (the entities, not any individuals) "knew" that Brannon was ineligible are insufficient to establish any culpable mental state,[211] let alone an act of interference.

Lastly, Plaintiff cannot use a "tortious interference" claim to sidestep "aiding and abetting" authorities explaining that when MLP unitholders accept "a purely contractual relationship," rather than fiduciary duty governance standards, "they have chosen to limit themselves to pursuing contractual remedies against their

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[209] *See* A116-17 ¶¶46-48, A145-46 ¶¶131-36.
[210] *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001).
[211] *See NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *28 (Del. Ch. Nov. 17, 2014).

contractual counterparties."[212] This Court should apply that logic to Plaintiff's tortious interference claim, which recycles his aiding and abetting arguments.[213]

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[212] *El Paso*, 113 A.3d at 193-94; *Gerber v. EPE Hldgs., LLC*, 2013 WL 209658, at *11 (Del. Ch. Jan. 18, 2013).

CONCLUSION

For the foregoing reasons, the court's judgment should be affirmed.

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CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, do hereby certify that on June 10, 2021, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

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