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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ENERGY TRANSFER, LP, et al., Defendants and Counterclaim Plaintiffs Below-Appellants, v. THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant Below-Appellee.	No. 391, 2022 Court below: Court of Chancery of the State of Delaware C.A. Nos. 12168-VCG and 12337-VCG PUBLIC VERSION - FILED Jan. 17, 2023

APPELLANTS' CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This case involves the failed merger between two energy conglomerates, Energy Transfer LP, formerly known as Energy Transfer Equity, L.P. ("ETE"), and The Williams Companies, Inc. ("Williams"). The companies signed an Agreement and Plan of Merger ("Merger Agreement" or "Agreement") on September 28, 2015, and they set June 28, 2016, as the closing date for the multi-billion dollar deal ("Merger"). Under the Agreement, if the deal fell through in the intervening nine months, each party could owe the other a termination fee under certain circumstances. If there was an adverse change in Williams' board of directors' recommendation in favor of the Merger—*i.e.*, if Williams stopped supporting the deal—then Williams would owe ETE $1.48 billion. Conversely, if ETE materially breached certain covenants and representations, then ETE would owe Williams $410 million.

Early in the nine months between agreement and closing, the energy market collapsed. Forces at the top of Williams, including Williams' CEO Alan Armstrong and board members who opposed the deal all along, viewed these adverse market conditions as an opportunity to stymie the deal and wring money from ETE—and took swift action toward those ends. Armstrong began a covert and overt campaign to scuttle the Merger, which he (rightly) worried would cost him his CEO post. According to a fellow Williams director, Armstrong "outright attempt[ed] to sabotage the transaction" from the start, "working exclusively on finding ways to break the deal instead of ways to complete the deal."[1] He leaked material non-public information critical of ETE and the Merger, worked hand-in-glove with a former Williams executive and current dissident shareholder to put together a lawsuit seeking to block the Merger, and lobbied Williams board members to stop thinking about the Merger Agreement as a contractual obligation to be honored but instead as an asset that allowed Williams to extract a walkaway fee from ETE. Nor was Armstrong alone at Williams in working to undermine the deal. The company itself sued ETE's Chairman Kelcy Warren—slated to head the combined post-merger entity—falsely asserting that, if the Merger went through, Williams' shareholders would find themselves "controlled" by a "malicious" leader who had "exploited" his position at ETE for personal gain.[2]

None of this was remotely consistent with Williams' obligations under the Agreement. The Agreement not only required the Williams board to "declar[e] that it is in the best interests of the stockholders of the Company that the Company enter into this Agreement and consummate the Merger … on the terms and subject to the conditions set forth herein" and "recommend[] that [Williams'] stockholders …

[1] A0847.

[2] A0989-90, A1010.

adopt this Agreement"[3]—which the Agreement collectively dubbed the "Company Board Recommendation"—but also obligated Williams to toe that line until closing. To keep the Williams board onside during the critical nine months between signing and closing, the consequences of wavering support for the Merger were steep: If Williams publicly or privately modified or qualified its pro-merger recommendation in any way, then it would owe ETE a $1.48-billion breakup fee.

Williams' repeated public efforts to undermine the deal had their intended effect, and ETE not surprisingly sought to recover this breakup fee. ETE pointed to the numerous instances of forbidden actions by Williams and its board. But the Chancery Court brushed all of these well-pleaded allegations aside, concluding that the only way the Williams board could trigger the breakup fee was if it ***formally*** withdrew ***non-public*** board resolutions in favor of the deal, and, accordingly, dismissing ETE's counterclaim at the pleadings stage. That conclusion defied the clear text of the Agreement and common sense. The whole point of the breakup provision was to ensure that Williams and its fractured board would ***publicly*** support the deal during the critical nine months before closing, not just that Williams would agree to refrain from formally reconsidering its ***non-public*** board resolutions. Yet under the court's holding, Williams could publicly denounce the Merger (and even

[3] A0434 (§3.01(d)). References to "§[•]" are to the Merger Agreement.

tell shareholders to vote against it) so long as the board did not also pass a formal, non-public resolution to that effect. That is decidedly not what the parties agreed to.

That erroneous threshold decision skewed the next six years of this litigation, as it prevented ETE from developing further evidence showing the true extent of Williams' departures from its obligations under the Agreement. But that was hardly the only error below, as the Chancery Court erred multiple times in awarding Williams the $410-million termination fee. To recover that fee, Williams needed to show, *inter alia*, that it did not materially breach its own contractual obligations. But the record confirmed the opposite. What is more, the court clearly erred in concluding that ETE breached the Merger Agreement by doing something—issuing equity securities to ensure the financial health of the post-merger entity—that the Merger Agreement explicitly and unambiguously permitted ETE to do.

All those clear legal errors necessitate reversal and obviate the need for this Court to reach the issue of Williams' unprecedented attorneys' fee award. But that award is unsustainable in all events. The parties agreed to a standard fee-shifting provision employing standard language that had been uniformly construed to allow only the recovery of the reasonable-fees-reasonable-hours lodestar amount. Interpreting that standard language to allow Williams to foist the terms of its contingency-fee arrangement—adopted mid-litigation—on ETE defies the parties' expectations and sound public policy. A party can pay its lawyers whatever it likes, but a reasonable-attorneys'-fee-shifting provision cannot be construed to shift nearly $40 million in fees above and beyond reasonable rates for reasonable hours of work.

SUMMARY OF ARGUMENT

I. The Chancery Court erred in dismissing ETE's counterclaim that Williams impermissibly modified its pro-Merger recommendation. The Merger Agreement could hardly be clearer: "Neither the [Williams] Board … nor any committee thereof shall … withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]), or publicly propose to withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]), the Company Board Recommendation"[4]; any such "adverse" "modif[ication] or qualif[ication]" of the Company Board Recommendation is a "Company Adverse Recommendation Change"[5]; and if ETE were to "terminate[]" the Agreement "at any time prior to [closing] … in the event that a Company Adverse Recommendation Change shall have occurred,"[6] then "[Williams] shall pay [ETE] … an aggregate fee equal to $1.48 billion."[7]

The text and structure of the Agreement make clear that ***any*** adverse qualification of the Williams board's resolutions in favor of the Agreement—not just a formal withdrawal—put Williams on the hook for the $1.48-billion breakup fee. The court below nonetheless misconstrued §4.02 to require that Williams act

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[4] A0464-65 (§4.02(d)). Unless otherwise noted, all emphases are added.

[5] *Id.*

[6] A0479-80 (§7.01(e)(i)).

[7] A0474 (§5.06(d)(iii)).

"***formally***" through "resolutions"[8]—and because ETE's "Counterclaim Complaint" did not allege that the Williams board "ever ***formally*** modified … the [Company Board] Recommendation,"[9] the court dismissed ETE's counterclaim. That atextual conclusion—supported by just two pages of analysis that did not even purport to grapple with the text or structure of the Merger Agreement—was clear reversible error that skewed the entire course of this litigation.

II. Under the terms of the Agreement, Williams was obligated to, among other things, (1) use reasonable best efforts to consummate the Merger, (2) operate its business in the ordinary course, and (3) "cooperate with [ETE] and use its … reasonable best efforts to contest and resist any [Merger-related] litigation."[10] Led by its CEO and several anti-Merger directors, Williams did exactly the opposite: It attempted to thwart the Merger by covertly assisting a stockholder lawsuit seeking to enjoin the Merger, funneling information to journalists and public opponents, filing a lawsuit leveling salacious but false charges against ETE's Chairman and would-be CEO of the merged entity, and trying to extract a break-up fee. Indeed, Armstrong "attempt[ed] to sabotage the transaction" from the very start, "working exclusively on finding ways to break the deal instead of ways to complete the

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[8] Ex. A, Motion to Dismiss Memorandum Opinion ("MTD.Op.") 17.

[9] MTD.Op.18.

[10] A0456 (§4.01(a)), A0468 (§5.03(a)).

deal."[11] None of this was consistent with Williams' commitments in the Merger Agreement. The court erred in concluding that Williams was entitled to recover the $410-million WPZ Termination Fee, as a party in material breach cannot recover under a contract.

III. Even if Armstrong's misconduct did not breach the Agreement, the court still erred in ruling that Williams was entitled to the WPZ Termination Fee. The court concluded that, by privately issuing convertible preferred units ("Issuance") to raise capital for closing, ETE breached its securities-related covenants, triggering an obligation to pay the WPZ Termination Fee. But ETE did not breach its obligations. In fact, it complied with the clear terms of the Merger Agreement as modified by the Parent Disclosure Letter ("PDL"), which the Merger Agreement expressly incorporated.

All of the relevant contractual obligations make clear that they are superseded by the PDL, and, specifically, PDL §4.01(b). That PDL provision explicitly permitted ***ETE*** to "make issuances of equity securities with a value of up to $1.0 billion in the aggregate."[12] ETE did just that. The court nonetheless held that ETE's compliance with that provision was only good for purposes of a single operating covenant. The court viewed the fact that the PDL's $1-billion issuance exception

[11] A0847.

[12] A0413 (§4.01(b)(v)(1)).

comes under a header titled "Section 4.01(b)(v)" to mean that it only provides an exception to the covenant in §4.01(b)(v) of the Agreement. But the parties explicitly agreed that headings are for "reference purposes only" and should "not affect ***in any way the meaning or interpretation***" of the Merger Agreement or PDL.[13] The Chancery Court's contrary decision cannot be squared with the text.

IV. Finally, the court erred in interpreting Merger Agreement §5.06(g) to allow Williams to shift a contingency-fee award that dwarfed its lodestar amount. Section 5.06(g) permits Williams to recover "reasonable attorneys' fees" if it prevails in seeking the WPZ Termination Fee. When the parties signed the Merger Agreement in September 2015, ***every*** Delaware authority in existence interpreted such provisions to authorize the shifting of reasonable fees calculated on the basis of reasonable hours worked at reasonable rates. The court's contrary decision to award far greater amounts based on a mid-litigation contingency-fee agreement was legal error, as was its decision interpreting §5.06(g) to permit Williams to recover quarterly compound interest, as opposed to simple interest, the ordinary default rule.

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[13] A0488 (§8.04(a)); A0390, (Gen. Term No. 7); Ex. D, Post-Trial Memorandum Opinion ("Op.") 74-75.

STATEMENT OF FACTS

I. Contractual Background

A. ETE and Williams Agree to Merge.

In May of 2015, ETE submitted to the Williams board a formal bid to purchase the company.[14] Not everyone at Williams favored the deal. Indeed, the Williams board preliminarily rejected it in a 6-to-7 "straw poll."[15] The next day, however, two directors who voted "no" in the straw poll changed their votes after internal wrangling, and the board approved the deal, 8-to-5.[16] The parties signed the Merger Agreement two days later, on September 28, 2015.[17]

Under the Agreement, in a series of interdependent transactions, Williams would merge into Energy Transfer Corp LP ("ETC"), a newly created ETE affiliate, with former Williams stockholders receiving consideration consisting of ETC shares, $6.05 billion, and certain contingent consideration rights.[18] ETC would become the managing member of the general partner of ETE.[19]

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[14] Op.6.

[15] Op.20.

[16] *Id.*; A0344; A1458-59:32:24-33:23, A1461-62:35:21-36:1; A1474-76:31:11-33:18.

[17] Op.3.

[18] Op.3, 6.

[19] Op.6.

B. The Merger Agreement and Parent Disclosure Letter.

The Agreement enumerated a number of conditions precedent, all of which needed to be satisfied by and on the closing date of June 28, 2016.[20] For instance, the Merger was conditioned upon the receipt of "a written opinion from Latham & Watkins LLP" that the Merger "should" qualify as a tax-free exchange.[21] The Agreement also contained various operating covenants that required each party to act in certain ways. Under §4.01, each party was obligated to "carry on its business in the ordinary course" between signing and closing.[22] Similarly, under §5.03, each side was obligated to use their "reasonable best efforts" to "do[] all things necessary, proper or advisable to consummate" the Merger, including using "reasonable best efforts to contest and resist any [Merger-related] litigation."[23]

As to ETE in particular, the Agreement further provided that, "[***e***]***xcept as set forth in Section 4.01(b) of the Parent Disclosure Letter***," ETE "shall not":

> (ii) take any action that would result in [ETE] becoming subject to any restriction not in existence on the date [of signing] with respect to the payment of distributions or dividends; [or]
>
> (iii) split, combine or reclassify any of its equity securities or issue or authorize the issuance of any other securities in

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[20] Op.9.

[21] A0477 (§6.01(h)).

[22] A0456 (§4.01(a)) (Williams); A0460 (§4.01(b)) (ETE).

[23] A0468 (§5.03(a)).

> respect of, in lieu of or in substitution for equity securities; [or]
>
> (vi) amend … the organizational documents of [ETE.][24]

These covenants (the "Interim Operating Covenants," or "IOCs") are subject to exceptions identified in the PDL, a separate document incorporated by reference into the Agreement.[25] Under the PDL, ETE "may make issuances of equity securities with a value of up to $1.0 billion in the aggregate."[26] The PDL further provided: "The headings contained in this [PDL] are for reference only and shall not affect in any way the meaning or interpretation of this [PDL]."[27] The Merger Agreement contained substantially similar language.[28]

Central to this litigation and front-and-center to this appeal, the Agreement contemplated two scenarios in which termination fees may be awarded:

1. <u>Williams Adverse Recommendation Change.</u>

If Williams adversely modified its initial recommendation in favor of the Merger, then, upon termination by ETE, Williams would owe ETE a $1.48-billion breakup fee. This arrangement was memorialized in clear and expansive terms.

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[24] A0460-61 (§4.01(b)).

[25] Op.11.

[26] A0413 (§4.01(b)(v)(1)).

[27] A0390 (Gen. Term No. 7).

[28] A0488 (§8.04(a)).

Under §3.01(d), the Williams board was required to "adopt[] resolutions … approving and declaring advisable this Agreement [and] the Merger," "declaring that it is in the best interests of the stockholders of the Company that the Company enter into this Agreement and consummate the Merger," and "recommending that the stockholders of the Company adopt this Agreement."[29] These resolutions were collectively "referred to" as "the 'Company Board Recommendation.'"[30] Under §4.02(d), "[n]either the [Williams] Board … nor any committee thereof shall … withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]) or publicly propose to withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]) the Company Board Recommendation."[31] Section 4.02(d) defined such an "adverse" "modif[ication] or qualif[ication]" as a "Company Adverse Recommendation Change."[32] Section 7.01(e) in turn provided that ETE could "terminate[]" the Agreement "at any time prior to [closing] … in the event that a Company Adverse Recommendation Change shall have occurred."[33] And, finally, §5.06(d) provided

[29] A0434 (§3.01(d)).

[30] *Id.*

[31] A0464 (§4.02(d)).

[32] *Id.*

[33] A0479-80 (§7.01(e)(i)).

that if the "Agreement is terminated by [ETE] pursuant to Section 7.01(e)," then "[Williams] shall pay [ETE] … an aggregate fee equal to $1.48 billion."[34]

The Merger Agreement underscored in multiple places the breadth of this central guarantee that Williams not waver in its support for the deal between signing and closing. For instance, §4.02(d) did not just prohibit "withdraw[ing]" the recommendation, but made clear that any action "***modify*[*ing*] *or qualify*[*ing*]" the recommendation "***in a manner adverse to*** [***ETE***]" would constitute a Company Adverse Recommendation Change. And §4.02(f) expressly provided that the Company Board Recommendation can be modified or qualified through "***any*** … action or statement or disclosure" "to [Williams] stockholders."[35]

2. <u>WPZ Termination Fee.</u>

On the flip side, ETE would owe Williams $410 million if (1) ETE terminated the Merger pursuant to §7.01(b)(i) (for failure to close on time), and (2) "at the time of any such termination," ETE had failed to satisfy the representations condition in §6.03(a) or the covenant condition in §6.03(b).[36] Section 6.03(a) required, *inter alia*, that ETE's "representations and warranties … set forth in Sections 3.02(c)(i)," which related to ETE's existing equity securities, "be true and correct as of the Closing

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[34] A0474 (§5.06(d)(iii)).

[35] A0464-65 (§4.02(f)).

[36] A0474 (§5.06(f)).

Date … except for any immaterial inaccuracies."[37] And §6.03(b) in turn required that ETE "shall have, in all material respects, performed or complied with all obligations required … under this Agreement."[38]

II. Factual Background

A. Williams' CEO Attempts to Undermine the Merger.

Despite being "tasked with executing the Board's directive to close the transaction"[39]—and despite clear contractual language requiring Williams to "use its reasonable best efforts to … assist and cooperate with [ETE] in doing, all things necessary, proper or advisable to consummate" the Merger[40]—Williams' CEO, Alan Armstrong, did exactly the opposite. Armstrong opposed the Merger from the outset.[41] As Williams' CFO conceded at trial, "[t]hroughout th[e] entire post-signing time frame," Armstrong "look[ed] for opportunities to terminate."[42]

Shortly after the Merger's announcement, John Bumgarner, a Williams stockholder and former executive, became convinced that the Merger was ill-

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37 A0478 (§6.03(a)(i)).

38 A0478 (§6.03(b)).

39 Op.44.

40 A0468 (§5.03(a)).

41 A3694-95:599:13-600:1.

42 A3215:120:7-19.

advised, prompting him to embark on a campaign to thwart it.[43] Specifically, "Bumgarner approached Armstrong and threatened litigation regarding the synergies estimates" contained in the press release about the Merger.[44] Rather than quell this campaign—as his duties and the Merger Agreement demanded—Armstrong added fuel to the fire, funneling non-public information to Bumgarner to aid his efforts to block the Merger.

Although Armstrong and Bumgarner rarely met before the Merger,[45] "[f]rom November 2015 through July 2016, Armstrong and Bumgarner met approximately weekly."[46] In an early-November 2015 meeting, Armstrong gave Bumgarner his notes for Williams' draft S-4[47]—which criticized ETE, noted that the Williams board was closely divided in supporting the deal, and contained non-public information about Williams' fairness opinion analyses.[48] Bumgarner then provided nearly identical notes to a Wall Street Journal reporter.[49] A month later, Bumgarner

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[43] A3999:904:12-15.

[44] Op.44.

[45] A4005:910:3-14.

[46] Op.46.

[47] *Compare* A0493-95, *with* A530-36.

[48] A0493-95; A3800:705:5-15, A3807-08:712:22-713:5.

[49] A0530-36; A4022-24:927:1-929:11; A2071-72:137:14-138:24, A2078:144:6-12.

requested Armstrong's "edits and corrections"[50] regarding a document that would ultimately become Bumgarner's federal-court complaint to enjoin the Merger.[51]

Bumgarner and Armstrong continued to exchange information about the potential lawsuit throughout December 2015. On December 17, Bumgarner blind-carbon-copied Armstrong on an email to Bumgarner's attorney, containing non-public information obtained from Armstrong and asking, "[w]hen can we file?"[52] A few days later, Armstrong answered more of Bumgarner's questions regarding the Merger's press release without disclosing his knowledge of Bumgarner's forthcoming suit.[53]

On January 14, 2016, Bumgarner sued Williams and ETE in federal court, alleging securities violations, accusing ETE and Williams of material representations, and seeking to enjoin the Merger.[54] Bumgarner alleged, among other things, that ETE and Williams acted "with the intent and purpose of deceiving" stockholders by disclosing a "materially overstated" $2 billion synergies estimate.[55] Despite having advance notice, Armstrong made no attempt to inform Williams'

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[50] Op.47.

[51] *Id.*

[52] *Id.*

[53] *Id.*; A0598-99.

[54] Op.47.

[55] A0753, A0761.

counsel, the full board, or ETE about Bumgarner's lawsuit.[56] Instead, in advance of the filing, Armstrong repeatedly met with Bumgarner,[57] suggested the claims had "merit,"[58] and informed Bumgarner that Williams' financial advisor assumed only $200 million of synergies—*i.e.*, non-public information that "corroborated" Bumgarner's claims.[59] Armstrong aided Bumgarner's litigation efforts despite Williams' obligation, under the express terms of the Agreement, to "use its … reasonable best efforts to contest and resist any … litigation" "challenging the Merger."[60]

Armstrong continued funneling Bumgarner relevant information even after the lawsuit was filed, all the while concealing his double-dealing.[61] In mid-February 2016, Bumgarner requested non-public information about asset sales and capital

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[56] Op.45; A3372:277:6-19.

[57] Op.46.

[58] A2017:83:9-20, A2090-91:156:23-157:10, A2096:162:6-11, A2102-03:168:2-169:14, A2105-06:171:7-172:1, A2106-07:172:15-173:6, A2112:178:2-16, A2120-21:186:7-187:3, A2136-37:202:13-203:16.

[59] Op.45; A4043:948:14-17.

[60] A0468 (§5.03(a)).

[61] *E.g.*, A0837; A0909-11; A3716-18:621:18-623:17, A3763:668:10-13, A3856:761:5-13, A3864-65:769:8-770:24, A3866-68:771:16-773:2; A3372:277:3-19; A4039-40:944:15-945:9, A4042-43:947:1-948:13.

spending plans,[62] as well as information to "spoon-feed to the analyst community."[63] Realizing that sending the information via email could land him in hot water, Armstrong handwrote responses and delivered them to Bumgarner[64]; the information was then relayed into an anti-Merger analyst report.[65] Armstrong later deleted his entire Gmail account in an (unavailing) effort to avoid detection—despite knowing that he was under three applicable litigation holds.[66]

Bumgarner further sought Armstrong's assistance with a letter to the SEC,[67] aiming to use regulators as a "deal killer hope."[68] The letter questioned whether a board recommendation "at all should be included" in the S-4, and if it were, whether to include a disclaimer notifying stockholders that, "[i]n deciding how much weight to give to the Board's recommendation that you approve the merger, you should note that the merger agreement provides that if the Board recommends otherwise for any

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[62] A0837.

[63] *Id.*

[64] *Id.*; A3864:769:22-24, A3867-68:772:17-773:2.

[65] Op.48; *compare* A0837, *with* A0862-64.

[66] Op.48, 92-93; A1925-26; A3775:680:6-10.

[67] Op.48; A0977-83.

[68] A0591.

reason … then ETE has the right to terminate the agreement and extract a penalty from Williams of $1.48 billion."[69]

In addition to actively assisting Bumgarner's efforts to derail the Merger, Armstrong "work[ed] behind the scenes with [the] dissident directors to fan the deal break flames."[70] For instance, to promote Williams' standalone prospects, he "intentionally" inputted fanciful assumptions into Williams' standalone projections[71] and "pressure[d]" Williams' CFO, Don Chappel, to produce forecasts reflecting "pessimistic … assumptions for ETE."[72] Williams concealed these issues from ETE, failing to produce most of the relevant documents before closing.[73]

B. The Energy Market Deteriorates, and Williams Uses the Downturn to Frustrate the Merger but Collect the WPZ Termination Fee.

As Armstrong worked to scuttle the deal, "commodity prices declined sharply, leading to a deterioration of the energy market."[74] Credit rating agencies were

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[69] A0980.

[70] A0847.

[71] A1909-10:100:17-101:8, A1915-16:280:25-281:22 (Williams director testifying Armstrong was "rigging the forecasts…to lead to an outcome of keeping the company independent"); Op.26.

[72] A3216-17:121:23-122:3; Op.26.

[73] *E.g.*, A0495; A0847; A0887-88; A0892-94; *see also* A0232 (demonstrating Williams' discovery error resulted in the belated production of over sixty thousand documents).

[74] Op.23.

downgrading energy companies;[75] equity values were "down very, very significantly"[76]; and the $6 billion due at closing was going to increase the post-merger entity's leverage "well above an acceptable range," risking a creditworthiness downgrade.[77]

In mid-January 2016, ETE communicated its concerns regarding the combined entity's leverage to Williams.[78] Chappel testified that ETE's concerns were "sincere," as "everyone in the sector had leverage issues," ETE was "at risk of a downgrade," and ETE should "certainly" take steps to "avoid[]" one.[79] The Williams board called a meeting to discuss ETE's concerns—but instead of collaborating with ETE toward a solution, Williams saw an opportunity to seek its own gain. At the meeting, the board "recognized the merger agreement as a valuable asset of the Company and determined that the Company's options are best preserved by the Board communicating to ETE its strong support for the current Merger

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[75] *In re Energy Transfer Equity, L.P. Unitholder Litig.,* 2018 WL 2254706, at *3-4 (Del. Ch. May 17, 2018), *aff'd sub nom. Levine v. Energy Transfer L.P.*, 223 A.3d 97 (Del. 2019) ("Unitholder Litig.").

[76] A3200:105:15-20.

[77] A4748:1653:2-18; A2696-97:10:19-11:24, A2699:13:5-12; Op.22-23.

[78] Op.24-25.

[79] A301-02:106:5-107:1; A3246:151:1-18; A3920:825:17-21.

terms."[80] Thus, Williams issued a press release stating that it was "***unanimously committed*** to completing the transaction with [ETE] per the merger agreement … as expeditiously as possible and delivering the benefits of the transaction to Williams' stockholders."[81]

That was a blatant misrepresentation. The Williams board was never "unanimously committed" to completing the Merger. As two Williams directors admitted, the board's messaging of supposed unanimity was nothing "more [than] trickery."[82] "The unanimous language" was used merely "for the benefit of negotiating tactics," *i.e.*, to try to extract a walkaway payment from ETE if the downturn caused ETE to be unable to pay up.[83] Nor was this idle posturing; in February 2016, the Williams board privately studied how large a walkaway payment it could extract from ETE; Williams' bankers (Barclays and Lazard) presented analyses suggesting a breakup fee between $6 and $11 billion[84]; and Williams' directors continued discussing a potential breakup fee until closing.[85]

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[80] A0766. The board "determined to communicate this position … by a press release to communicate the Board's unanimous commitment to completing the Merger." *Id.*; Op.26-27.

[81] A0768-70; Op.27.

[82] A0840-41; A1068.

[83] A0869.

[84] A0885-86; A0883-84.

[85] A3220-21:125:18-126:12; A0881-82; A0918-76; A1069-128.

C. To Address Post-Merger Leverage Concerns, ETE Issues Equity Securities, as Permitted by the Parent Disclosure Letter; Williams Blocks the Public Offering, Forcing ETE to Pivot.

As a master limited partnership, "ETE distributed all of its available cash to unitholders every quarter," and thus "depended on access to capital markets to fund its growth."[86] "Because credit ratings determine access to credit and the cost of debt, it was particularly important" for ETE to maintain its rating, which "was becoming increasingly difficult by late 2015, when the rating agencies began to express concern about ETE's credit outlook."[87] In early 2016, ETE began evaluating ways to reduce its leverage with the help of outside financial advisers, including Perella Weinberg Partners ("Perella").[88] After exploring various financing options—including selling assets,[89] issuing common units,[90] and cutting distributions ("an option of last resort"),[91] it became clear that the only realistic option was issuing equity securities that raised capital but deferred distributions.[92]

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[86] *Unitholder Litig.,* 2018 WL 2254706, at *23.

[87] *Id.*

[88] Op.28.

[89] *Id.*

[90] *Id.*

[91] Op.28-29.

[92] *See Unitholder Litig.*, 2018 WL 2254706, at *5-6; A0600-04; A4749-51:1654:21-1656:18; A4812:1717:9-18.

ETE and Perella developed the new class of securities, which they planned to offer to all ETE's unitholders (the "Public Offering").[93] The Public Offering was meant to "address potential cash needs (including to help fund the cash consideration payable in the [M]erger)" and "show rating agencies, equity research analysts and investors that [ETE is] proactively managing [its] cash situation"; as a result, ETE viewed it as "part of the financing for the [merger]."[94] ETE previewed the Public Offering for the rating agencies, who were "very positive" about the plan.[95] Williams took a similar view—at least initially. Chappel recognized that the Public Offering would "have a positive impact on [the] leverage issues,"[96] and he wanted Williams to consider doing "something like it" in light of the new economic reality.[97] Williams did so, evaluating a convertible preferred equity offering several times post-signing, recognizing (as ETE had) that such an offering would allow the company "to raise equity capital at [a] lower cost of capital" than a common unit issuance.[98]

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[93] Op.29.

[94] A0846.

[95] *Unitholder Litig.*, 2018 WL 2254706, at *7; Op.29; A0872.

[96] Op.34.

[97] A3207:112:10-24; A0834; A0836.

[98] A0516; A0681.

As required to register the new securities with the SEC, ETE sent a draft S-3 to Williams on February 12, 2016, notifying it of the planned Public Offering and asking for updated financial information to include in the filing.[99] Chappel responded that Williams believed the Public Offering "requires [Williams'] consent" (though none of the agreements mandated such consent) and scheduled a board meeting for February 17 to discuss the issue.[100] Chappel further stated that Williams was "review[ing] potential additional actions" "to strengthen" its "credit profile,"[101] which caused ETE to believe that Williams "would give … consent."[102]

Consistent with that understanding, on February 15, 2016, ETE amended the terms of the convertible preferred units ("CPUs")[103] to "make [them] as marketable as possible."[104] That was because the "biggest challenge" ETE and Perella encountered when designing the security was figuring out how to ensure a sufficient

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[99] Op.32.

[100] *Id.*; A0835; A3207-08:113:17-114:11.

[101] Op.32.

[102] A3535-36:440:3-441:13.

[103] Op.32-33.

[104] A3536-37:441:17-442:11, A3545:450:11-21.

"participation level" to meaningfully lower ETE's leverage.[105] "There was no consideration" of a private offering at this time.[106]

To ETE's surprise,[107] however, on February 17, 2016, the Williams board "decided to deny consent," and instructed its auditors to withhold information necessary for the Public Offering's SEC disclosures.[108] Williams' actions prohibited ETE from completing the Public Offering—the terms of which the Chancery Court determined were "objectively fair and reasonable."[109]

Williams' lack of cooperation forced ETE to pivot to a private offering, which could be executed without Williams' financial information.[110] On March 8, 2016, ETE completed the Issuance, which received positive feedback from rating agencies.[111]

D. The Williams Board Modifies and Qualifies its Recommendation.

The downturn in the energy sector hit Williams particularly hard. At first, Williams shared its dire projections with ETE: From November 2015 until early-

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[105] A4751-53:1656:19-1658:3.

[106] A3237-38:442:12-443:2.

[107] A3535-36:440:5-441:13, A3538-39:443:16-444:3; A3397-98:302:21-303:9.

[108] Op.34; A0844.

[109] *Unitholder Litig.*, 2018 WL 2254706, at *23.

[110] *Unitholder Litig.*, 2018 WL 2254706, at *8; A0867.

[111] *Unitholder Litig.*, 2018 WL 2254706, at *14; A0878-80.

February 2016, Williams repeatedly revised its financial projections downward.[112] But things changed when Williams got wind that ETE was considering issuing new securities. On February 10, 2016, Williams provided ETE with updated base-case projections suggesting that "things were improving."[113] Indeed, although these projections included a downside case, the downside case was presented as a not-anticipated "scenario" analysis.[114]

ETE welcomed these updated projections, as they suggested that the combined post-merger entity would be better positioned than previously apparent. ETE took these revised projections at face value, and when it completed the Issuance, it believed that these base-case projections accurately reflected Williams' outlook.[115] Unfortunately, the numbers did not add up. When ETE asked Williams for updated projections to use in a revised S-4 forecast roughly a month later,[116] Williams became evasive, initially telling ETE it would provide an update, but backtracking within hours.[117] ETE finally received Williams' updated projections

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[112] *Compare* A0557, *with* A0812; A4666-67:1571:6-1572:5.

[113] Op.38-39; A4665-67:1570:21-1572:5; A0812; A3200-01:105:21-106:4; A4879.

[114] Op.39; A0824; A4669-70:1574:16-1575:6, A4727-28:1632:16-1633:3; A3139:44:10-22.

[115] A4727-28:1632:16-1633:3.

[116] A4667:1572:6-20; A0984-85.

[117] A4667:1572:6-20; A0986; A0987-88; A1047-48.

on April 7, 2016, which revealed that Williams' financial position was actually materially worse than ETE had understood,[118] even worse than the ***downside*** projections Williams had provided ETE in February.[119]

Williams' "material" updates "caught everyone off guard," as they "clearly harmed" the combined post-merger entity's ability to "maintain distributions."[120] Compounding the bad news, the estimated merger synergies materially declined. On February 23, 2016, ETE had identified between $195-$879 million in annual synergies, plus additional synergistic opportunities.[121] By March 9, ETE increased its estimate to $403-$889 million.[122] By April, the base-case estimate dropped to $126 million, following diligence by both parties.[123] These events caused ETE to expect post-merger distribution cuts for the first time in April, even with the Issuance.[124] Nevertheless, ETE remained fully committed to the deal.[125]

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[118] Op.39; A1049-50; A1062-63.

[119] Op.39; A3199:104:3-15.

[120] Op.40; A4667-70:1572:24-1575:6, A4726-27:1631:3-1632:8.

[121] Op.40.

[122] *Id.*

[123] *Id.*

[124] A1067; A4662:1567:5-12; A3396:301:14-23; A3533:438:3-18; A2701:101:10-13.

[125] A3394:299:5-9, A3394-95:299:19-300:4, A3477:382:3-10.

The same could not be said for Williams. On March 24, 2016, Armstrong emailed the seven directors who had initially voted against the deal in the straw poll. He forcefully argued against "continuing to press forward" with the Merger, encouraging the recipients (who collectively comprised a majority of the board) not to "hide behind the fact that the shareholders can decide for themselves," and warning against "just hold[ing] the course."[126] The dissenters fully agreed with Armstrong's position.[127] Armstrong's position was not borne out of goodwill toward ETE, but from fear that ***not*** reconsidering, when the board had falsely claimed to be unanimously committed to the deal, could be grounds for a shareholder securities-fraud suit.[128]

It was thus clear, at least internally, by the end of March 2016 that the Williams board was no longer fully committed to the Merger. But acknowledging that reality in public would be a disaster for Williams. As explained above, if the board "rescinded, modified or withdr[ew]" its initial "declar[ation] that it is in the best interests of the stockholders of the Company that the Company enter into this Agreement and consummate the Merger … on the terms and subject to the conditions

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[126] A0916.

[127] A0915.

[128] A0916 ("When it has been put out that we are in unanimous agreement to support the execution of the agreement, some shareholders will clearly rely on this notion.").

set forth [in the Agreement]," then Williams would owe ETE a $1.48-billion breakup fee.[129] Stuck between a rock (a potential shareholder lawsuit) and a hard place (owing a massive breakup fee), Williams tried to find a third way. Instead of formally reconsidering its recommendation in favor of the Merger, the Williams board issued a series of press releases on April 6, April 14, and May 13, 2016, which no longer talked about "completing the transaction," but instead referenced "enforc[ing] its rights under the merger agreement" and "delivering the benefits of the merger agreement" to Williams shareholders[130]—by which it meant extracting a walkaway payment from ETE.

In a far less subtle maneuver, ***Williams filed a lawsuit against ETE's Chairman***, Kelcy Warren, asserting that if Williams' stockholders approved the Merger, they would be "controlled" by a "malicious" leader who had "exploited" his leadership position at ETE.[131] Williams' public pleadings alleged, among other things, that:

> (a) Warren orchestrated [the Issuance] to protect his private financial interests as ETE's largest unitholder.

[129] *See* A0437 (§3.01(d)), A0464 (§4.02(d)), A0473-74 (§5.06(d)(iii)), A0479-80 (§7.01(e)(i)).

[130] A1041; A1056; A1131.

[131] Op.58; A0989-91, A0995, A1010, A1033-34.

> (b) Warren exploited his control of ETE … to protect his own financial interests at the expense of Williams' stockholders and ETE's other common unitholders.
>
> (c) Warren … maliciously orchestrated the [Issuance] with the purpose and effect of siphoning value to himself and away from Williams' stockholders.[132]

These sworn accusations effectively gutted the Company Board Recommendation. It was not just that Williams was leveling salacious accusations against ETE's leadership; they were targeting the person who, under the Agreement's terms, would lead the combined post-merger entity. Indeed, the lawsuit raised supposed red flags ("risks and other countervailing factors") related to Warren's control of the combined enterprise in particular, as disclosed in the Form S-4:

> (a) ETC GP [the general partner of the post-merger entity] will be controlled by Mr. Warren;
>
> (b) Mr. Warren's ownership of a substantial number of ETE common units may influence the actions he takes on behalf of ETC GP and may cause him to favor ETE over ETC in tax allocation or other decisions;
>
> (c) ETC and ETE will be managed at the discretion of Mr. Warren for the foreseeable future and … the success of ETE and ETC will depend in part on how well Mr. Warren manages these businesses; and
>
> (d) the ETC GP Board will not be required to submit matters giving rise to a conflict of interest between ETC,

[132] A0990-91.

> on the one hand, and Mr. Warren and his affiliates, on the other hand.[133]

The press and investors took note of the dissonance in the board's unusual behavior. A portfolio manager commented: "I've never seen anything like this—a board that hates what the management team is doing enough to sue, but still wants to do the deal."[134] Bloomberg also noted the incoherence of Williams' decision to "accus[e] its would be leader of 'maliciously orchestrating' [an allegedly self-dealing transaction]" while simultaneously pressing towards closing.[135]

Williams' scheme finally became transparent in May 2016, when it abandoned its "unanimous" messaging ploy and modified its stockholder recommendation in the latest S-4 filing: "Certain members of the WMB Board voted on September 28, 2015 against entering into the merger agreement and continue as of the date of this proxy statement/prospectus to disagree with the recommendation of a majority of the WMB Board that WMB stockholders adopt the merger agreement."[136] The board had never been unanimous in its commitment to the deal. Rather, as a major Williams investor aptly noted, Williams spent 2016 playing "a

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[133] A0567. The lawsuit constituted yet another public posturing effort, as evidenced by the fact that Williams never refiled after a Texas court dismissed the suit for violating the Merger Agreement's forum selection clause. A1175.

[134] A1045.

[135] A1039-40.

[136] A1174.

dangerous game of chicken"[137]—pushing toward close while blocking ETE's efforts to make the post-closing entity viable, all in hopes that ETE would capitulate.

E. With the Court's Approval, ETE Terminates the Merger.

Because a tax-free Merger was important to both parties, a closing condition required tax counsel at Latham to provide an opinion that "the Contribution and the Parent Class E Issuance should qualify as an exchange to which Section 721(a) of the Code applies" (the "721 Opinion"). After months of effort, however, Latham ultimately concluded that it was "unable to issue the 721 Opinion."[138] Williams sued, seeking specific performance of the Merger Agreement; ETE filed counterclaims.[139] The Chancery Court held a two-day trial in June 2016, and issued a Memorandum Opinion before the Closing Date denying Williams' request to enjoin ETE from terminating the Merger.[140] The court concluded that Latham's inability to issue the 721 Opinion was in good faith, the "record [was] barren of any

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[137] A0771.

[138] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *1, *17 n.130 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017); A4474-79:1379:13-1384:2; A4576-77:1481:21-1482:18; A4246:1151:18-24.

[139] *Williams*, 2016 WL 3576682, at *9.

[140] *Id.* at *21.

indication that the action or inaction of ETE … contributed materially to Latham's inability to issue the 721 Opinion," and thus that ETE was permitted to terminate.[141]

ETE did so on June 29, 2016, asserting both the failure of a condition precedent and the occurrence of a Company Adverse Recommendation Change as bases for terminating the Merger.[142] Williams did not seek stay of the judgment, instead pursuing a non-expedited appeal.[143] This Court affirmed in March 2017.[144]

Following termination, Armstrong and Bumgarner met for celebratory drinks.[145] Bumgarner applauded Armstrong for their "'***team***' efforts during the past 6 months."[146] Armstrong and Bumgarner's frequent meetings then stopped; the Merger was terminated, and Armstrong no longer "had a need to meet with him."[147]

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[141] *Id.* at *16 n.130.

[142] A1537-38.

[143] A1847:10:1-22; *Williams*, 159 A.3d at 265.

[144] *Williams*, 159 A.3d at 275.

[145] A1540.

[146] A1541.

[147] A3773:678:3-20.

ARGUMENT

I. The Court Erred In Dismissing ETE's Counterclaim Alleging That Williams Adversely Modified The Company Board Recommendation.

A. Question Presented

Did the court err in dismissing ETE's counterclaim that Williams breached the Agreement by adversely modifying its Company Board Recommendation? This question was raised below (A1550-59, 1566-96) and considered by the Court of Chancery (MTD.Op.15-19).

B. Scope of Review

The Court reviews de novo decisions made on a motion to dismiss under Chancery Court Rule 12(b)(6).[148]

C. Merits of Argument

Under the terms of the Merger Agreement, both parties were required to satisfy various conditions before closing, lest they risk owing their counterparty a termination fee. Some of these conditions—failure to obtain regulatory approval or failure to secure the consent of Williams' shareholders, for instance—came with relatively small termination fees, reflecting that they were based on factors outside a party's direct control.[149] But the termination fee associated with Williams'

[148] *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 717 (Del. 2020).

[149] *See* A0473 (§5.06(b)), A0479 (§7.01(b)(iii)), A0479-80 (§7.01(c)).

adversely modifying its recommendation in favor of the Merger was different. Given the nine-month lag between agreement and closing and ETE's agreement to outlay more than $6 billion in cash, ETE bore considerable risk, and it was imperative that the support of the Williams board for the deal be unwavering. Consistent with that understanding, the parties agreed that, if the Williams board adversely qualified or modified its support for the deal in any way, then ETE could terminate the Merger, and Williams would owe a breakup penalty of $1.48 billion.

The Merger Agreement memorializes this understanding in clear terms. First, the Williams board was required, in advance of closing, to make four recommendations, initially to be reflected in "resolutions":

> (A) approving and declaring advisable this Agreement, the Merger, and the other Transactions,
>
> (B) declaring that it is in the best interests of the stockholders of the Company that the Company enter into this Agreement and consummate the Merger … on the terms and subject to the conditions set forth herein,
>
> (C) directing that the adoption of this Agreement be submitted to a vote at a meeting of the stockholders of the Company[,] and
>
> (D) recommending that the stockholders of the Company adopt this Agreement.[150]

[150] A0434 (§3.01(d)).

These four actions were defined as the "Company Board Recommendation"; the term "resolution" was specifically ***not*** included in the definition.[151]

Second, under §4.02(d), "[n]either the [Williams] Board … nor any committee thereof shall … withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]), or publicly propose to withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]), the Company Board Recommendation,"[152] and any such "adverse" "modif[ication] or qualif[ication]" of the Company Board Recommendation—not just a formal withdrawal of the resolutions that collectively comprise it—would constitute a "Company Adverse Recommendation Change."[153]

Third, §4.02(f) clarifies that "any disclosure," not just a formal resolution, can violate §4.02(d)(i).[154] Section 4.02(f) provides two narrow circumstances in which an adverse public statement or action is ***not*** a modification or qualification of the Company Board Recommendation.[155] Logically, then, other public statements can constitute a prohibited "Company Adverse Recommendation Change."[156]

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[151] *Id.*

[152] A0464 (§4.02(d)).

[153] *Id.*

[154] A0464-65 (§4.02(f)).

[155] *Id.*

[156] A0464-65 (§4.02(d), (f)).

Fourth, §5.06(d)(iii) and §7.01(e) together provided that, if Williams adversely modified or qualified the Company Board Recommendation, then ETE could terminate the Merger, and Williams "shall pay" ETE "$1.48 billion."[157]

Had the Chancery Court correctly interpreted the Agreement, it would have been compelled to hold that ETE plausibly alleged in its Counterclaim Complaint all the facts necessary to establish its counterclaim. Instead, the court relied on supposed "common sense" by noting that "ETE—not Williams—terminated the Merger upon failure of a condition precedent" and that it would be "passing strange for two parties to a merger agreement to structure the agreement so that a party which desired to exit the agreement could do so, over the other party's objections, and at the same time receive the windfall of a substantial termination fee."[158] But as just explained, ETE terminated the Merger based on ***both*** the failure of a condition precedent ***and*** the occurrence of a Company Adverse Recommendation Change. And it did so for good reason, as Williams' conduct clearly amounted to a Company Adverse Recommendation Change under the plain terms of the Agreement.

The Williams board initially adopted resolutions reflecting the four enumerated recommendations, as required by §3.01(d).[159] From November 24,

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[157] A0473-74 (§5.06(d)(iii)), A0480 (§7.01(e)).

[158] MTD.Op.17.

[159] A1566-67.

2015, through May 4, 2016, Williams presented its "Board Recommendation" to its shareholders via the Form S-4 as "The WMB Board recommends that WMB stockholders vote 'FOR' each of the Proposals."[160] The board told the public that it was "***unanimously*** committed to completing the transaction with [ETE] per the merger agreement … as expeditiously as possible and [to] delivering the benefits of the transaction to Williams' stockholders."[161]

But it later shifted gears substantially. In stark contrast to its prior messages, in the May 16, 2016, Form S-4, Williams stated that "[*c*]***ertain members of the WMB Board*** voted on September 28, 2015 against entering into the merger agreement and ***continue as of the date of this proxy statement/prospectus to disagree with the recommendation of a majority of the WMB Board***."[162] And that was just the beginning of the board's qualification of its recommendation in favor of the Merger. Williams further modified the Company Board Recommendation by (i) publicly denigrating the would-be leaders of the combined enterprise, (ii) publicly admitting that the board was consciously disregarding its duty to obtain fairness opinions supporting the Merger, and (iii) issuing public statements in which

[160] A0566; A1130.

[161] A0768.

[162] A1172.

Williams postured for a walk-away payment.[163] Indeed, on May 4, 2016, Williams significantly modified its recommendation by informing the public that Williams knew its fairness opinions were premised on projected financial information that was no longer valid, would not seek new fairness opinions, and was not relying on a fairness opinion at all.[164] The unmistakable message from the Williams board—which the market and Williams' stockholders received loud and clear—was that Williams had changed its tune vis-à-vis the Merger.

At the pleading stage, ETE's detailed allegations of these significant adverse changes in Williams' public messaging about the Merger were more than just plausible. Indeed, the court did not dispute that ETE had met its pleading burden if something short of a formal resolution were sufficient. The court held only that the lack of ***formal*** action rescinding or qualifying the initial resolutions was dispositive.[165] But that is simply not what the Agreement required ETE to show. Section 4.02(d) expressly provided that the breakup penalty would be triggered if the Williams board, "[o]r any committee thereof," were to "withdraw (or ***modify or qualify in a manner adverse to*** [***ETE***]), ***or publicly propose to*** withdraw (***modify or***

[163] A1566-96.

[164] A1584-89.

[165] MTD.Op.18-19.

qualify in a manner adverse to [***ETE***]), the Company Board Recommendation."[166] And, §4.02(f) made clear that, "***any disclosure*** to [Williams] stockholders," with the exception of (a) "a mere 'stop, look and listen' disclosure in compliance with Rule 14d-9(f) of the Exchange Act" and (b) one necessary to avoid a breach of fiduciary duty, would constitute "a Company Adverse Recommendation Change" "unless the Board of Directors … reaffirm[ed] its recommendation in favor of the Merger in such statement or disclosure."[167] If, as the court below held, Williams could only modify or qualify the Company Board Recommendation via formal board resolutions, then §4.02(f) would be inexplicable and rank surplusage, because public statements could never constitute a Company Adverse Recommendation Change, even outside §4.02(f)'s two narrow exceptions.

It is axiomatic that courts must avoid interpretations that render contractual provisions "mere surplusage."[168] The Chancery Court's construction violates that rule many times over. It also produces absurd results. The evident intent of the Company Board Recommendation provisions was to ensure that Williams and its board would ***publicly*** support the deal during the critical nine-month interregnum between signing and closing given the substantial risks ETE faced, not just that

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[166] A0464 (§4.02(d)).

[167] A0464-65 (§4.02(f)).

[168] *Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019).

Williams would not change its ***non-public*** board resolutions. Yet, under the holding below, Williams could publicly denounce the Merger (and even encourage shareholders to vote against it) so long as the board did not also pass a formal, non-public resolution to that effect.[169] That "sounds absurd, because it is."[170] The decision dismissing ETE's Counterclaim should be reversed.

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[169] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010).

[170] *Sekhar v. United States*, 570 U.S. 729, 738 (2013).

II. Williams Breached The Merger Agreement In Multiple Material Respects, And Thus Is Not Entitled To The WPZ Termination Fee.

A. Question Presented

Did the Chancery Court err in holding that Williams satisfied its best-efforts obligations, where Williams' CEO not only attempted to subvert the Merger at every turn, but intentionally destroyed evidence of his underhanded actions? This question was raised below (A5106-77, A5119-24, A5227-44) and considered by the Court of Chancery (Op.89-91).

B. Scope of Review

This issue involves a mixed question of law and fact. This Court "review[s] questions of law … de novo" and "review[s] a trial judge's factual findings for clear error."[171]

C. Merits of Argument

Even putting aside the Chancery Court's erroneous threshold decision dismissing ETE's Counterclaim, the court erred in awarding Williams the $410-million WPZ Termination Fee. In order for Williams to recover, it needed to show, *inter alia*, that it substantially complied with its own contractual obligations.[172] But

[171] *Osborn*, 991 A.2d at 1158.

[172] *Frunzi v. Paoli Servs., Inc.*, 2012 WL 2691164, at *7 (Del. Super. Ct. July 6, 2012).

the record confirmed the opposite: Williams materially breached the Merger Agreement in several respects. The court erred in holding otherwise.

1. <u>The court erred in concluding that Armstrong's actions did not breach Williams' best-efforts obligations.</u>

The Merger Agreement did not make extraordinary demands of the parties when it came to operating and best-efforts covenants; it simply required each party to "cooperate with [one] other," "use its respective reasonable best efforts to contest and resist" "any … litigation … challenging the Merger," and "carry on its business in the ordinary course."[173] Williams fell far short of that bar. Rather than cooperate with ETE or act as an ordinary business leader, and despite being "tasked with executing the Board's directive to close the transaction,"[174] Williams' CEO Alan Armstrong, in the words of a fellow Williams director, "***outright attempt*[*ed*] *to sabotage the transaction***" from the outset, "working exclusively on finding ways to break the deal instead of ways to complete the deal."[175] In fact, Armstrong colluded with a dissident stockholder and former Williams executive to kill the deal (and position Williams for a potential walkaway payment), ***including via litigation to enjoin the Merger***, and then destroyed the evidence of his malfeasance.

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[173] A0468 (§5.03(a)), A0456 (§4.01(a)).

[174] A3752:657:2-7.

[175] A0847.

To support its finding that Williams did not breach the Merger Agreement, the court relied on two conclusions: (1) Armstrong's purported "inten[t] [was] to assuage Bumgarner's concerns about the synergies estimates, not to thwart the Merger"[176]; and (2) Williams only needed to be in compliance with its efforts obligations at the time of closing.[177] Neither conclusion is sustainable.

a. *The court wrongly concluded that Armstrong did not aid Bumgarner's anti-Merger litigation.*

The evidence that Williams' CEO actively attempted to thwart the Merger is overwhelming, and the trial record is replete with instances of Armstrong assisting Bumgarner with the latter's litigation challenging the Merger.[178] In addition to funneling Bumgarner material non-public information to use in his lawsuit seeking to block the deal, Armstrong colluded with Bumgarner to smear ETE and the Merger in the press. Bumgarner "obtained"[179] Armstrong's notes containing highly critical, non-public information regarding ETE and the Merger,[180] and relayed them to a Wall Street Journal reporter in an effort to stir up anti-Merger press.[181] And while

176 Op.89.

177 Op.90-91.

178 *E.g.*, A568-78; A0584; A0588-89; A0598-99.

179 Op.48.

180 A0493-95.

181 *Compare* A0493-95 (Armstrong's personal notes), *with* A0530-36 (Bumgarner's email to the Wall Street Journal reporter).

Armstrong feigned ignorance in testimony as to how Bumgarner "obtained" these notes, after significant pressure, he ultimately accepted "responsibility" for the fact that Bumgarner got "ahold of th[em]."[182]

Despite all of this evidence (and more, *see* pp.14-19, *supra*), the court held that Armstrong's actions "were intended to assuage Bumgarner's concerns," "not to thwart the Merger," and thus that Williams did not breach its best-efforts obligations.[183] That conclusion is unsustainable.

As an initial matter, the court committed legal error by imposing an intent requirement. It is black-letter law that "proving a breach of contract … does not require scienter."[184] Regardless of his ***intent***, Armstrong's ***actions*** clearly fell well below what the best-efforts and other obligations required of Williams under the Merger Agreement. As Williams has previously conceded when writing about the applicable Merger Agreement provisions in §5.03: "[a] party may not employ a 'clandestine approach' that conceals relevant information from the counter-party."[185] Nonetheless, Armstrong concealed his meetings with Bumgarner, ***and his***

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[182] A3726:631:3-14.

[183] Op.89.

[184] *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *71 n.248 (Del. Ch. Nov. 30, 2020); *see also Williams*, 159 A.3d at 273 ("This language [in §5.03] not only prohibited the parties from preventing the merger, but obligated the parties to take all reasonable actions to complete the merger.").

[185] A1514-15.

knowledge that Bumgarner was planning to file a lawsuit challenging the Merger, from ETE. The fact that a former Williams executive and current shareholder was gearing up to file litigation seeking to enjoin the Merger—and was in possession of non-public information supporting his claim—was plainly "relevant information." And it is not in dispute that Armstrong acted clandestinely here.

Even if intent were relevant to the breach question, the court still erred, because its factual finding regarding Armstrong's intent was clearly wrong.[186] The court ignored a mountain of evidence making clear that Armstrong's chief aim was to torpedo the Merger by whatever means (without triggering Williams' obligation to pay the $1.48-billion fee). In fact, the court explicitly found that ***Armstrong destroyed relevant evidence and lied under oath***.[187] At his June 2016 deposition, Armstrong was asked if he had email exchanges with Bumgarner.[188] He testified, "I don't recall any, no."[189] Two days later, and a week before the 2016 trial between the parties, Armstrong ***permanently deleted his Gmail account*** containing numerous communications with Bumgarner, despite knowing that he was under

[186] *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1231 (Del. 2018).

[187] Op.92-94.

[188] A1316.

[189] *Id.*

three applicable litigation holds.[190] His spoliation came to light a year later, when ETE obtained the Armstrong-Bumgarner documents via a third-party subpoena.[191] At that point, Armstrong claimed that he closed the account due to a "spam attack"—but Williams could not and did not offer any support for that claim at trial.[192] Considering the overwhelming evidence of Armstrong's culpability, the court (correctly) concluded that Armstrong intentionally destroyed evidence of his communications with Bumgarner ***and lied under oath about doing so***.[193]

Despite that conclusion, the court credited Armstrong's explanation that "he did not notify Williams' counsel" of his supposedly well-intentioned interactions with Bumgarner because "he believed he could keep Bumgarner … at bay.'"[194] It defies reason to conclude, on the one hand, that Armstrong intentionally destroyed evidence of his illicit dealings with Bumgarner to try to cover his tracks ***and*** testified falsely about this destruction,[195] while simultaneously crediting Armstrong's testimony that these same communications were made in good faith and merely

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190 Op.90-91; A3774-75:679:18-680:10; A1925-26.

191 Op.46.

192 Op.92-93.

193 Op.46, 92-94.

194 Op.45 (alterations omitted).

195 Op.45, 92-94.

intended "to allay Bumgarner's opposition to the Merger."[196] It also defies the record evidence. The court simply ignored that Armstrong continued assisting Bumgarner—and continued to keep these meetings a secret—even after Bumgarner filed suit, which undermines any notion that all Armstrong was trying to prevent Bumgarner from suing.[197] The court also missed the forest for the trees. Even if, as the court (erroneously) found, the record did not conclusively prove that Armstrong encouraged Bumgarner to sue ***Williams***, that is a far cry from a finding that Armstrong gave his reasonable best efforts to ensure that the Merger would close. After all, nothing in the record contradicts Bumgarner's admission that Armstrong "didn't have any trouble with [his] suing ***ETE***" to enjoin the Merger.[198]

Finally, even if the record were not overwhelming on this point, any inference that Armstrong had noble intentions was negated by his clandestine approach. As noted, Armstrong never alerted the full Williams board, Williams' counsel, or ETE about his communications with Bumgarner,[199] and he candidly admitted that he was "pretty careful to have most of [his] conversation[s] with [Bumgarner] in person"—

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[196] Op.44; *see TR Inv., LLC v. Genger*, 2009 WL 4696062, at *19 (Del. Ch. Dec. 9, 2009) ("[The] most natural inference that arises when sophisticated people act secretively … is that they have something to hide.").

[197] Op.45; *see also* A0837; A3864:769:18-24, A3858:763:4-21.

[198] A2187-88:253:22-254:7.

[199] A3372:277:6-19; A3864:769:18-24, A3858:763:4-21.

i.e., not in writing, which he knew would produce discoverable documents revealing his actions.[200] By any measure, Armstrong's dealings with Bumgarner and later spoliation and perjury confirm that Williams fell well short of its best-efforts obligations.

b. *The court wrongly concluded that Armstrong's other machinations did not breach Williams' best-efforts obligations.*

Williams further breached its best-efforts obligations when Armstrong was "work[ing] behind the scenes with [the] dissident directors to fan the deal break flames,"[201] including (1) bringing "swing votes" back to the dissident camp,[202] (2) positioning Williams for a walkaway payment,[203] (3) "working the press" to write anti-ETE articles,[204] and (4) suing Warren in a thinly-veiled publicity stunt.[205]

The court disposed of all of this evidence in a single paragraph, which failed to grapple with ETE's arguments. For example, the court emphasized that "the Williams Board resolved to publicly support the Merger, and ultimately sued to

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[200] A3718:623:2-12.

[201] A0847.

[202] *Supra* pp.27-28.

[203] *Supra* pp.19-21.

[204] A0889.

[205] *Supra* pp.29-30.

enjoin ETE from terminating the Merger Agreement."[206] But just because Williams decided to sue ETE to enjoin the termination of the Merger (after its efforts had made an actual merger untenable and solely to position itself to extract a hefty break-up fee) does not mean that Williams could then magically erase the damage done from its board's misconduct, such as its smear campaign against ETE, culminating with the lawsuit against ETE's CEO. And while the court found that ETE "introduced no evidence that Williams' Texas lawsuit against Warren … was intended to be a 'publicity stunt,'"[207] one need look no further than the complaint itself, which called Warren "malicious" ***nine times*** and alleged that if Williams' stockholders approved the deal, they would be "controlled" by such "malicious" leader who has "exploited" his leadership position at ETE.[208] Nor did the court confront the fact that, were this lawsuit ***not*** a publicity stunt, Williams would have refiled it after the Texas court dismissed it for violating the Merger Agreement's forum-selection clause.

Even putting aside Armstrong's dealings with Bumgarner, these machinations defeat any claim that Williams satisfied its best-efforts obligations.

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[206] Op.90.

[207] *Id.*

[208] A0989-1038.

c. *The court wrongly focused only on the date of closing when analyzing Williams' breach of its best-efforts obligations.*

Perhaps recognizing that these actions in the critical nine-month executory interval were flatly inconsistent with even the most charitable reading of Williams' obligations, the court focused its analysis entirely on the time of closing, and excused any prior misconduct because Williams settled the Bumgarner litigation before closing.[209] But contrary to the court's construction, Williams' "obligation to comply with" its best-efforts covenants was a continuing obligation, not one that arose only at a closing that Williams could thus thwart altogether by denigrating ETE and the Merger in ways that would make closing the deal impractical.

Merger Agreement §6.02(b), on which the Court relied, is an unremarkable provision regarding a closing certificate that merely confirms that Williams was required to have "performed or ***complied with*** all obligations required by the time of the Closing."[210] Williams' best-efforts obligations, and its obligation to contest and resist anti-Merger litigation, imposed continuing obligations that Williams needed to honor during the entire executory period, not just at closing.[211] Indeed, if it did not honor them, then closing would never happen. Moreover, when the shoe was on

[209] Op.90-91.

[210] A0478 (§6.03(b)).

[211] A0468 (§5.03(a)).

the other foot, Williams argued for an analysis under §5.03 that focused on a party's actions, not just on whether or not the objective was achieved at close.[212] And, of course, ***this Court held the same*** in interpreting §5.03 ***in 2017***.[213] It would render §5.03's efforts obligations all but nugatory to interpret §6.02(b) as allowing Williams to sponsor anti-Merger litigation as long as it later settled that litigation (at whatever cost) just before closing. And such an interpretation would be entirely contrary to the obvious intent underlying the best-efforts covenants.[214] The court's interpretation of the Merger Agreement—*i.e.*, excusing any breach as long as Williams resolved it at the eleventh hour—was legal error.

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Williams breached the Merger Agreement through Armstrong's remarkable assistance of Bumgarner's litigation and smear campaign, as well as through the company's own litigation against the would-be leader of the post-Merger entity. The Chancery Court erred in excusing these breaches, which foreclose Williams' right to recover and provide an affirmative defense to Williams' claims as a matter of law.

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[212] A1513-15.

[213] *Williams*, 159 A.3d at 272.

[214] *Id.* ("[C]ovenants like the ones involved here impose obligations to take all reasonable steps to solve problems and consummate the transaction.").

2. <u>The court applied the wrong spoliation standard, and should have concluded that ETE is entitled to the adverse finding that Williams breached the Merger Agreement.</u>

The court abused its discretion by not making an adverse finding that Williams materially breached its obligations under the Merger Agreement due to Armstrong's intentional and prejudicial spoliation of evidence.[215] Despite finding that Armstrong ***both*** intentionally destroyed evidence ***and*** lied under oath about doing so, the court only awarded ETE its fees and expenses related to subpoenaing Bumgarner's emails and for bringing the sanctions motion.[216] This barebones penalty—the minimum penalty permitted under Delaware law when there is intentional spoliation[217]—constitutes an abuse of discretion. Indeed, "the deterrent effect of [awarding] fees [is] insufficient; the temptation to destroy unfavorable evidence at the outset of high stakes litigation would overshadow the prospect of being sanctioned with paying fees and costs."[218] When, as here, the "evidentiary record [is] incomplete due to the absence of [evidence] that probably existed and should have been produced," courts have concluded that the non-spoliator has "***proved the specific breach it was***

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[215] This Court reviews "sanction[s] for a discovery violation for abuse of discretion." *Zachman v. Real Time Cloud Servs., LLC*, 251 A.3d 115, at *5 (Del. 2021).

[216] Op.92-94.

[217] *Bader v. Fisher*, 504 A.2d 1091, 1096 (Del. 1986).

[218] *Micron Tech., Inc. v. Rambus Inc.,* 917 F. Supp. 2d 300, 325 (D. Del. 2013).

attempting to prove," period.[219] Such is the case here. As Williams' CEO, Armstrong's misconduct is attributable to Williams.[220] Furthermore, had Williams properly collected and produced documents when litigation began, spoliation would have been avoided. Thus, Williams is responsible.

In denying ETE an adverse finding, the court held ETE "failed to demonstrate that Armstrong's destruction of his Gmail account ultimately prejudiced [it]."[221] This is manifestly wrong. First, given the finding that Armstrong intentionally deleted evidence,[222] the court erroneously placed the burden to prove prejudice on ETE. Black-letter law instructs that "[i]f the spoliation was done in bad faith, the burden shifts to the spoliating party to show lack of prejudice."[223] Second, Armstrong himself admitted at trial that there may have been other emails that were destroyed and never recovered.[224]

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[219] *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *30 (Del. Ch. July 22, 2015); *see also Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 548 (Del. 2006) ("It is the duty of a court, in such a case of willful destruction of evidence, to adopt a view of the facts as unfavorable to the wrongdoer as the known circumstances will reasonably admit.").

[220] *See Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 n.23 (Del. Ch. 2006).

[221] Op.93.

[222] Op.92-93.

[223] *Micron,* 917 F. Supp. 2d at 319. This is a "heavy burden." *Id.*

[224] A3875:780:13-22; A3783-84:688:5-689:11.

Under the court's reasoning, the victim of spoliation is put between a rock and a hard place: If the non-spoliator finds missing documents from a third party, then she has not suffered prejudice under the court's "no harm, no foul" holding; but if she ***does not*** find missing documents from a third party, then she has no proof that spoliation occurred at all. This is not in accordance with well-settled Delaware law, and for good reason.[225] ETE is entitled to a finding that Williams breached the Merger Agreement to "deprive" the spoliator "of the advantages of any evidentiary gaps that [its] own misbehavior might have caused."[226]

3. <u>The court erred in concluding that Williams' refusal to cooperate with ETE's financing efforts satisfied §5.14.</u>

Section 5.14 required Williams to "provide cooperation reasonably requested by [ETE] that is necessary or reasonably required in connection with … financing … arranged by [ETE]."[227] Williams failed to do so.

As part of its efforts to secure the cash needed to finance the Merger in a quickly deteriorating energy market, ETE planned to issue a Public Offering, which

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[225] *E.g.*, *In re Shawe & Elting LLC*, 2016 WL 3951339, at *14, *19 (Del. Ch. July 20, 2016) (awarding sanctions because the "fortuit[ous]" recovery of deleted files "does not negate [the spoliator's] illicit intent"), *aff'd*, 157 A.3d 142 (Del. 2017).

[226] *TR Inv'rs*, 2009 WL 4696062, at *19; *see also Micron*, 917 F. Supp. 2d at 324-25 (granting dispositive sanctions where spoliation was "in bad faith" and "prejudiced" non-spoliator's pursuit of "several … affirmative defenses").

[227] A0476 (§5.14).

ETE intended to offer to all ETE unitholders.[228] In an email requesting Williams' cooperation, ETE informed Williams "the proposed offering of [CPUs] will … help fund the cash consideration payable in the merger" and is "part of the financing for the pending transaction."[229] The requested cooperation was *de minimis*: Williams simply had to instruct its auditor to release its financials for an SEC filing.[230] And there was nothing unreasonable about this request. As Williams concedes, ETE had a significant need to de-lever, industry conditions severely limited ETE's options, and ETE could not publicly offer the CPUs without Williams' assistance.[231]

ETE thus "reasonably requested" Williams' cooperation under §5.14. But Williams refused. That breached §5.14, independently defeating any claim by Williams to recover the WPZ Termination Fee.

The Chancery Court held the opposite only by adopting a tortured construction of the Agreement. In the court's view, Williams "reasonably" withheld consent based on "a legitimate business purpose."[232] But the "legitimate business

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[228] *See supra* pp.22-25.

[229] A0846; A0872.

[230] A0838-39; A0844.

[231] *Unitholder Litig.*, 2018 WL 2254706, at *3-6; A0834; A0674; A3200-02:105:13-107:1, A3208:113:8-11; A3909:814:2-6, A3910-11:815:23-816:11, A3912-13:817:14-818:6, A3920:825:17-21, A3921:826:8-22.

[232] Op.86.

purpose" test does not apply here. That text comes from cases involving contractual provisions specifying that "consent shall not be unreasonably withheld,"[233] and Williams' duty to cooperate under §5.14 is not qualified by any such language. In fact, the Agreement imposes reasonableness qualifiers on the parties' cooperation covenants elsewhere, ***but not in §5.14***, which places a reasonableness qualifier only on ***ETE***'s actions.[234] The "legitimate business purpose" standard is inapplicable.[235]

In ruling to the contrary, the court noted that "an obligation to take reasonable actions … does not require a party 'to sacrifice its own contractual rights for the benefit of its counterparty.'"[236] But assisting ETE with the Public Offering would not have required Williams to sacrifice any "contractual rights" because, as explained below, the Public Offering would not have violated the Merger Agreement.[237] In short, Williams breached §5.14, and thus cannot recover the WPZ Termination Fee.

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[233] *See Union Oil Co. of Cal. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *11 (Del. Ch. Dec. 15, 2006).

[234] *Compare* A0466 (§5.01(a)) (requiring parties to "reasonably assist and cooperate" to prepare the proxy), *and* A0468 (§5.03(a)) (requiring parties to use their "reasonable best efforts … to assist and cooperate with the other parties…to consummate" the Merger), *with* A0476 (§5.14).

[235] *See Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *1, *6 (Del. Ch. July 23, 2010) (declining to impose "any reasonableness condition" in contravention of the agreement's plain language).

[236] Op.87.

[237] *See infra* pp.58-66.

III. The Court Erred In Concluding That The Issuance Entitled Williams To The WPZ Termination Fee.

A. Question Presented

In ruling that the Issuance violated the Merger Agreement, did the court err when interpreting contractual language that unambiguously exempted the Issuance from the relevant restrictions? This question was raised below (A5061-82, A5208-21) and considered by the Court of Chancery (Op.61-85).

B. Scope of Review

This Court "review[s] questions of law and interpret[s] contracts de novo."[238]

C. Merits of Argument

The PDL states in no uncertain terms that "[ETE] may make issuances of equity securities with a value of up to $1.0 billion in the aggregate" (the "Equity Issuance Exception").[239] It is undisputed that the Issuance satisfied that provision: As Williams concedes, the CPUs that ETE issued were "equity securities"[240]; and as the court found at summary judgment, the Issuance was "under $1 billion."[241]

The Chancery Court nonetheless ruled that the Issuance violated the Merger Agreement. In the court's view, because the PDL's Equity Issuance Exception

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[238] *Osborn*, 991 A.2d at 1158.

[239] A0413 (§4.01(b)(v)(1)).

[240] A4960; A3271:176:1-11; A3601-02:506:24-507:13.

[241] Ex. C, Summary Judgment Memorandum Opinion ("MSJ.Op.") 47.

appears underneath a "subheader" that reads "Section 4.01(b)(v)," it modified ***only*** the corresponding provision in the Merger Agreement, and not any other provisions.[242] The court thus ruled that the PDL's Equity Issuance Exception does not apply to the IOCs or to the "ordinary course covenant" in §4.01(b) (the "OCC"), which required ETE to run its business "in the ordinary course" between signing and closing,[243] or to a representation about ETE's capital structure in §3.02(b) (the "Capital Structure Representation")—all of which reside outside §4.01(b)(v) of the Merger Agreement—and consequently that the Issuance violated each of those provisions. That construction is flawed for several reasons.

First, the parties explicitly agreed that any headings are for "reference purposes only" and should "not affect ***in any way the meaning or interpretation***" of the Merger Agreement or PDL.[244] The Chancery Court simply ignored this clear instruction. To support its interpretation, the court noted that "the substance of each exception [in the PDL] matches the substance of the corresponding operating covenant [in the Merger Agreement]," the "headers are not ordered consecutively" (*e.g.*, skip from 4.01(b)(ii) and 4.01(b)(v)), and "certain exceptions [in the PDL

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[242] Op.77.

[243] A0460 (§4.01(b)).

[244] Op.74-77; A0488 (§8.04(a)); A0390 (Gen. Term No. 7).

appear] under multiple headers."[245] But the fact that PDL terms are grouped or organized with a topical Merger Agreement counterpart does not limit those terms' application to that counterpart if the actual text (apart from the headings) does not indicate otherwise. Any other interpretation flatly violates the prohibition on giving headings interpretive force, which the parties explicitly included in the text.

<u>Second</u>, even without this explicit rule of construction, the decision below would be wrong given the plain language of the preambles to the OCC, the IOCs, and the Capital Structure Representation. Both the OCC and the IOCs are preceded by an unambiguous preamble that appears twice in §4.01(b): "***Except as set forth in Section 4.01(b) of the Parent Disclosure Letter*** [or] expressly permitted by this Agreement …."[246] These provisos indicate that all of PDL §4.01(b) cross-applies to all of the IOCs and the OCC, not just the ones that correspond to the specific subheadings. And the Capital Structure Representation contains an even broader proviso: "Except … as set forth in the Parent Disclosure Letter …."[247] The Chancery Court ignored this broad incorporative language in the IOCs, the OCC, and the Capital Structure Representation. But this broad incorporative language was plainly deliberate. After all, in other provisions, the Merger Agreement references

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[245] Op.75-76.

[246] A0460 (§4.01(b)).

[247] A0445 (§3.02(c)).

a particular enumerated right in the PDL, rather than an entire section (as in the preamble to the IOCs and the OCC) or the PDL as a whole (as in the Capital Structure Representation).[248] For example, Merger Agreement §1.01(b)(i) specifically references "PDL §1.01(b)(i)."[249] Such provisions underscore that the drafters knew how to limit a PDL exemption to a specific Merger Agreement provision and did so through explicit cross-references, not intimations from headings that were declared off-limits for interpretive purposes ***in the text itself***.

Third, and relatedly, the preamble to the OCC is surplusage under the court's subheading-by-subheading interpretation.[250] The OCC is found at the beginning of Merger Agreement §4.01(b) and does not have a subheading number. Thus, as Williams' lead deal lawyer confirmed, "if we interpret th[e] [P]reamble to take into account the subsection numbers in the [PDL]," as the court ultimately did in ruling for Williams on this issue, "then the [PDL] has ***no exceptions*** to the [OCC]," as there is no PDL subheading corresponding to the OCC.[251] This further confirms that the subheadings cannot be taken into account for purposes of the Preamble, since the PDL undisputedly ***does*** provide exceptions to the OCC. Indeed, in prior briefing,

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[248] *E.g.*, A0420 (§1.01(b)(i)).

[249] *Id.*

[250] *Sunline*, 206 A.3d at 846.

[251] A3319-20:224:16-225:4; Op.74.

Williams conceded that the Preamble allows ETE to "engage in the specific actions set forth in the [PDL] even if they were outside the ordinary course."[252]

Fourth, under the decision below, the same language ("Except as set forth in [PDL §4.01(b)]") has two different meanings in consecutive sentences in §4.01(b)—once before the OCC, and once before the IOCs. That cannot be right. When an agreement uses the same phrase multiple times, the phrase bears the same meaning throughout, unless the agreement explicitly provides otherwise.[253] No such explicit language is found here. Basic principles thus compel rejecting the Chancery Court's construction. Instead, the only "reasonable" interpretation of the Preamble is that it constitutes an unqualified exception to the OCC for any item permitted by PDL §4.01(b)—which means that "when the identical [Preamble] appears again in front of the [IOCs], it creates an identical unqualified exception to those covenants."[254]

Fifth, the decision below cannot be squared with the express language found in both the Merger Agreement and the PDL providing that an exception in the PDL "shall be deemed to apply to and qualify" not just the corresponding "Section or

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[252] A2845.

[253] *In re Mobilactive Media, LLC*, 2013 WL 297950, at *19 & n.211 (Del. Ch. Jan. 25, 2013) ("[W]ord[s] … will be given the same meaning throughout the contract in the absence of countervailing reasons."); *accord Comerica Bank v. Glob. Payments Direct, Inc.,* 2014 WL 3567610, at *11 (Del. Ch. July 21, 2014).

[254] Op.74.

subsection of th[e Merger] Agreement," but all provisions of the Merger Agreement to which "it is reasonably apparent" that the disclosure "is relevant."[255] The Chancery Court held that the Equity Issuance Exception does not apply to the Capital Structure Representation, the OCC, and the allegedly breached IOCs because those provisions are not in the corresponding subsection. But it is more than reasonably apparent that each of those provisions relates to equity securities.[256] Indeed, that is not even in dispute, as Williams' deal counsel conceded the point.[257] Yet despite that concession, the Chancery Court construed the Merger Agreement and PDL to mean that a disclosure could be deemed to cross-apply to a section or subsection other than the corresponding one only "where ***facially necessary*** to permit the activity provided by the [PDL] provision."[258] No text supports that construction. Nowhere does "necessary" appear in the applicable language, which calls only for a "reasonably" apparent "relevance" between the provisions.

<u>Sixth</u>, the Equity Issuance Exception in PDL §4.01(b) grants ETE the right to issue "equity securities," whereas other provisions in the PDL use the narrower term

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[255] A0445 (§3.02(c)); A0390 (Gen. Term No. 4).

[256] A5074-76.

[257] A3333-34:238:16-239:7, A3336-39:241:8-244:5.

[258] Op.79 (emphasis in original).

"Common Units,"[259] yet the court's subheading-by-subheading interpretation limits the Equity Issuance Exception to common units.[260] Under the court's interpretation, the Equity Issuance Exception allowed ETE to issue only ***pre-existing*** classes of securities that require ***no amendment to ETE's partnership agreement***.[261] It is undisputed that, due to ETE's capital structure, this effectively limits ETE to issuing only common units: as Williams conceded, ETE's ability to issue "equity securities" under the subheading-by-subheading interpretation is limited to "issuing up to $1 billion in common units."[262] This complete rewrite of the parties' agreement is untenable, particularly given that other PDL sections use the narrower term "common units." Williams' witnesses acknowledged that the PDL term "equity securities" was "purposely chosen," is "broader than just common units," and the

[259] *E.g.*, A0394 (§3.02(c)); A0412 (§4.01(b)(i)).

[260] *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *7 (Del. Ch. Dec. 30, 2010). In its summary judgment opinion, the Chancery Court applied this canon of construction in ***rejecting*** an ETE argument, but the court then failed to apply it here. *See* MSJ.Op.29 n.123.

[261] Op.81.

[262] ETE had only two other pre-existing equity classes (the general partner interest and special units issued only to one executive), and ETE could not issue additional units of these classes for reasons unrelated to the Merger Agreement. A0445 (§3.02(c)).

parties "knew how to say common units when [they] intended to."[263] The court erred by failing to give effect to the actual language the parties memorialized.

Finally, although unnecessary to consider given the Agreement's unambiguous language, the Chancery Court likewise erred in concluding that the extrinsic evidence supports its interpretation.[264] The court cited the parties' drafting history and party testimony.[265] But this extrinsic evidence supports ***ETE's*** interpretation. An earlier draft of the Merger Agreement permitting ETE to issue securities in an "at-the-market offering"[266] was revised to allow ETE is issue "up to $1B of equity."[267] "[A]t the market offerings" are limited to existing publicly traded securities,[268] thus the revision to the broader term "equity" indicates that the parties intended to permit ETE to issue a new class of equity. The court ignored all that. It also did not—and could not—square its reading with the testimony of Williams' CFO, Don Chappel, Williams' lead negotiator of the disclosure letters. Chappel testified that "the goal with the interim operating covenants" was to provide "a great

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263 A3176:81:1-7, A3177:82:18-21, A3178:83:3-16; A3330:235:5-11; A0350.

264 Op.76-77.

265 *Id.*

266 A0350.

267 *Id.*

268 17 C.F.R. § 230.415(a)(4).

deal of flexibility"[269] and that the Equity Issuance Exception specifically was intended to provide "some flexibility in dealing with the capital markets,"[270] which was essential for both parties.[271] Chappel also admitted that ETE's interpretation of the interplay between the disclosure letters and Merger Agreement was correct. When asked about the Company Disclosure Letter ("CDL"), which is Williams' equivalent counterpart to the PDL, Chappel admitted:

- CDL §4.01(a)(ix) is an exception to the OCC;
- CDL §4.01(a)(v) is an exception to the §4.01(a)(iv) IOC; and
- CDL §4.01(a)(ix) is an exception to the §4.01(a)(vi) IOC.[272]

These admissions, which the court never addressed, cannot be squared with the court's subheading-by-subheading interpretation of the Merger Agreement and PDL.

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Given the expected nine-month executory period of the Merger, the PDL and CDL exceptions were meant to provide each party with ample latitude, rather than being used as "gotchas." The Chancery Court erred by adopting Williams' interpretations and holding that the Issuance breached the Merger Agreement.

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[269] A0352-54; A3159-60:64:6-65:8.

[270] A3171:76:11-23.

[271] A3896-99:801:10-804:1; A2356:73:1-15, A2357:74:9-24.

[272] A3165-66:70:13-71:22, A3167-70:72:8-75:11; A0379-83.

IV. The Court Erred In Interpreting §5.06(g) To Allow Williams' Counsel To Recover A Large Contingent Fee.

A. Question Presented

Did the court err in interpreting a contractual provision allowing for the shifting of "reasonable attorneys' fees" to allow Williams to recover fees dwarfing a reasonable-hours-billed-times-reasonable-rates lodestar, based upon a mid-litigation shift to a contingency arrangement? This question was raised below (A5364-70, A5373-75) and considered by the Court of Chancery (Fee.Op.4-10, 13-15).

B. Scope of Review

This Court "interpret[s] contracts de novo."[273]

C. Merits of the Argument

The court erred in interpreting §5.06(g) to allow for Cravath's contingent fee award well in excess of reasonable hours at Cravath rates. Section 5.06(g) permits Williams to recover "reasonable attorneys' fees" if it prevails in seeking the WPZ Termination Fee. When the parties signed the Merger Agreement in September 2015, ***every*** Delaware authority in existence that awarded attorneys' fees pursuant to a contractual fee-shifting provision did so based on a ***reasonable-hours-billed-***

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[273] *Osborn*, 991 A.2d at 1158.

times-reasonable-rates lodestar.[274] Not one construed such a contractual provision to permit the prevailing plaintiff to shift larger amounts contemplated by their contingency arrangements. This uniform authority reflects what "would be understood by an objective, reasonable third party" when interpreting §5.06(g).[275] Moreover, if contractual parties "intend to deviate from the meaning that a reasonable [person] would attribute to use of a term … it is incumbent upon them to manifest that intent."[276] In other words, if Williams wanted to recover the full amount due to its lawyers based on a contingency arrangement, then the Agreement should have explicitly authorized that unusual recovery. It did not. That should have been the end of the matter.

The Chancery Court nonetheless construed the Agreement to allow Williams' counsel to recover $85,440,716.36 in fees[277] primarily based on a contingency award, nearly double Williams' lodestar amount of $47,116,996.83 based on

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[274] *E.g.*, *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc.*, 2010 WL 571934, at *4 (Del. Ch. Feb. 5, 2010) (shifting fees pursuant to contractual fee-shifting provision based on hours worked); *Global Link Logistics, Inc. v. Olympus Growth Fund III, L.P.*, 2010 WL 692752, at *1, *4 (Del. Ch. Feb. 24, 2010) (same).

[275] Delaware adheres to the objective theory of contracts, which holds that "[a] contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn*, 991 A.2d at 1159.

[276] *Zimmerman v. Crothall*, 62 A.3d 676, 697 (Del. Ch. 2013).

[277] Ex. F, Final Order and Judgment ¶1C.

Cravath rates.[278] Besides finding no support in case law, the court's reasoning is unsustainable. According to the court, contractual fee-shifting based on a contingency award was presumptively permitted unless the Agreement explicitly prohibited it. Reflecting this improper "everything is allowed unless explicitly forbidden" approach (which is starkly inconsistent with its analysis of the IOCs), the court concluded that the parties "knew at [signing] that their bargained-for 'reasonableness' limitation on fee-shifting did not automatically ***prohibit*** contingent fees" because Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct, which provides eight factors courts evaluate to determine the reasonableness of a fee, "explicitly contemplates [the existence of] contingent fees."[279] But Rule 1.5 covers all attorneys' fee arrangements (such as those in engagement letters) and not contractual fee-shifting provisions, and does not address the relevant question: whether the parties in fact intended that their contractual fee-shifting provision would allow one party to foist a then-unprecedented contingent-fee arrangement well in excess of the reasonable-rates-times-reasonable-hours lodestar on its contractual counterparty. And the answer to that question is plainly no. It is ***undisputed*** that neither Williams nor ETE contemplated a contingent-fee

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[278] Ex. E, Plaintiff's Fee Request Memorandum Opinion ("Fee.Op.") 10.

[279] Fee.Op.6-7.

arrangement when entering into §5.06(g); as Williams concedes, a contingency-fee arrangement was first contemplated in mid-2017, nearly two years after the parties executed the Merger Agreement.[280]

The court's reliance on *Shareholder Representatives Services LLC v. Shire US Holdings, Inc.*[281] 2021 WL 1627166 (Del. Ch. Apr. 27, 2021), *aff'd*, 267 A.3d 370 (Del. 2021) to support its interpretation was also in error. *Shire* was decided years after the Agreement was signed, and the underlying circumstances are markedly different. In *Shire*, the court awarded contingent fees under a contractual fee-shifting provision where plaintiffs were stockholders who were suing their company, the stockholders "struggled to fund th[e] litigation," and the contingency arrangement enabling them to "retain skilled and experienced counsel despite a lack of resources."[282] None of these considerations applies here. Yet the Chancery Court found these factual differences did not constitute "a principled basis [on which] to distinguish *Shire*."[283] The court held that Williams "made a business judgment to switch to a contingency fee to 'align Cravath and Williams as partners in this litigation,'" just like the *Shire* plaintiff's "business judgment to switch to a

[280] A5348-51:43:7-46:18.

[281] 2021 WL 1627166 (Del. Ch. Apr. 27, 2021), *aff'd*, 267 A.3d 370 (Del. 2021).

[282] *Id.* at *1-2.

[283] Fee.Op.9.

contingency fee."[284] That proves too much. If, deep into the litigation, Williams agreed to pay its attorneys four times their normal rates if they prevailed and nothing if they lost, that would be a business judgment—but it would not obligate ETE to pay four times a reasonable rate under a fee-shifting provision that plainly contemplated shifting only the reasonable rates of the prevailing attorneys. The agreement here is no different.

The court's interpretation of §5.06(g) contradicts the purpose of fee-shifting provisions, which exist to "make the prevailing party whole" in the event they are the prevailing party in the litigation.[285] Here, by contrast, by switching to a contingency arrangement mid-stream, Williams put itself in a position to avoid any fee burden for its own lawyers win or lose. That arrangement effectively forces ETE not only to pay reasonable fees in the event Williams prevails, but also to pay for insurance against Williams' having to pay Cravath's fees even if Williams loses. That fundamentally changes the parties' agreement:

	Original arrangement	**Modified arrangement**
Williams loses	Williams pays Cravath's fees	Williams pays Cravath almost nothing
Williams prevails	ETE pays Cravath's fees	ETE pays almost double Cravath's fees

[284] *Id.*

[285] *Aveta, Inc. v. Bengoa*, 2010 WL 3221823, at *6 (Del. Ch. Aug. 13, 2010); *see also Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007) (fee shifting provisions "award the prevailing party all of ***the costs it incurred*** during litigation").

If Williams wants to pay Cravath a portion of its recovery (*e.g.*, "a success fee") in exchange for an assurance that it will owe Cravath nothing or nearly nothing if it loses, that is Williams' business. But Williams cannot convert its right to recover reasonable fees if it wins into an insurance policy against owing Cravath anything win or lose funded by ETE in the event Williams prevails. Neither the Agreement's plain language nor the existing circumstances when the bargain was struck support the court's holding.

Finally, the court also erred in interpreting §5.06(g) (which states that a party may recover "interest … at the prime rate") as permitting Williams to recover quarterly compound interest, as opposed to simple interest.[286] Because §5.06(g) does not address compounding, it should be interpreted in the same manner as Delaware's pre-judgment interest statute, which similarly makes no reference to compounding and "has long been construed as providing for a simple interest calculation."[287] As with its attorneys' fee holding, the Chancery Court flipped the burden by holding that compounding was allowed unless it was explicitly prohibited, and it blue-penciled the Agreement by inserting not just the term "compounding,"

[286] A0474 (§5.06(g)); Fee.Op.16.

[287] *Rexnord Indus., LLC v. RHI Hldgs., Inc.*, 2009 WL 377180, at *9-10 (Del. Super. Ct. Feb. 13, 2009).

but that such compounding would be "quarterly." That was legal error which, if this Court reaches this issue, should be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and ETE's Counterclaim should be reinstated.

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Dated: December 30, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ENERGY TRANSFER, LP, et al., Defendants and Counterclaim Plaintiffs Below-Appellants, v. THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant Below-Appellee.	No. 391, 2022 Court below: Court of Chancery of the State of Delaware C.A. Nos. 12168-VCG and 12337-VCG

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. The foregoing Appellants' Corrected Opening Brief (the "Brief") complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This Brief complies with the type-volume limitation of 14,000 words granted in the Order dated November 7, 2022 because it contains 13,978 words, which were counted by Microsoft Word 2016.

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Dated: December 30, 2022

CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, hereby certify that on December 30, 2022, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

By File & ServeXpress

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EXHIBIT A

EFiled: Dec 01 2017 08:36AM EST
Transaction ID 61412020
Case No. 12168-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER EQUITY, L.P. and LE GP, LLC, Defendants and Counterclaim Plaintiffs.	)	C.A. No. 12168-VCG
THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER CORP LP, ETE CORP GP, LLC, LE GP, LLC, and ENERGY TRANSFER EQUITY GP, LLC, Defendants and Counterclaim Plaintiffs.	)	C.A. No. 12337-VCG

MEMORANDUM OPINION

Date Submitted: August 29, 2017
Date Decided: December 1, 2017

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GLASSCOCK, Vice Chancellor

What, Langston Hughes asked, becomes of a dream deferred?[1] When the dream is a multi-billion-dollar merger that changing market conditions no longer favor, it seems, it becomes a carcass that, like those of millions of turkeys featured in the holiday feasts just past, is diligently picked over. The carcass here is the remnant of the dreamed-of merger of The Williams Companies, Inc. ("Williams") and Energy Transfer Equity, L.P. ("ETE" or the "Partnership"). The matter came before me just before its demise, as Williams unsuccessfully fought for injunctive relief to force consummation, a result vigorously opposed by ETE. Thereafter, the parties pursued actions against one another for contractual damages under the merger agreement. Before me now is Williams' Motion to Dismiss ETE's counterclaims. ETE, having successfully resisted Williams' attempt to force consummation of the merger, is in the unlikely position of arguing that it is also entitled to a billion-dollar breakup fee under the merger agreement. ETE, however, was able to walk away from the merger based on the failure of a condition precedent: the inability of its counsel to opine that the merger "should" trigger favorable tax treatment. Since none of the allegations of breach supporting ETE's entitlement to the breakup fee caused, or even relate to, ETE's exercise of its right to avoid the merger, and, fundamentally, because the contract language it relies on is not

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[1] *Harlem*, Langston Hughes, Collected Poems (1994).

supportive, I find ETE's counterclaim seeking the breakup fee not viable. My analysis of ETE's remaining counterclaims is mixed. My reasoning follows.

I. BACKGROUND

This Memorandum Opinion assumes familiarity with the facts outlined in the previous Opinions of both this Court and the Supreme Court. "The reader is forewarned that this case involves a maze of corporate entities and an alphabet soup of corporate names."[2] This Opinion includes only those facts necessary to my analysis.

A. The Merger Agreement and Failure of a Condition

The parties are significant players in the energy pipeline business.[3] Counterclaim Plaintiffs ETE and its affiliate Energy Transfer Corp LP ("ETC") are Delaware limited liability partnerships.[4] Counterclaim Defendant Williams is a Delaware corporation.[5]

Williams and ETE negotiated a merger as set out in an Agreement and Plan

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[2] *Chester Cty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at *1 (Del. Ch. Oct. 6, 2017) (quoting *Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at *2 (Del. Ch. Sept. 18, 2014)).

[3] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.* (*Williams' Second Action*), 2016 WL 3576682, at *1 (Del. Ch. June 24, 2016).

[4] In addition, Counterclaim Plaintiffs LE GP, LLC ("LE GP"), ETE Corp GP, LLC ("ETE Corp"), and Energy Transfer Equity GP, LLC ("ETE GP") are Delaware limited liability companies. Defs.' and Countercl. Pls.' Second Am. & Supplemental Affirm. Defenses & Verified Countercl. (the "Countercl." or the "Counterclaim Complaint") ¶¶ 41–45.

[5] *Id.* ¶ 46.

of Merger dated September 28, 2015 (the "Merger Agreement" or "Agreement").[6] Under the Merger Agreement, Williams would merge into ETC (the "Merger") in exchange for ETC stock, $6.05 billion in cash, and certain other rights.[7] Post-Merger ownership of ETC would be split, with 19% held by the Partnership and 81% by former Williams stockholders.[8]

After ETE and Williams signed the Merger Agreement, the energy industry—and particularly the outlook for ETE and Williams—declined substantially.[9] In reaction to this decline—although its precise motives are in dispute—ETE issued new units to certain large ETE equity holders after signing the Merger Agreement (the "Special Issuance").[10] Ultimately, ETE's tax counsel, Latham & Watkins LLP ("Latham"), decided that it could not issue a tax-related opinion with the required confidence level to satisfy a condition precedent for the Merger to close.[11] Relying on the failure of this condition precedent, ETE exercised its right to terminate the Agreement on June 29, 2016.[12]

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[6] *Id.* ¶ 48 (including a Letter Agreement dated May 24, 2016 and noting that the Merger Agreement was amended on May 1, 2016); *Williams' Second Action*, 2016 WL 3576682 at *1.
[7] Countercl. ¶ 48; *Williams' Second Action*, 2016 WL 3576682 at *3.
[8] *Williams' Second Action*, 2016 WL 3576682 at *3, 6.
[9] Countercl. ¶ 3.
[10] *Id.* ¶¶ 143–46, 149–50, 158–59; *Williams' Second Action*, 2016 WL 3576682 at *4.
[11] Countercl. ¶¶ 171–77; Merger Agreement § 6.01(h).
[12] Countercl. ¶ 7; *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 275 (Del. 2017) (denying Williams' request to enjoin ETE from terminating the Merger Agreement).

B. Procedural History

The parties quickly became entangled in litigation. Williams challenged the Special Issuance and filed its first Verified Complaint against the Partnership and LE GP on April 6, 2016 (the "First Action"), arguing that equitable relief was necessary to preserve the Merger Agreement.[13] Williams filed a Verified Amended Complaint on April 19, 2016 (the "Second Action") against the Defendants to specifically enforce the Agreement and compel ETE to comply.[14] I found that ETE was entitled to terminate the Agreement because Latham's inability to issue the tax opinion was a failure of a condition precedent under that Agreement.[15] Williams appealed to the Supreme Court, which affirmed, in pertinent part, the Opinion below.[16] Williams also filed suit against ETE CEO and Chairman Kelcy Warren in Texas state court for tortious interference with contract, but the suit was dismissed as incompatible with the forum selection clause in the Merger Agreement.[17]

Williams seeks contract damages in the current litigation. ETE brought counterclaims and alleges that Williams breached provisions of the Agreement

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[13] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, C.A. No. 12168-VCG (Del. Ch. Apr. 6, 2016); a separate challenge to ETE's issuance is also proceeding before me. *In re Energy Transfer Equity L.P. Unitholder Litig.* (*ETE Unitholder Litig.*), 2017 WL 782495, at *1 (Del. Ch. Feb. 28, 2017).

[14] The actions are now combined in the present matter. *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, C.A. No. 12337-VCG (Del. Ch. Nov. 30, 2016).

[15] *Williams' Second Action*, 2016 WL 3576682 at *21.

[16] *Williams Cos.*, 159 A.3d at 275.

[17] Countercl. ¶¶ 72, 168–69.

pertaining to (i) the board recommendation requirement, (ii) the forum selection clause, and (iii) the reasonable best efforts, disclosure, and financing cooperation requirements. ETE contends that, as a result of these breaches, Williams owes ETE $1.48 billion (the "Termination Fee") and other damages.[18] Currently before me is Williams' Motion to Dismiss those counterclaims. Because these alleged breaches largely rely on my interpretation of the Merger Agreement, I include significant portions of that Agreement below.

C. The Board Recommendation Claim

ETE alleges that Williams breached the board recommendation and reasonable best efforts provisions of the Agreement by making negative comments about Warren in press releases, public filings, pleadings in a lawsuit against Warren in Texas state court, and by "failing to reconsider the recommendation" of the Merger in light of changes "described in [Williams'] Form S-4" that "gutted the foundations for the original recommendation."[19] The required "Company Board Recommendation" (or the "Recommendation") was defined in Section 3.01(d) of the Merger Agreement:

> The *Board of Directors of the Company duly and validly adopted resolutions* (A) approving and declaring advisable this Agreement, the Merger and the other Transactions, (B) declaring that it is in the *best interests of the stockholders* of the Company that the Company enter into this Agreement and consummate the Merger and the other

[18] Countercl. ¶ 8.
[19] *Id.* ¶ 23.

> Transactions on the terms and subject to the conditions set forth herein, (C) directing that the adoption of this Agreement be submitted to a vote at a meeting of the stockholders of the Company and (D) recommending that the stockholders of the Company adopt this Agreement ((A), (B), (C) and (D) being referred to herein as the "Company Board Recommendation"), which resolutions, as of the date of this Agreement, have *not been rescinded, modified or withdrawn in any way*.[20]

ETE's contention relies on interpreting the Agreement to mean that the public statements made by Williams, or Williams' Board of Directors (the "Directors" or the "Board"), constitute a withdrawal of the Company Board Recommendation or designation as a "Company Adverse Recommendation Change" under Section 4.02.[21] Williams argues that a proper construction of Section 4.02 allows for a "Company Adverse Recommendation Change" only in the context of a formal board resolution and that no such board resolution was enacted.[22] Section 4.02 reads in relevant part:

> (d) Neither the *Board of Directors of the Company nor any committee thereof* shall (i)(A) *withdraw (or modify or qualify in a manner adverse to [ETE])*, or *publicly propose* to withdraw (or modify or qualify in a manner adverse to [ETE]), the Company Board Recommendation or (B) recommend the approval or adoption of, or approve or adopt, declare advisable or publicly propose to recommend, approve, adopt or declare advisable, any Company Takeover Proposal (any action described in this clause (i) being referred to as a "Company Adverse Recommendation Change") or (ii) approve or recommend, or publicly

[20] Merger Agreement § 3.01(d) (emphases added).
[21] For ease of reference, any citation to a "section" refers to a section in the Merger Agreement, unless otherwise noted.
[22] Pl.'s Br. in Supp. of Its Mot. to Dismiss & to Strike Defs. & Countercl. Pls.' Second Am. & Supplemental Affirmative Defenses & Verified Countercl. ("Pl. Op. Br.") at 23–30; Nov. 30, 2016 Oral Arg. Tr. at 8:14–9:14.

> propose to approve or recommend, or cause or permit the Company or any of its Subsidiaries to execute or enter into any Company Acquisition Agreement.
>
> (f) Nothing contained in this Section 4.02 or elsewhere in this Agreement shall prohibit the Company or any of its Subsidiaries from (i) taking and disclosing to its stockholders a position contemplated by Rule 14d-9, Rule 14e-2(a) or Item 1012(a) of Regulation M-A promulgated under the Exchange Act or (ii) making any *disclosure to its stockholders* if the Board of Directors of the Company or any of its Subsidiaries determines in good faith (after consultation with and receiving advice of its outside legal counsel) that the failure to do so would reasonably be likely to constitute a breach of its fiduciary duties to its stockholders under applicable Law; provided, however, that any such action or statement or disclosure made pursuant to clause (i) or clause (ii) shall be deemed to be a Company Adverse Recommendation Change *unless the Board of Directors of the Company reaffirms its recommendation in favor of the Merger in such statement or disclosure or in connection with such action*.[23]

ETE contends that violations of the Company Adverse Recommendation provision in Section 4.02(d), which fall outside of the safe harbor in Section 4.02(f), are necessarily a violation of the reasonable best efforts provision in Section 5.03, and that Williams—by breaching Section 4.02(d)—is also in breach of Section 5.03.[24] ETE also contends that violations of portions of Section 5.03 are "untethered to consummation of the Merger" and that such claims should remain even if the Merger

[23] Merger Agreement § 4.02(f) (emphases added).
[24] Countercl. ¶¶ 9, 32.

failed.[25] As a result of these and other breaches, ETE seeks unspecified damages.[26]

ETE also argues that Williams' breach of the Company Adverse Recommendation provision in Section 4.02(d) allowed ETE to terminate the Agreement under Section 7.01(e), which permits termination by ETE "in the event that a Company Adverse Recommendation Change shall have occurred."[27] Therefore, Williams became immediately liable for a $1.48 billion fee (the "Company Termination Fee") under Section 5.06(d)(iii).[28] Section 5.06(d)(iii) states that if the "Agreement is terminated by [ETE] pursuant to Section 7.01(e) [a Company Adverse Recommendation change], then . . . [Williams] shall pay [ETE] . . . an aggregate fee equal to $1.48 billion."[29] Thus, according to ETE, Williams' breach of the Company Adverse Recommendation Change provision in Section 4.02(b) allowed ETE to terminate the Agreement under the permissible termination provision in Section 7.01(e), but then required Williams to pay a $1.48 billion Company Termination Fee under Section 5.06(d)(iii).[30]

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[25] Defs. & Countercl. Pls.' Br. in Opp'n to Pl. and Countercl. Def.'s Mot. to Dismiss & to Strike Defs. and Countercl. Pls.' Second Amended & Supplemental Affirmative Defenses & Verified Countercl. ("Defs. Ans. Br.") 47–48.
[26] The damages sought other than the $1.48 billion Company Termination Fee are left unclear in the Counterclaim Complaint. *See* Countercl. ¶¶ 32 ("By taking these actions, Williams breached Sections 4.01(b), 5.03, and 5.14 of the Merger Agreement, is not entitled to any post-termination relief, and is liable for damages."), 86 ("Williams has, therefore, violated Sections 4.02 and 5.03 of the Merger Agreement, owes ETE $1.48 billion, and is not entitled to any relief.").
[27] Merger Agreement § 7.01(e).
[28] *Id*. § 5.06(d)(iii).
[29] *Id*. § 5.06(d)(iii).
[30] Countercl. ¶ 51.

According to Williams, ETE could receive the $1.48 billion Termination Fee only if ETE "validly terminated the Agreement under Section 7.01(e) because the Williams Board effected a Company Adverse Recommendation Change."[31] Thus, Williams contends, to the extent that ETE maintains that violations of the reasonable best efforts clause in Section 5.01—or any other violations besides those under Section 7.01(e) and Section 5.06(d)(iii)—could lead to Williams paying the Company Termination Fee, those contentions are based on an inaccurate reading of the Merger Agreement.[32] Sections 5.06(b) and (c) specify the fees and expenses owed to the parties when the Agreement is terminated under other circumstances.[33] Williams argues that it does not owe ETE the $1.48 billion Termination Fee because it did not effect a Company Adverse Recommendation Change under the Agreement,[34] which is, according to Williams, the *only* way for Williams to owe ETE the $1.48 billion Termination Fee.

D. The Forum Selection Clause

ETE alleges that Williams' lawsuit against Warren in Texas for tortious interference with the Agreement (the "Texas Merger Action") violates the forum selection clause in Section 8.10(b) of the Merger Agreement.[35] Section 8.10(b)

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[31] Pl.'s Reply Br. in Further Supp. of Its Mot. to Dismiss & to Strike Defs. and Countercl. Pls.' Second Am. & Supplemental Affirmative Defenses & Verified Countercl. at 6.
[32] Nov. 30, 2016 Oral Arg. 16:22–17:5.
[33] Merger Agreement §§ 5.06(b)–(c).
[34] Nov. 30, 2016 Oral Arg. Tr. 15:9–17:5.
[35] Countercl. ¶ 33.

states that:

> Each of the parties hereto irrevocably submits to the *exclusive jurisdiction of the Court of Chancery of the State of Delaware* for the purposes of any suit, action or other proceeding arising out of or relating to this Agreement and the rights and obligations hereunder or the Transactions or for the recognition and enforcement of any judgment in respect of this Agreement and the rights and obligations arising hereunder or the Transactions.[36]

Williams contends that it did not breach the clause because it sued Warren in his personal capacity and Warren is not a party to the Merger Agreement.[37] Regardless, argues Williams, any such breach was immaterial and therefore not subject to liability because Section 7.02 limits post-termination liability for everything except "*willful* and *material* breach[es] of any of its representations, warranties, covenants or agreements."[38] Even if a breach were material, according to Williams, ETE suffered no cognizable damages.[39] Alternatively, if there were damages, then Williams argues that recovery would be prohibited because Section 5.02(a) of the Agreement states that "all fees and expenses incurred in connection with this Agreement and the Transactions shall be paid by the party incurring such fees or expenses, whether or not the Transactions are consummated."[40]

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[36] Merger Agreement § 8.10(b) (emphasis added).
[37] Pl. Op. Br. at 52–53.
[38] Merger Agreement § 7.02 (emphases added).
[39] Pl. Op. Br. at 52.
[40] Merger Agreement § 5.06(a).

E. The Additional Breach of Contract Claims

ETE argues that Williams breached Section 5.01 of the Agreement by failing to disclose: (i) information about an internal proxy contest that may have influenced Williams' vote in approving the Agreement and for failing to promptly notify ETE of the same,[41] (ii) "the self-interests of the Williams Board and/or beliefs concerning those self-interests,"[42] and (iii) the "material fact that members of [Williams'] [B]oard considered the possibility of a board-member-led proxy contest when voting in favor of the [Merger]" in the Form S-4.[43] Williams argues that it disclosed the relevant facts and that, in any case, ETE "has pleaded (and can plead) no injury" from any disclosure violations.[44]

Section 5.01 pertains to the preparation of the Form S-4 and the proxy statement and states in pertinent part:

> (a) If at any time prior to receipt of the Company Stockholder Approval any information relating to [ETE] or the Company, or any of their respective Affiliates, directors or officers, should be discovered by [ETE] or the Company which is required to be set forth in an amendment or supplement to either the Form S-4 or the Proxy Statement, so that either such document would *not include any misstatement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they are made, not misleading*, the party that discovers such information shall promptly notify the other parties hereto and an appropriate amendment or supplement describing such information

[41] Countercl. ¶ 29.
[42] *Id.* ¶ 130.
[43] *Id.* ¶ 112.
[44] Pl. Op. Br. at 42–48.

> shall be promptly filed with the SEC and, to the extent required by Law, disseminated to the stockholders of the Company.[45]

The success of ETE's allegations rest on whether I find that these omissions are material and, if material, resulted in compensable damages.

ETE further alleges that Williams breached Sections 4.01(b) (carrying on business in the ordinary course), 5.03 (reasonable best efforts), and 5.14 (reasonable cooperation in financing arrangements) of the Agreement by refusing to provide the information required—including certain financial information and a consent from Williams' auditor to include its audit reports related to that financial information—for ETE to file a Form S-3 and complete a public equity offering.[46] ETE's contention is that Williams' obligation to not unreasonably withhold consent for ETE to "carry on its business in the ordinary course" under Section 4.01(b), combined with the Letter Agreement's allowance for "issuances of equity securities with a value of up to $1.0 billion in the aggregate,"[47] should be read together to mean that a proposed issuance, by which ETE intended to finance the Merger in part, was allowable. Williams' consent was improperly withheld, placing Williams in breach of Section 4.01(b).[48] ETE alleges that this violation also breaches the reasonable best efforts provision in Section 5.03 and a provision requiring cooperation in

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[45] Merger Agreement § 5.01(a) (emphasis added).
[46] Countercl. ¶¶ 31–32.
[47] *Id*. ¶ 154.
[48] *Id*. ¶¶ 148–56.

financing arrangements in Section 5.14.[49] Williams argues that Section 5.14 was not triggered because its consent was not *unreasonably* withheld.[50] Section 5.14 states in relevant part:

> Prior to the Effective Time, the Company shall, and shall cause its Subsidiaries and their respective Representatives to, provide cooperation *reasonably requested* by [ETE] that is necessary or *reasonably required* in connection with the Financing or any other financing that may be arranged by [ETE].[51]

The viability of these contentions depends on my finding that Williams' consent was withheld improperly and that any such withholding of consent caused injury to ETE.

In addition, Williams argues that alleged violations of Section 5.01(b)—which pertains to preparing the Form S-4 and the proxy statement—did not result in damages to *ETE*. Section 5.06 states in pertinent part:

> (b) If this Agreement is terminated (i) by either the Company or [ETE] pursuant to Section 7.01(b)(iii) or (ii) by [ETE] pursuant to Section 7.01(c), then in each case of clauses (i) and (ii) the Company shall promptly upon written demand by [ETE] (and in any event no later than two business days after such written demand is delivered to the Company) reimburse [ETE], by wire transfer of same day federal funds to the account specified by [ETE], for *all out-of-pocket fees and expenses incurred or paid by or on behalf of* [ETE] or their respective Subsidiaries and Affiliates in connection with the Merger or related to the preparation, negotiation, execution and performance of this Agreement, the Commitment Letter, the Fee Letter and related transaction documents, including *all fees and expenses of counsel*,

[49] *Id*. ¶¶ 32, 136; Merger Agreement §§ 4.01(b), 5.03, 5.14.
[50] Pl. Op. Br. at 48–52.
[51] Merger Agreement § 5.14 (emphases added).

> financial advisors, accountants, experts and consultants retained by [ETE] or their respective Subsidiaries and Affiliates, such amount *not to exceed $50.0 million* in the case of clause (i) and *$100.0 million* in the case of clause (ii).
>
> (c) If this Agreement is terminated by the Company pursuant to Section 7.01(d), then [ETE] shall promptly upon written demand by the Company (and in any event no later than two business days after such written demand is delivered to [ETE]) *reimburse the Company*, by wire transfer of same day federal funds to the account specified by the Company, for all out-of-pocket fees and expenses incurred or paid by or on behalf of the Company or its Subsidiaries and Affiliates in connection with the Merger or related to the preparation, negotiation, execution and performance of this Agreement and related transaction documents, including *all fees and expenses of counsel*, financial advisors, accountants, experts and consultants retained by the Company or its Subsidiaries and Affiliates, such *amount not to exceed $100.0 million*.[52]

II. ANALYSIS

The Counterclaim Defendants have moved to dismiss the counterclaims under Court of Chancery Rule 12(b)(6). When reviewing such a motion,

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are well-pleaded if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.[53]

I need not, however, "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[54] In addition,

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[52] Merger Agreement §§ 5.06(b)–(c).
[53] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (footnotes and internal quotation marks omitted).
[54] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011).

I refer to certain documents and public filings that are incorporated by reference in the Counterclaim Complaint.[55]

A. The Board Recommendation Claim

The most serious contention in the ETE counterclaims—from a damages perspective, at least—is that Williams violated its contractual obligations regarding the Board Recommendation in favor of the Merger, after which ETE terminated the Agreement, triggering an obligation on Williams' part to pay ETE a $1.48 billion Termination Fee. ETE seeks specific performance of this provision.

The syllogism under which ETE seeks the Termination Fee is rather complicated. First, ETE points out that under Section 3.01(d)(1), the Williams' Board of Directors is required to cause the Company to adopt resolutions (a) approving the Merger; (b) declaring that the Merger is in the best interest of its stockholders; (c) directing a stockholder vote; and (d) recommending that the stockholders adopt the Merger Agreement in that vote. Resolutions comprising (a), (b), (c) and (d) are defined as the "Company Board Recommendation."[56] All parties agree that the Williams's Board initially complied with the Merger Agreement by making this required Company Board Recommendation. Second, ETE points out that Section 4.02(d)(i)(A) provides that neither Williams' Board, "nor any

[55] *See Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. 2016).
[56] Merger Agreement § 3.01(d).

committee thereof," shall "withdraw (or modify or qualify in a manner adverse to [ETE], or publicly propose to withdraw, or modify or qualify in a manner adverse to [Williams], the Company Board Recommendation."[57] ETE argues that, even though the Williams Directors did not formally withdraw the Company Board Recommendation, the Directors informally decided (in light of ETE's perceived disinclination to merge) that it was more lucrative to Williams to pursue negotiation of a walk-away payment from ETE than to consummate the Merger. Third, ETE contends that, in pursuit of the strategy just described, the Company took the following actions during the pendency of the Merger: it (1) issued press releases that signaled Williams' pessimism about the Merger to the market; (2) sued ETE CEO Kelcy Warren in Texas state court and used the pleadings to damage investor confidence in Warren; (3) used the media to portray ETE in a negative light; and (4) released a Form S-4 that undermined the financial projections used to initially recommend the Merger to Williams' stockholders. The actions described above, according to ETE, amount to a *de facto* "withdrawal" of the Company Board Recommendation sufficient to qualify as a breach of Section 4.02(d). Fourth, after that breach, ETE exercised its right to terminate the Merger. Fifth, and finally, under the remedies described in Section 5.06 of the Merger Agreement, termination in this scenario entitles ETE to the Termination Fee.

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[57] *Id*. § 4.02(d)(i)(A).

ETE presses this argument despite the following undisputed facts: 1) Williams sued ETE to specifically enforce consummation of the Merger, which ETE strenuously (and successfully) opposed; 2) notwithstanding the supposed *de facto* withdrawal of the Company Board Recommendation in favor of the Merger, Williams' Directors never acted formally to withdraw the resolutions; 3) the Board affirmed the Company Board Recommendation several times during the pendency of the Merger; 4) an overwhelming majority of Williams' stock was voted in favor of the Merger, after which ETE—not Williams—terminated the Merger *upon failure of a condition precedent.*

Williams notes that ETE did not purport to terminate the Merger based on breach of the Company Board Recommendation provision; instead, it relied on the failure of the tax opinion to avoid the deal. Williams then makes the common-sense observation that it would be passing strange for two parties to a merger agreement to structure the agreement so that a party which desired to exit the agreement could do so, over the other party's objections, and at the same time receive the windfall of a substantial termination fee. ETE does not suggest that it is *not* seeking a windfall in the form of the Termination Fee; it simply notes that Delaware is a contractarian state that leaves parties to the benefits of their bargains, good, bad, and indifferent. ETE argues that Williams breached its duty not to modify the Company Board Recommendation, after which breach ETE terminated the Merger, thereby qualifying for the $1.48 billion Termination Fee. Accordingly, ETE asserts that if it is entitled to the Termination Fee under the negotiated terms of the Agreement, our Courts will enforce the contract, windfall or no. ETE is correct in noting that this is a contractarian jurisdiction;[58] however, I find the contract language, as written, fatal to ETE's contention here.

That is because the Agreement itself carefully defines the Company Board Recommendation as a series of four recommendations to be made, via board resolution, by the Williams' Directors. It is undisputed that the Williams Board created, via resolutions, a contractually compliant Company Board Recommendation. There are no allegations in the Counterclaim Complaint that the Directors, or any subcommittee thereof, ever formally modified (or expressed the intent to so modify) the Recommendation. In fact, the Recommendation remained in place through the vote on the Merger, which was overwhelmingly approved by Williams' stockholders. ETE, therefore, received what it bargained for. ETE has not alleged facts which make it reasonably conceivable that the Board withdrew the Recommendation.

ETE's argument is really that the Board adopted a strategy under which the

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[58] *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072, 1075 (Del. Ch.), *aff'd*, 68 A.3d 1208 (Del. 2012), *as corrected* (July 12, 2012) ("I conclude that . . . consistent with Delaware's pro-contractarian public policy, the parties' agreement . . . should be entitled to specific performance and injunctive relief should be respected.").

Company took a number of actions which ETE deems inimical to consummation of the merger. As will be discussed below, those efforts may be contractually meaningful in terms of the "best efforts" requirement that the Merger Agreement imposed on Williams. However, the Agreement was careful to cabin ETE's entitlement to the Termination Fee to those situations in which Board (or subcommittee) action modified (or proposed to modify) the required Company Board Recommendation, after which ETE terminated the Merger.

Because I find the Merger Agreement sections discussed to be clear on their face, I will not discuss further the parties' various attempts to construe those provisions in light of other provisions in the Agreement. Suffice it to say that ETE's reference to other contract provisions, attempting to demonstrate that the plain reading of the sections I have described above is incompatible with the balance of the Merger Agreement, I find unconvincing.

B. The Forum Selection Clause

During the pendency of the Merger, Williams brought an action against Kelcy Warren, ETE's principal, in Texas. The parties dispute the motive behind the litigation, which involved ETE's issuance of equity in ETE to insiders. The purpose for that issuance is itself disputed. Williams characterizes the Texas litigation as in aid of consummation of the Merger; ETE characterizes it as posturing in favor of Williams' negotiating a payment from ETE in return for Williams' consent to terminate the merger. In any event, ETE argues that the Texas litigation violated Section 8.10(b), which provides that no party shall bring "actions relating to this Agreement or the Transactions in any court other than the [Court of Chancery]" and that each such party "irrevocably submits with regard to any such action or proceeding . . . generally and unconditionally, to the personal jurisdiction of the aforesaid courts."[59] According to ETE, the Texas court dismissed the suit for violating the forum selection clause in Section 8.01(b) of the Merger Agreement.[60] ETE seeks damages here, which it describes as the fees and costs of the Texas action, arising from breach of the forum selection clause.

The parties argue forcefully about whether Warren was a party to the Merger Agreement, and thus whether Section 8.01(b) applied to the Texas action, and whether this Court had jurisdiction over Warren under the terms of the Merger Agreement. Even if I assume that ETE has the best of that argument, and that ETE is the proper party to seek as damages fees and costs incurred in a suit against Warren in his personal capacity, ETE cannot recover those fees and costs here, because Section 5.06(a) of the Agreement is, in that case, dispositive. That Section provides that "all fees and expenses incurred in connection with this Agreement and the Transactions shall be paid by the party incurring such fees or expenses, whether or

[59] Merger Agreement § 8.10(b).
[60] Defs. Ans. Br. 16.

not the Transactions are consummated."[61] In adopting that language, the parties waived any right to receive fees and expenses for a breach of the Agreement—if a breach it was—of the type ETE describes here.

I note that in addition to fees and costs, ETE argues that it suffered other damages in connection with the representations made by Williams in the Texas litigation, violating Merger Agreement provisions *independent* of the forum selection clause. Those damages claims are incorporated in the discussion below.

C. The Additional Breach of Contract Claims

Aside from its arguments concerning the Termination Fee and breach of the forum selection clause, ETE alleges other supposed breaches of the Agreement by Williams.

ETE argues that, as market conditions changed, the Williams' Board failed to obtain an updated fairness opinion from its financial advisors and failed to make disclosures to its stockholders concerning changes in market conditions. In addition, ETE contends that Williams' disclosures were materially incomplete concerning its reasons for agreeing to the Merger in the first instance. According to ETE, those include the threat of a proxy fight or consent solicitation—which caused some Williams Directors to change their vote to favor the Merger—that was inadequately disclosed. ETE next alleges that Williams failed to disclose various self-interests of

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[61] Merger Agreement § 5.06(a).

Williams' Directors. Also, ETE alleges that Williams failed to update its Form S-4 to reflect that at least one of the potential proxy contests could have been led by at a sitting Williams' Board member, which according to ETE, influenced the other Directors' votes in the Merger. These disclosures, according to ETE, would have been material to stockholders in making an informed vote concerning the Merger. The disclosures—in addition to being required under common law—were required under Section 5.01 of the Agreement.

Whether Williams' Board breached duties to its stockholders either under common law or the Agreement is a question of fact. Here, however, ETE seeks its own damages under the Agreement. While failure of material disclosures may have posed a threat of damages to the combined entity if the Merger had been consummated, the Merger was in fact terminated by ETE. Damages are an element of a breach of contract action.[62] It is simply not reasonably conceivable that any breach of the Williams Directors' responsibility to obtain an updated fairness opinion[63] or make required disclosures to Williams stockholders could lead to damages to ETE, in light of the failure of the Merger. Therefore, the Motion to Dismiss must be granted with respect to this issue.

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[62] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003) ("Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff.").

[63] I make no finding here that Williams was under a common law obligation to obtain an updated fairness opinion, as a duty to its stockholders.

Next, ETE notes that Williams failed to consent to a nearly $1 billion public offering, by which ETE intended to finance, in part, the Merger. ETE argues that Williams had a responsibility to cooperate with this equity financing, which required Williams to submit certain financial information and a consent from Williams' auditor to include certain audit reports related to that financial information. According to Williams, the public offering was discriminatory to Williams' stockholders, and it had a proper business purpose for withholding its consent. As noted above, I have another action pending[64] concerning this Special Issuance and its effect on other non-participating stockholders. The contractual language regarding Williams' obligation in this situation is not clear to me, and my analysis would benefit from extrinsic evidence regarding that obligation. A more serious question is whether damages can flow from any breach, given that ETE terminated the Agreement for failure of the unrelated condition precedent regarding tax consequences. ETE also argues that Williams failed to use best efforts to consummate the Merger as required by the Merger Agreement. To the extent that ETE can prove such, again, damages are problematic. However, we are at the motion to dismiss phase of this litigation. ETE argues that its willingness to exercise its option to terminate the Merger Agreement, based on the failure of the condition precedent, was informed by the results of Williams' breach of the obligation to

[64] *See ETE Unitholder Litig.*, 2017 WL 782495, at *1.

approve the equity offering and failure of best efforts. It seeks, at a minimum, to offset Williams' own damages claims accordingly. While I am dubious that ETE will ultimately prevail in demonstrating that Williams breached the Agreement in this regard, and that damages flowed as a result, such an outcome is reasonably conceivable. Therefore, resolution of these issues awaits a developed record and the Motion to Dismiss this claim is denied.

III. CONCLUSION

For the foregoing reasons, the Plaintiff's Motion to Dismiss the counterclaims is granted in part and denied in part. I note that Williams has a motion outstanding to strike ETE's affirmative defenses, which rest on the same allegations as do the counterclaims. The parties should consult and inform me whether any portion of that Motion to Strike needs further judicial resolution. The parties should also provide a Form of Order consistent with this Memorandum Opinion.

EXHIBIT B

GRANTED

EFiled: Nov 14 2018 10:26AM EST
Transaction ID 62667316
Case No. Multi-Case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER EQUITY, L.P., and LE GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12168-VCG
THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER CORP LP, ETE CORP GP, LLC, LE GP, LLC and ENERGY TRANSFER EQUITY GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12337-VCG

[PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART WILLIAMS' MOTION TO DISMISS AND TO STRIKE

WHEREAS, Defendants and Counterclaim Plaintiffs (collectively, "ETE") filed their Second Amended and Supplemental Affirmative Defenses and

Verified Counterclaim on September 23, 2016, and Plaintiff and Counterclaim Defendant ("Williams") filed a motion to dismiss and to strike (the "Motion to Dismiss") on September 29, 2016, which Motion to Dismiss was fully briefed on November 14, 2016;

WHEREAS, the Court indicated that it considered the Motion to Dismiss submitted on August 29, 2017, and issued its Memorandum Opinion on December 1, 2017;

WHEREAS, ETE filed a motion for reargument (the "Motion for Reargument") on December 8, 2017, which Motion for Reargument was fully briefed on December 14, 2017, and for which oral argument was held on March 19, 2018;

WHEREAS, the Court denied the Motion for Reargument on April 16, 2018 in a Letter Opinion;

WHEREAS, the Court held a telephonic hearing on October 30, 2018 concerning the parties' September 4, 2018 and September 11, 2018 letter briefs concerning certain provisions of this Proposed Order (the "Telephonic Hearing");

NOW, THEREFORE, IT IS HEREBY ORDERED, this ____ day of November, 2018, that, for the reasons set forth in the Memorandum Opinion, the Letter Opinion and the Telephonic Hearing:

1. The Motion to Dismiss is GRANTED as to (1) ETE's counterclaim for the Company Termination Fee; (2) ETE's counterclaim based on Williams' alleged breach of Merger Agreement § 4.02(d); (3) ETE's counterclaim based on Williams' alleged breach of Merger Agreement § 8.10(b); and (4) ETE's counterclaim based on Williams' alleged breach of Merger Agreement § 5.01. For the avoidance of doubt, the dismissal of these counterclaims does not decide the question whether ETE may rely on facts alleged in support of a dismissed counterclaim in support of one or more of its remaining counterclaims and defenses.

2. The Motion to Dismiss is DENIED as to ETE's remaining breach of contract counterclaims.

3. Specifically, as to Count I of ETE's Counterclaims, the Motion to Dismiss is GRANTED as to the declaratory judgments sought in: paragraph 196(b), (f), (h), (i) and (g) in part (*i.e.*, "and may collect the contractually agreed upon fee for such termination" is stricken from that paragraph); and paragraph 196(a) to the extent that it is based on subsections (b), (f), (h), (i) and (g) in part (*i.e.*, "and may collect the contractually agreed upon fee for such termination" is stricken from that paragraph) of paragraph 196. Those aspects of Count I are DISMISSED WITH PREJUDICE. The Motion to Dismiss is DENIED as to the remaining declaratory judgments sought in paragraph 196.

4. Specifically, as to Count II of ETE's Counterclaims, the Motion to Dismiss is GRANTED as to the breaches of contract alleged in paragraph 200(a), (b), (c) and (h), and as to ETE's claim for the Company Termination Fee, and those aspects of Count II are DISMISSED WITH PREJUDICE. The Motion to Dismiss is DENIED as to the remaining breaches of contract alleged in paragraph 200.

5. As to ETE's Affirmative Defenses, the Motion to Dismiss is GRANTED with respect to ETE's affirmative defense that "Williams' claims are barred, in whole or in part, by its failure to comply with the Merger Agreement" (Countercl. p. 87) to the extent this affirmative defense is based upon ETE's allegation of breach of Merger Agreement § 4.02(d), and that aspect of the affirmative defense is STRICKEN WITH PREJUDICE. The Motion to Dismiss is DENIED with respect to ETE's affirmative defense that "Williams' claims are barred, in whole or in part, by its failure to comply with the Merger Agreement" (Countercl. p. 87) to the extent this affirmative defense is based upon ETE's allegation of breach of other sections of the Merger Agreement. The Motion to Dismiss is DENIED WITHOUT PREJUDICE with respect to ETE's other affirmative defenses.

____
Vice Chancellor Sam Glasscock III

Court: DE Court of Chancery Civil Action

Judge: Multi-Case

File & Serve Transaction ID: 62647525

Current Date: Nov 14, 2018

Case Number: Multi-Case

/s/ Judge Glasscock, Sam

EXHIBIT C

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., and LE GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12168-VCG
THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER CORP LP, ETE CORP GP, LLC, LE GP, LLC and ENERGY TRANSFER EQUITY GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12337-VCG

MEMORANDUM OPINION

Date Submitted: March 4, 2020
Date Decided: July 2, 2020

Kenneth Nachbar, Susan Waesco, Matthew Clark, and Zi-Xiang Shen, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; OF COUNSEL: Antony Ryan, Kevin Orsini, and Michael Addis, of CRAVATH, SWAINE & MOORE LLP, New York, New York, *Attorneys for Plaintiff and Counterclaim Defendant The Williams Companies, Inc.*

Rolin Bissel, James Yoch, Jr., and Benjamin Potts, of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; OF COUNSEL: Michael Holmes, John Wander, Craig Zieminski, and Andy Jackson, of VINSON & ELKINS LLP, Dallas Texas, *Attorneys for Defendants and Counterclaim Plaintiffs Energy Transfer LP, formerly Energy Transfer Equity, L.P.; Energy Transfer Corp LP; ETE Corp GP, LLC; LE GP, LLC; and Energy Transfer Equity GP, LLC.*

GLASSCOCK, Vice Chancellor

This matter involves a failed merger between two fuel pipeline giants, Plaintiff/Counterclaim Defendant The Williams Companies, Inc. ("Williams") and Defendant/Counterclaim Plaintiff Energy Transfer LP ("ETE"). That merger, slated to close four years ago, foundered on the shoal of a declining energy market. ETE made no secret of the fact that it wanted to avoid the deal, and—as ETE tells it, at least—Williams saw the merger agreement primarily as an opportunity to leverage a settlement to consent to a breakup. Williams, however, sought specific performance of the merger agreement. Fortunately for ETE, the cash-plus-equity structure of the consideration together with the rapid decline in the value of ETE units (which fell in consort with the general energy industry decline) meant that its tax advisor could no longer certify that the merger would qualify as tax free. Since the parties had agreed in the merger agreement that such an opinion was a condition precedent to closing, I denied Williams' request to specifically enforce the merger agreement via closing, after an expedited proceeding, on June 24, 2016.[1] The failure of the merger was bruising to both sides, and they sought to dress their wounds with the balm of contractual damages; thus, this litigation proceeded. By a second

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

Memorandum Opinion dated December 1, 2017, I dismissed in part ETE's counterclaim seeking a contractual breakup fee.[2]

Before me now are cross-motions for summary judgement concerning part of Williams' contractual damages claims. Williams, in order to enter the merger agreement with ETE, had to exit another transaction, which caused it to incur a cost of $410 million. Williams and ETE allocated the risk that this payment might prove valueless if the Williams-ETE merger failed to go through. They provided that, if either party terminated the merger for reasons including the passing of an outside date (which occurred here due to the failure of the tax-free condition), *and* ETE was not at that time in compliance with one of several other contractual mandates, ETE would reimburse Williams the $410 million. This Memorandum Opinion addresses whether ETE is liable for that reimbursement, under the record as it now exists. While I am not able to resolve all remaining issues without a trial record, I am able to address and clarify the contractual obligations of the parties, as I interpret the merger agreement. My reasoning is below.

[2] *Williams Cos., Inc. v. Energy Transfer Equity*, 2017 WL 5953513 (Del. Ch. Dec. 1, 2017) *reargument denied* 2018 WL 1791995 (Del. Ch. Apr. 16, 2018).

I. BACKGROUND[3]

A. The Parties

Plaintiff and Counterclaim Defendant Williams is a Delaware corporation with headquarters in Tulsa, Oklahoma.[4]

Defendant and Counterclaim Plaintiff ETE, formerly known as Energy Transfer Equity, L.P., is a Delaware limited partnership with headquarters in Dallas, Texas.[5] Defendant and Counterclaim Plaintiff ETE Corp GP, LLC ("ETE Corp") is a Delaware limited liability company.[6] Defendant and Counterclaim Plaintiff LE GP, LLC ("LE GP") is a Delaware limited liability company and the general partner of ETE.[7] Defendant and Counterclaim Plaintiff Energy Transfer Equity GP, LLC ("ETE GP") is a Delaware limited liability company.[8] Defendant Energy Transfer Corp LP ("ETC") is a Delaware limited partnership taxable as a corporation.[9] ETC

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[3] I recite the facts necessary to my decision of the cross-motions for summary judgment. A more complete recitation may be found in *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017). I draw the facts below from the evidence submitted under affidavit with the parties' papers. I also draw facts from the prior decision in this case, affirmed by the Delaware Supreme Court. *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1174 (Del. 1995) (holding that factual findings uncontested in appeal become law of the case).

[4] *Williams*, 2016 WL 3576682, at *2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at *1.

is the entity into which Williams planned to merge.[10] I refer to these Defendants and Counterclaim Plaintiffs collectively as "ETE."

B. Factual Background

1. <u>Williams and ETE Agree to Merge</u>

ETE offered to purchase Williams in an all-equity deal on May 19, 2015.[11] After four months of negotiations, the parties signed the Agreement and Plan of Merger (the "Merger Agreement").[12] The transaction the parties ultimately negotiated (the "Merger") included cash as well as equity components: the surviving company would own 57% of the limited partner interest of ETE; ETE would own the Williams assets and 19% of the surviving company's shares; and former Williams stockholders would "receive a right to consideration consisting of (1) ETC shares representing approximately 81% of the surviving entity; (2) $6.05 billion in cash; and (3) certain contingent consideration rights."[13]

As a condition to its offer, ETE required that Williams terminate a roll-up transaction to which Williams had committed with its master limited partnership,

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[10] *Id.*

[11] *Id.*

[12] *Id.*; Transmittal Aff. of Matthew R. Clark in Support of Pl.'s and Countercl.-Def.'s Mot. for Partial Summ. J., D.I. 460 ("Clark Aff."), Ex. 1, Agreement and Plan of Merger dated as of September 28, 2015 ("Merger Agreement").

[13] *Williams*, 2016 WL 3576682, at *3. Getting to this final result required several complex steps aimed at achieving a tax-free transaction. The deal mechanics, not at issue here, are described in detail in *Williams*, 2016 WL 3576682, at *3–4.

Williams Partners, L.P. ("WPZ") on May 12, 2015.[14] Terminating that roll-up transaction required Williams to pay WPZ a $410 million termination fee.[15] Thus, as a part of the Merger Agreement, the parties negotiated that if either party terminated the Merger Agreement under certain conditions, ETE would reimburse Williams in the same amount Williams had paid to WPZ to extract itself from the roll-up transaction: $410 million (the "WPZ Termination Fee Reimbursement").[16]

2. <u>The Market Declines and ETE Issues New Equity</u>

In late 2015, shortly after the parties executed the Merger Agreement, the energy market "experienced a precipitous decline."[17] The decline made the Merger far less attractive to ETE, and it sought a way out.[18]

One effect ETE feared if the Merger had negative consequences was that it would have to cut distributions to maintain cash flow in order to prevent its credit rating from dropping.[19] Distributions to equity holders, however, are the *raison d'etre* of ETE's business model.[20] To resolve the issue, it proposed an offering of

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[14] Clark Aff., Ex. 6, at -1680566.

[15] Clark Aff., Ex. 5, Agreement and Plan of merger dated as of May 12, 2015 by and among The Williams Companies, Inc., SCMS LLC, Williams Partners L.P., and WPZ GP LLC, § 7.6(a).

[16] Merger Agreement, § 5.06(f).

[17] *Williams*, 2016 WL 3576682, at *1.

[18] *Id.*

[19] *See* Clark Aff., Ex. 9, at -67801; Clark Aff., Ex. 11, Dep. of Thomas Long date Dec. 3, 2019, at 11:20–13:12.

[20] *See In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *4 (Del. Ch. May 17, 2018) (discussing the Merger and noting the possibility of distribution cuts "spelled

convertible preferred units ("CPUs") to ETE unitholders, while excluding Williams' stockholders (the "Public Offering").[21] The holders of the CPUs would receive guaranteed but deferred distributions, allowing ETE to preserve cash. Williams informed ETE that it believed such an offering would violate certain operating covenants under the Merger Agreement, and that the offering therefore required Williams' consent.[22] Williams believed that the Public Offering would hurt Williams stockholders because it would allow ETE to cut common distributions to nothing while still permitting distributions to participating ETE unitholders.[23] As a result of this belief, the Williams board of directors declined to consent to the Public Offering.[24]

ETE then made a private offering of Series A Convertible Preferred Units (the "Preferred Offering") largely similar to the Public Offering that Williams had rejected, but which, in ETE's view, did not require Williams' consent.[25] The

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trouble for ETE . . . ETE distributed all of its available cash to unitholders every quarter. Thus, ETE depended on access to capital markets to fund its growth. Because credit ratings determine access to credit and the cost of debt, it was particularly important for the ETE family of companies to maintain its ratings.").

[21] Clark Aff., Ex. 17.

[22] Clark Aff., Ex. 19, at -1697936.

[23] Clark Aff., Ex. 20, at -51439; Clark Aff., Ex. 10, Dep. of Garner dated Dec. 12, 2019, at 289:10–290:10; Clark Aff., Ex. 21, Dep. of Gary Posternack dated Oct. 24, 2019, at 115:6–17, 357:9–358:9.

[24] Clark Aff., Ex. 23, at -22330.

[25] *See* Clark Aff., Ex. 24.

maximum potential value of the Preferred Offering was $942,508,720.[26] ETE informed Williams of the Preferred Offering *after* it completed.[27] The Preferred Offering operated in the same way as the Public Offering, allowing participating ETE units to receive a guaranteed distribution, regardless of distributions to non-participating units.[28] This meant that following the Merger, ETE could potentially cut distributions to all common unitholders (including former Williams stockholders), while participating unitholders—the majority of whom were ETE insiders—would continue to receive guaranteed (but deferred) distributions.[29]

Before ETE signed the Merger Agreement, it had three classes of equity.[30] The Preferred Offering represented a fourth class of equity in addition to the three

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[26] Transmittal Aff. of Benjamin M. Potts in Support of Defs.' and Countercl. Pls.' Opening Br. in Support of Mot. for Summ. J., D.I. 463 ("Potts Aff."), Ex. 8, Rebuttal Aff. of J.T. Atkins on Behalf of Energy Transfer Equity, LP, and LE GP, LLC, ¶¶ 23, 32; *see* Potts Aff., Ex. 21, at 2 (ETE Form 8-K dated March 8, 2016 summarizing issuance).

[27] Clark Aff., Ex. 25, Dep. of John W. McReynolds dated Oct. 8, 2019, at 191:11–15; Clark Aff., Ex. 26, Dep. of David A. Katz dated Oct. 29, 2019, at 67:9–17 ("Katz Dep."); Clark Aff., Ex. 18, Dep. of Donald Chappel dated Nov. 6, 2018, at 149:4–11.

[28] *See* Clark Aff., Ex. 24 (ETE Form 8-K dated March 8, 2016 describing Preferred Offering). The distribution was in the form of units, distribution of which would be deferred. An explanation of the operation of these rather complex securities can be found in *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *5–8 (Del. Ch. May 17, 2018) *aff'd sub nom. Levine v. Energy Transfer L.P.*, 223 A.3d 97 (Del. 2019).

[29] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *4 (Del. Ch. June 24, 2016) (describing ETE's intent to cut cash distributions to common unitholders due to the Merger and the effect of such a distribution cut); Clark Aff., Ex. 27, at 266–67 (ETE SEC Form S-4 noting participation by ETE's CEO, co-founder, and other insiders in the Preferred Offering).

[30] Merger Agreement, § 3.02(c)(i).

pre-existing classes.[31] Issuing the Preferred Offering necessitated ETE amending its limited partnership agreement.[32]

3. <u>Williams' and ETE's Actions Prior to the Closing Date</u>

Both Williams and ETE took actions prior to the Merger's expected closing date (the "Closing Date") that the other party describes as violations of the respective "reasonable best efforts" obligations to consummate the Merger. Among other things, the parties had conditioned closing on the receipt of an opinion from ETE's tax counsel, Latham & Watkins LLP ("Latham"), that the transaction would qualify for tax-free treatment under Section 721(a) of the Internal Revenue Code (the "721 Opinion").[33] After the market's decline reversed ETE's interests in the deal, ETE's Head of Tax, Brad Whitehurst, reviewed the transaction and began to think that it might not qualify for tax-free treatment.[34] Although at the time, no one else—

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[31] Clark Aff., Ex. 45, Private Placement Memorandum, at -199834 (ETE Private Placement Memorandum filed with SEC representing that "Convertible Units will be a new class of units representing limited partner interests. . ."); Clark Aff., Ex. 46, Amendment No. 5 to Third Amended and Restated Agreement of Limited Partnership of Energy Transfer Equity, L.P., at 1 (Amendment to ETE's limited partnership agreement describing Preferred Offering as a "new class of units representing limited partner interest. . ."); Clark Aff., Ex. 47, Form 10-K, at F-7 through F-8 (ETE 2016 Form 10-K describing four classes of equity).

[32] *See* Clark Aff., Ex. 46, Amendment No. 5 to Third Amended and Restated Agreement of Limited Partnership of Energy Transfer Equity, L.P., at 1 (Amendment No. 5 to ETE's Third Amended and Restated Agreement of Limited partnership, adopted March 8); *Williams*, 2016 WL 3576682, at *4.

[33] Merger Agreement, § 6.01(h).

[34] *Williams*, 2016 WL 3576682, at *6.

including Latham and Williams' counsel—had advanced this view, Whitehurst brought the issue to Latham's attention.[35]

When it became apparent the issue was a real one that could potentially relieve ETE of its obligation to close, ETE made little to no effort to resolve it or find a workaround. After trial in 2016, I found that ETE "did not direct Latham to engage earlier or more fully with Williams' counsel, failed itself to negotiate the issue directly with Williams, failed to coordinate a response among the various players, went public with the information . . . and generally did not act like an enthusiastic partner in pursuit of consummation" of the Merger Agreement.[36]

Williams now offers new evidence in addition to that already established at trial in 2016 that suggests ETE's lack of effort. The evidence indicates a possibility that contrary to Whitehurst's testimony, one of his subordinates, Darryl Krebs, in fact uncovered the tax issue that ultimately led to the Merger's failure.[37] Krebs and Whitehurst's correspondence on the potential inability to close the Merger describes it as a "silver lining" and a possible "opportunity."[38] Additionally, attorneys at Wachtell, Lipton, Rosen & Katz ("Wachtell") who acted as ETE's deal counsel and

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[35] *Id.*

[36] *Id.* at *17.

[37] Transmittal Aff. of Zi-Xiang Shen in Support of The Williams Companies, Inc.'s Br. in Opp'n to Defs.' and Countercl.-Pls.' Mot. for Summ. J., D.I. 479 ("Shen Aff."), Ex. 82, Dep. of Darryl A. Krebs dated Oct. 25, 2018, at 97:6–98:18, 100:7–102:8.

[38] Shen Aff., Ex. 83, at -294226.

advisors, expressed serious skepticism regarding Latham's recently-adopted position on the tax issue, but ETE never asked Wachtell to communicate with Latham or evaluate Williams' proposals to resolve the issue.[39]

For its part, ETE alleges that Williams' CEO, Alan Armstrong, attempted to extract *Williams* from the Merger, and that he took various obstructive actions toward that end. ETE alleges that Armstrong, without Williams' knowledge, fed inside information to a Williams stockholder, John Bumgarner, to assist with litigation attempting to enjoin the merger.[40] Bumgarner sued the parties in federal court in January 2016, asserting violations of the Securities and Exchange Act and seeking an injunction.[41] Armstrong never told the Williams board of directors about his alleged assistance to Bumgarner.[42] Two weeks prior to the 2016 trial in this Court, Armstrong deleted his personal email account that he used to communicate

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[39] Shen Aff., Ex. 87, Dep. of T. Eiko Stange dated Oct. 26, 2018, at 105:22–106:6, 109:11–112:18, 120:6–23, 128:5–15 (Wachtell attorney testifying regarding his skepticism of Latham's perspective on the tax issue), 204:10–15 (testifying that ETE had not asked Wachtell to form an opinion on Latham's reasoning), 233:21–234:8 (testifying he was not asked to review Williams' proposals to resolve the issue); Shen Aff., Ex. 88, at -42729 (Internal Wachtell email date April 7, 2016 expressing skepticism of Latham's position).

[40] Transmittal Aff. of Benjamin M. Potts in Support of Defs.' and Countercl. Pls.' Response to Pl.'s Mot. for Partial Summ. J., D.I. 481 ("Potts Response Aff."), Ex. 2, Dep. of Meister dated Nov. 4, 2019 ("Meister Dep."), at 309:8–22, 327:17–23; Potts Response Aff., Ex. 3, Dep. of Laura Ann Sugg dated Nov. 22, 2019, at 36:23–37:7; Potts Response Aff., Ex. 4, Dep. of Alan Armstrong dated Oct. 24, 2019 ("Armstrong Dep."), at 186:22–187:3, 242:22–243:1, 270:16–24, 273:15–24.

[41] Potts Response Aff., Ex. 9, Class Action Compl., at ¶¶ 1, 46.

[42] Meister Dep, at 209:8–16, 327:17–23.

with Bumgarner.[43] Ultimately, Bumgarner's lawsuit was mooted when this Court permitted ETE to terminate the Merger.

In addition to Armstrong's actions with Bumgarner, ETE submits evidence that Armstrong initially withheld information about ETE's interest in acquiring Williams from the Williams' board, thus allowing it to enter the transaction with WPZ and commit to a substantial breakup fee without this knowledge.[44] ETE contends that Armstrong thus used the WPZ transaction as a form of "poison pill" against ETE's advances.[45] After the Williams board nonetheless determined to sign the Merger Agreement, Armstrong attempted to influence the board to find a way to terminate the agreement.[46] Using allies in management, he pushed for Williams' value as a standalone company.[47] Approaching the board approval vote, Armstrong continued to attempt to convince various directors to oppose the Merger.[48]

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[43] Potts Response Aff., Ex. 36, Responses of Pl. the Williams Companies, Inc. to Defs.' First Set of Request for Admissions, at 8.

[44] Potts Response Aff., Ex. 41, Dep. of Mandelblatt dated Nov. 20, 2018 ("Mandelblatt Dep."), at 72:11–73:17; Meister Dep, at 141:20–142:7; *see* Potts Response Aff., Ex. 42, Minutes of a Special Meeting of the Board of Directors Held September 28, 2015, at -52994 (Williams board minutes showing absence of a discussion of the timing of ETE's solicitations).

[45] *See* Mandelblatt Dep., at 273:21–274:25, 322:6–14; Meister Dep., at 142:15–144:12.

[46] Potts Response Aff., Ex. 37, at -819862 through 63; Meister Dep., at 169:3–17; Potts Response Aff., Ex. 38, Dep. of Donald Chappel dated Nov. 6, 2018, at 88:8–17.

[47] Meister Dep., at 171:6–12; Potts Response Aff., Ex. 46, at -873387; Potts Response Aff., Ex. 37, at -819862 through 63.

[48] Potts Response Aff., Ex. 56, at -789293 through 94; Potts Response Aff., Ex. 93, at -795561.

Although the initial vote to enter the Merger Agreement had garnered a contested 8-5 approval, Williams' board issued a press release that it was "unanimously committed to completing the transaction with [ETE] per the merger agreement. . ."[49] ETE contends that Williams' strategy at this point was already to position itself for a breakup fee.[50] Some members of the Williams board questioned the Merger's value for Williams' stockholders, and Williams began to discuss the value of a breakup fee with its financial advisors.[51]

Williams took several other actions ETE contends were aimed at obstructing the Merger. It sued ETE's Chairman in Texas, alleging he engaged in self-dealing transactions.[52] When ETE approached it regarding the Public Offering, Williams declined to give its consent, thus ensuring the Public Offering could not be made.[53] ETE also alleges that Williams obstructed its efforts to talk with Williams' board or

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[49] Potts Response Aff., Ex. 60, at -543388.

[50] *See* Potts Response Aff., Ex. 56, at -789293 through 94 (Armstrong writing that "some will claim that we should just hold the course, forcing [ETE founder] Kelcy to the alter [sic].").

[51] Potts Response Aff., Ex. 62, at -167054 (Williams director stating that "[b]enefits to shareholders [are] . . . now much diminished, if not gone."); *see* Potts Response Aff., Ex. 67, at -69170 through 71 (analysis prepared for Armstrong suggesting Merger was no longer valuable and valuing breakup fee); Potts Response Aff., Ex. 68, at -467599 (Williams advisor estimating potential breakup fee).

[52] Potts Response Aff., Ex. 69, Williams v. Warren, No. DC-1603941 (Apr. 6, 2016 Tex. Dist. Ct.).

[53] Potts Response Aff., Ex. 38, Dep. of Donald Chappel dated Nov. 6, 2018, at 217:7–218:5.

management about alternative financing resolutions to alleviate the tax issues that had arisen.[54]

4. ETE Terminates the Merger

On April 12, 2016, Latham informed Williams that it would likely be unable to deliver the 721 Opinion, which was, as described, a condition precedent to closing.[55] Williams attempted to work through the issue, suggesting alternatives to achieve tax-free status, and when these discussions failed, it filed suit in this Court to compel ETE to close under the Merger Agreement.[56]

On June 24, 2016, I declined to compel ETE to close, finding that it was "contractually entitled to terminate the Merger Agreement."[57] I concluded that Latham's inability to issue the 721 Opinion was in good faith, and that ETE did not contribute materially to Latham's inability to issue it.[58] I also found that neither party breached the "Tax Representation" clauses found in § 3.01(n)(i) and § 3.02(n)(i), meaning there were no facts regarding tax aspects of the transaction that

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[54] *See* Potts Response Aff., Ex. 78, Minutes of a Telephonic Special meeting of the Board of Directors Held February 17, 2016, at -1944124 through 25.

[55] *See* Merger Agreement, § 6.01(h); Clark Aff., Ex. 30, at -196308 through 10.

[56] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *8 (Del. Ch. June 24, 2016); Clark Aff., Ex. 31, at -665882 through 83.

[57] *Williams*, 2016 WL 3576682, at *2, *21.

[58] *Id.* at *16 ("[T]he record is barren of any indication that the action or inaction of [ETE] (other than simply drawing Latham's attention to the problem) contributed materially to Latham's inability to issue the 721 Opinion.").

either party had failed to disclose.[59] These findings were later affirmed by the Supreme Court.[60] However, the Supreme Court disagreed with my analysis of ETE's best efforts, writing, "covenants like the ones involved here impose obligations to take all reasonable steps to solve problems and consummate the transaction."[61] The Supreme Court found the language in the best efforts covenants "not only prohibited the parties from preventing the merger, but obligated the parties to take all reasonable actions to complete the merger."[62] The Supreme Court stated that a focus on the *absence* of affirmative Merger-scuttling acts by ETE was in error and noted that "[t]here was evidence, recognized by the Court of Chancery, from which it could have concluded that ETE did breach its [efforts] covenants. . ."[63] This issue was not case dispositive, however, and so the Court affirmed.

On, June 27, 2016, the Williams stockholders voted in support of the Merger.[64] That same day, Latham sent ETE "an execution version of the tax officer's certificate to support the [721 Opinion]," and Whitehurst informed Latham, "I have reviewed the revised officer's certificate and I continue to be unable to sign

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[59] *Id.* at *18–19.

[60] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 268 (Del. 2017).

[61] *Id.* at 272.

[62] *Id.* at 273.

[63] *Id.*

[64] Clark Aff., Ex. 38, at 2.

the officer's certificate as drafted."[65] The day after that, June 28, was the Closing Date.[66] Williams attempted to close the transaction on the Closing Date, but ETE refused, relying on the absence of Latham's 721 Opinion, a condition precedent under the Merger Agreement.[67] Latham reaffirmed that it could not deliver the 721 Opinion at that time.[68] ETE terminated the Merger Agreement on June 29, after the Outside Date provided in the Merger Agreement.[69] ETE's CEO confirmed that in terminating the Merger Agreement, ETE relied solely on Latham's inability to deliver the 721 Opinion.[70] Williams wrote a letter to ETE, stating that it had been willing to waive conditions set forth in § 6.03(a)-(b) in the Merger Agreement and proceed with closing, but that it would now pursue the WPZ Termination Fee Reimbursement.[71]

5. Termination Clauses and Fees in the Merger Agreement

As noted, the parties agreed that ETE would pay Williams the WPZ Termination Fee Reimbursement if either party terminated the Merger Agreement

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[65] Clark Aff., Ex. 71, at -87794.

[66] Clark Aff., Ex. 39, at -1174715; *see also* Merger Agreement, § 1.02.

[67] Clark Aff., Ex. 40, Declaration of Richard Hall, ¶¶ 3–4; Clark Aff., Ex. 41, at -1002872.

[68] Clark Aff., Ex. 42, at -290751 through 52.

[69] Clark Aff., Ex. 44, at -87881 through 82.

[70] Clark Aff., Ex. 15, Dep. of Kelcy Warren dated Dec. 4, 2019, at 104:21–22.

[71] Potts Aff., Ex. 24 (Letter from Williams General Counsel stating, "Williams was prepared yesterday to waive the failure of the conditions in Sections 6.03(a) and 6.03(b) and close, but in light of ETE's refusal to close and subsequent termination, Williams is now entitled to receive the WPZ Termination Fee Reimbursement.").

under certain circumstances. In the Merger Agreement provisions that follow, "Company" means Williams, "Parent" means ETE, and "TopCo" means ETC.[72] Specifically, § 5.06(f) of the Merger Agreement states:

> If the Company or Parent terminates this Agreement pursuant to (A) Section 7.01(b)(ii), (B) Section 7.01(d), or (C) Section 7.01(b)(i) and, at the time of any such termination pursuant to this clause (C) any condition set forth in Section 6.01(b), 6.01(c), 6.01(d), 6.01(e), 6.03(a) or 6.03(b) shall not have been satisfied, then, in each case, Parent shall reimburse the Company for $410.0 million (the "WPZ Termination Fee Reimbursement"). . .[73]

Section 7.01(b)(i)—one of the possibilities listed above for termination that triggers the obligation set out in § 5.06(f)—provides:

> This Agreement may be terminated at any time prior to the Effective Time, whether before or after receipt of the Company Stockholder Approval, by delivery of written notice to the other parties hereto under the following circumstances . . . (b) by either of Parent or the Company (i) if the Merger shall not have been consummated on or before the date that is nine months after the date of this Agreement (as it may be extended from time to time by the mutual written agreement of Parent and the Company, the "Outside Date") . . . provided . . . however, that the right to terminate this Agreement pursuant to this Section 7.01(b)(i) shall not be available to any party if the failure of such party (and in the case of Parent, TopCo) to perform any of its obligations under this Agreement has been a principal cause of or resulted in the failure of the Merger to be consummated on or before such date[.][74]

[72] Merger Agreement, *Recitals*.

[73] *Id.*, § 5.06(f).

[74] *Id.*, § 7.01(b)(i).

The parties do not dispute that ETE terminated the Merger Agreement under § 7.01(b)(i) because the defined "Outside Date," June 28, 2016, passed without the Merger having consummated.[75]

6. ETE's Representations and Covenants in the Merger Agreement

In the Merger Agreement, ETE made several contractual representations and operating covenants that are now at issue in these cross-motions for summary judgment.

a. Ordinary Course of Business Operating Covenants

ETE represented it would carry on in the ordinary course of business, which entailed several specific "ordinary course" covenants, discussed below. Under § 6.03(b) of the Merger Agreement, ETE agreed that:

> Each of TopCo and Parent shall have, in all material respects, performed or complied with all obligations required by the time of the Closing to be performed or complied with by it under this Agreement, and the Company shall have received a certificate signed on behalf of Parent by the chief executive officer or the chief financial officer of Parent to such effect.[76]

These performance obligations described in § 6.03(b) required ETE to abide by several further, specific operating covenants under § 4.01(b). ETE represented, first of all, that it would carry on its business "in the ordinary course":

[75] As described above, I found in 2016 that ETE had no obligation to close the merger by the Outside Date because the condition precedent to closing described in § 6.01(h)—Latham's 721 Opinion—had not been met.

[76] Merger Agreement, § 6.03(b).

> Except as set forth in Section 4.01(b) of the Parent Disclosure Letter, expressly permitted by this Agreement, required by applicable Law or consented to in writing by the Company (such consent not to be unreasonably withheld, conditioned or delayed), during the period from the date of this Agreement to the Effective Time, Parent shall, and shall cause each of its Subsidiaries to, carry on its business in the ordinary course and shall use commercially reasonable efforts to preserve substantially intact its current business organizations, maintain its rights, franchises and Parent Permits and to preserve its relationship with significant customers and suppliers. . . .[77]

Carrying on "its business in the ordinary course," in turn, entailed several specific restrictions. *First*, ETE represented that it would not take any actions resulting in new restrictions in the form of distributions and payments of dividends:

> [D]uring the period from the date of this Agreement to the Effective Time, Parent shall not, and shall not permit any of its Subsidiaries to . . . (ii) take any action that would result in Parent or any of its Subsidiaries becoming subject to any restriction not in existence on the date hereof with respect to the payment of distributions or dividends[.][78]

Second, ETE represented that it would refrain from certain actions regarding manipulation of its equity securities:

> [D]uring the period from the date of this Agreement to the Effective Time, Parent shall not, and shall not permit any of its Subsidiaries to . . . (iii) split, combine or reclassify any of its equity securities or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for equity securities, other than transactions by a wholly owned Subsidiary of Parent which remains a wholly owned Subsidiary after consummation of such transaction[.][79]

[77] *Id.*, § 4.01(b).

[78] *Id.*, § 4.01(b)(ii).

[79] *Id.*, § 4.01(b)(iii).

Third, ETE represented it would not amend its organizational documents:

> [D]uring the period from the date of this Agreement to the Effective Time, Parent shall not, and shall not permit any of its Subsidiaries to . . . (vi) amend (A) the organizational documents of TopCo, (B) the Parent Certificate of Partnership or the Partnership Agreement (other than the Parent Partnership Agreement Amendment) or (C) the comparable organizational documents of any Subsidiary of Parent in any material respect[.][80]

b. Capital Structure Representations

ETE made certain representations regarding its capital structure. In § 6.03(a)(i), ETE agreed:

> The obligation of the Company to effect the Merger is further subject to the satisfaction or (to the extent permitted by Law) waiver at or prior to the Effective Time of the following conditions: . . . (a)(i) The representations and warranties of TopCo and Parent set forth in Sections 3.02(c)(i) and 3.02(c)(ii) (Capital Structure) shall be true and correct as of the Closing Date as though made on such date (except to the extent any of such representations and warranties speak as of an earlier date, in which case such representations and warranties shall be true and correct as of such earlier date), except for any immaterial inaccuracies. . . .[81]

Under § 3.02(c)(i), ETE represented that it had three classes of equity:

> (c) Capital Structure. (i) The authorized equity interests of Parent consist of common units representing limited partner interests in Parent ("Parent Common Units"), Class D Units representing limited partner interests in Parent ("Parent Class D Units") and a general partner interest in Parent ("Parent General Partner Interest"). At the close of business on September 25, 2015 (the "Parent Capitalization Date"), (i) 1,044,764,836 Parent Common Units were issued and outstanding, of

[80] *Id.*, § 4.01(b)(vi).

[81] *Id.*, §6.03(a)(i).

> which 5,776,462 consisted of Parent Restricted Units, (ii) 2,156,000 Parent Class D Units were issued and outstanding and (iii) there was an approximate 0.2576% Parent General Partner Interest. Except as set forth above, at the close of business on the Parent Capitalization Date, no equity securities or other voting securities of Parent were issued or outstanding. Since the Parent Capitalization Date to the date of this Agreement, (x) there have been no issuances by Parent of equity securities or other voting securities of Parent, other than the conversion of Parent Class D units outstanding as of the Parent Capitalization Date and (y) there have been no issuances by Parent of options, warrants, other rights to acquire equity securities of Parent or other rights that give the holder thereof any economic interest of a nature accruing to the holders of Parent Common Units.[82]

c. Tax Representations

ETE made certain representations regarding tax matters in the Merger Agreement. Section 6.03(a)(iv) set out certain specific materiality limitations that would govern representations under that section:

> each of the other representations and warranties of TopCo and Parent set forth in this Agreement shall be true and correct (disregarding all qualifications or limitations as to "materiality", Parent Material Adverse Effect" and words of similar import set forth therein) as of the Closing Date as though made on such date . . . except, solely in the case of this clause (iv), where the failure of such representations and warranties to be so true and correct would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect. The Company shall have received a certificate signed on behalf of Parent by the chief executive officer or the chief financial officer of Parent to such effect.[83]

[82] *Id.*, § 3.02(c)(i).

[83] *Id.*, §6.03(a)(iv).

One of the representations that came under the provision above was certain representations that ETE made in § 3.02(n)(i) regarding tax matters related to the transaction:

> None of TopCo, Parent or any Subsidiaries of Parent has taken or agreed to take any action or knows of the existence of any fact that would reasonably be expected to prevent (A) the Merger from qualifying for the Intended Tax Treatment or (B) the Contribution and Parent Class E Issuance from qualifying as an exchange to which Section 721(a) of the Code applies.[84]

d. Best Efforts Covenants

The parties also represented that they would use best efforts to consummate the Merger. As described above, § 6.03(b) required ETE to have "in all material respects, performed or complied with all obligations required by the time of the Closing to be performed or complied with by it under this Agreement."[85] One of these requirements, found in § 5.03, was to use "reasonable best efforts" to consummate the transaction "in the most expeditious manner practicable":

> Upon the terms and subject to the conditions set forth in this Agreement, each of the parties hereto shall use its reasonable best efforts to, and shall cause their respective Affiliates to use reasonable best efforts to, take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the Transactions, including using reasonable best efforts to accomplish the following: (i)

[84] *Id.*, § 3.02(n)(i).

[85] *Id.*, § 6.03(b).

> the taking of all acts necessary to cause the conditions to Closing to be satisfied as promptly as practicable. . . .[86]

This requirement also encompassed several specific best efforts, among them qualification for tax-free treatment in § 5.07(a)(ii):

> The Company, TopCo and Parent shall cooperate and each use its commercially reasonable efforts to cause (i) the Merger to qualify for the Intended Tax Treatment . . .[87]

7. The Parent Disclosure Letter and the Company Disclosure Letter

The Parent Disclosure Letter and the Company Disclosure Letter were incorporated into the Merger Agreement by reference.[88] These disclosure letters, among other things, enumerated carve-outs to the representations and covenants made in the Merger Agreement, permitting the parties to take certain actions that might otherwise be prohibited. Pertinent here, § 4.01(b)(v)(1) of the Parent Disclosure Letter permitted ETE to issue equity while the Merger was pending: "[ETE] may make issuances of equity securities with a value of up to $1.0 billion in the aggregate."[89]

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[86] *Id.*, § 5.03(a).

[87] *Id.*, § 5.07(a)(ii).

[88] *Id.*, § 8.07(a) ("This Agreement (including the Company Disclosure Letter and the Parent Disclosure Letter and all other exhibits and schedules hereto), the Confidentiality Agreement and the CCR Agreement constitute the entire agreement. . .").

[89] Potts Aff., Ex. 2, Parent Disclosure Letter for Agreement and Plan of Merger ("Parent Disclosure Letter"), § 4.01(b)(v)(1).

II. PROCEDURAL HISTORY AND CLAIMS

A. Procedural History

Williams filed its original complaint seeking specific performance of the Merger Agreement on April 6, 2016.[90] ETE filed counterclaims.[91] I held a two-day trial in June 2016 and issued a post-trial Memorandum Opinion denying Williams' request to enjoin ETE from terminating the Merger.[92] Williams appealed.[93] The Supreme Court affirmed the decision on March 23, 2017.[94]

Meanwhile, Williams and ETE filed amended claims and counterclaims.[95] On December 1, 2017, I granted in part Williams' Motion to Dismiss ETE's counterclaims, foreclosing ETE's efforts to obtain a breakup fee as a result of the Merger it had terminated.[96] I then denied ETE's Motion for Reargument of that decision.[97] The parties proceeded on the remaining claims, centered largely on Williams' right to the WPZ Termination Fee Reimbursement. The parties filed

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[90] Verified Compl. Seeking Specific Performance and Other Relief, D.I. 1.

[91] Defs.' Answer, Affirmative Defenses, and Original Verified Countercl., D.I. 58.

[92] Mem. Op. and Order, D.I. 185.

[93] Notice of Appeal to Supreme Court, D.I. 191.

[94] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264 (Del. 2017).

[95] Verified Am. Compl., D.I. 215 ("Am. Compl."); Defs.' and Countercl. Pls.' Sec. Am. and Suppl. Affirmative Defenses and Verified Countercl., D.I. 219 ("Am. Countercl.").

[96] Mem. Op., D.I. 288.

[97] Letter Op. and Order, D.I. 321.

cross-motions for summary judgment on January 14, 2020.[98] I heard argument on March 5, 2020, and I considered the matter fully submitted at that time.[99] After the motions were fully submitted, ETE filed a Motion for Sanctions on May 20, 2020.[100]

B. The Parties Claims and the Cross Motions for Summary Judgement

In its Amended Complaint, Williams brings two counts for breach of contract against ETE. Count I relates to ETE's actions regarding the termination of the Merger: Williams alleges that ETE failed to use best efforts as required under § 5.03 and § 5.07 of the Merger Agreement to close the Merger.[101] Under Count I, Williams seeks damages arising from the deprivation "of the benefits of the Transaction" in "an amount to be proved at trial."[102] Williams has not moved for summary judgment on Count I, but ETE has moved for summary judgment on Count I. In Count II, Williams alleges that ETE was in breach of the Merger Agreement as of the Closing Date, entitling Williams to the WPZ Termination Fee Reimbursement under § 5.06(f).[103] The parties have cross-moved for summary judgment of Count II.

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[98] Pl.'s and Countercl.-Def.'s Mot. for Partial Summ. J., D.I. 460; Defs.' and Countercl. Pls.' Mot. for Summ. J., D.I. 464.

[99] D.I. 495.

[100] Defs.' and Countercl. Pls.' Mot. for Sanctions or, Alternatively, an Evidentiary Hr'g on Spoliation of Evid., D.I. 503.

[101] Am. Compl., ¶¶ 216–32.

[102] *Id.* ¶ 231.

[103] *Id.* ¶¶ 233–52.

ETE filed its amended counterclaim and affirmative defenses ("Amended Counterclaim"), also containing two counts, on September 23, 2016.[104] In Count I, ETE seeks declaratory judgments under 10 *Del. C.* § 6501 regarding the parties' actions in the Merger.[105] In Count II, ETE alleges breach of contract against Williams.[106] I dismissed or struck parts of the Amended Counterclaim and issued a final judgment on November 14, 2018.[107] The chief effect was to deny ETE's counterclaims supporting its sought-after $1.48 billion termination fee.[108] In ETE's remaining counterclaims, it alleges breach of contract and seeks declaratory judgment for the following: that Williams breached the Merger Agreement (1) by failing to use its best efforts to consummate the transaction; (2) by withholding its consent from the Public Offering; and (3) by refusing to reasonably cooperate with ETE's requests to find financing solutions.[109] ETE does not seek summary judgment on its counterclaims. Thus, the cross-motions for summary judgment are largely a contest over whether Williams has a right as a matter of law to the WPZ Termination Fee Reimbursement.

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[104] Am. Countercl.

[105] *Id.* ¶¶ 191–96.

[106] *Id.* ¶¶ 197–203.

[107] Order Granting in Part and Denying in Part Williams' Mot. to Dismiss and Strike, D.I. 399.

[108] *See id.*

[109] *See id.*

III. ANALYSIS

Summary judgment may be granted if there is "no genuine issue as to any material fact" and the moving party is "entitled to a judgment as a matter of law."[110] The Court "must view the evidence in the light most favorable to the non-moving party."[111] The Court must not weigh evidence and instead must "determine whether or not there is any evidence supporting a favorable conclusion to the nonmoving party."[112] This requires the non-moving party to "set[] forth specific facts demonstrating that there is a genuine issue for trial."[113] Where the parties file cross-motions for summary judgment and "have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[114] Nonetheless, there is no right to summary judgment; the court in its discretion may determine that a trial record is necessary in the interests of justice.[115]

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[110] Ct. Ch. R. 56(c).

[111] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2017 WL 3168966, at *2 (Del. Ch. July 26, 2017) (quoting *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 1998 WL 731660, at *2 (Del. Ch. Oct. 9, 1998)).

[112] *Id.* (quoting *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 2014 WL 2768782, at *8 (Del. Ch. June 12, 2014)).

[113] *Klig v. Deloitte LLP*, 36 A.3d 785, 793 (Del. Ch. 2011).

[114] Ct. Ch. R. 56(h).

[115] *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002); *El Paso Pipeline*, 2014 WL 2768782, at *9.

Contract interpretation is often amenable to summary judgment because "the interpretation of a contract is a question of law."[116] Generally, only in ambiguous contracts where the contractual language is "fairly susceptible [to] different interpretation[s]" is summary judgment improper.[117] However, "the intent of the parties as to [the contract's] scope and effect are controlling, and the court will attempt to ascertain their intent from the overall language of the document."[118]

Because the cross-motions for summary judgment here concern the same Merger Agreement provisions, I address both motions at once except where noted. Although the parties dispute each alleged breach separately, ETE raises two overarching arguments that Williams' claims are entirely foreclosed as a matter of law. I address these first before proceeding to the specific alleged breaches.

A. The Merger Agreement Permits Williams the Opportunity to Recover the WPZ Termination Fee Reimbursement Even Though ETE Validly Terminated the Merger for Failure of the 721 Opinion

ETE's first overarching argument is that the contractual scheme in the Merger Agreement forecloses any recovery for Williams because the Merger terminated as a result of Latham's inability to issue the 721 Opinion, *not* from any of the alleged

[116] *Deloitte LLP v. Glanagan*, 2009 WL 5200657, at *5 (Del. Ch. Dec. 29, 2009).

[117] *ITW Glob. Invs. Inc. v. Am. Indus. Partners Capital Fund IV, L.P.*, 2017 WL 1040711, at *6 (Del. Super. Mar. 6, 2017) (quoting *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012)).

[118] *Id.* (quoting *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 336 (Del. 2012)).

breaches at issue here.[119] As with any highly negotiated transaction, the parties allocated risks in the Merger Agreement. To enter the transaction with ETE, Williams first needed to extract itself from a different transaction with WPZ.[120] That extraction required paying WPZ a $410 million termination fee.[121] To compensate for this risk, the parties negotiated that if *either* party terminated the Merger under certain circumstances, then ETE would reimburse Williams that $410 million termination fee.

Section 5.06(f) describes the circumstances in which ETE must reimburse Williams the WPZ Termination Fee Reimbursement:

> If the Company or Parent terminates this Agreement pursuant to (A) Section 7.01(b)(ii), (B) Section 7.01(d), or (C) Section 7.01(b)(i) and, at the time of any such termination pursuant to this clause (C) any condition set forth in Section 6.01(b), 6.01(c), 6.01(d), 6.01(e), 6.03(a) or 6.03(b) shall not have been satisfied, then, in each case, Parent shall reimburse the Company for $410.0 million (the "WPZ Termination Fee Reimbursement"). . .[122]

The parties agree that ETE terminated the Merger Agreement under § 7.01(b)(i) due to the passing of the Outside Date. Sections 6.03(a) and 6.03(b)—which set forth the conditions Williams alleges ETE breached—describe various representations

[119] Defs.' and Countercl. Pls.' Opening Br. In Support of Their Mot. for Summ. J., D.I. 462 ("ETE Opening Br."), at 11–13.

[120] Clark Aff., Ex. 6, at -1680566.

[121] Clark Aff., Ex. 5, § 7.6(a).

[122] Merger Agreement, § 5.06(f).

and operating covenants that Williams claims ETE was in breach of at the time of termination.

The language of § 5.06(f) is unambiguous and provides clear instructions: *if* either party terminates due to, among other reasons, the passing of the Outside Date, *and* when this happens, various conditions are unmet, then ETE must reimburse Williams $410 million. The language provides a simple formula: has a party terminated pursuant to §§ 7.01(b)(ii), 7.01(d), or 7.01(b)(i)? If yes, do any of several "conditions" remain unsatisfied? If yes, ETE must pay Williams $410 million. Section 5.06(f) contains no causal language that suggests that to trigger the WPZ Termination Fee Reimbursement, the termination must result from the unsatisfied condition. By contrast, other termination fees in the Merger Agreement *do* contain causal language, suggesting its absence here is intentional.[123] Thus, a plain reading of § 5.06(f), based on the facts here, is as follows: ETE terminated the Merger Agreement under § 7.01(b)(i) due to the passing of the Outside Date; if at the time

[123] *See id.* § 5.06(d)(ii) (permitting ETE to recover a $1.4 billion termination fee if "this Agreement is terminated . . . *as a result of* [Williams'] breach of its obligations. . ."). ETE unsuccessfully pursued this $1.4 billion termination fee in its counterclaims. *See Williams Cos., Inc. v. Energy Transfer Equity*, 2017 WL 5953513 (Del. Ch. Dec. 1, 2017) *reargument denied* 2018 WL 1791995 (Del. Ch. Apr. 16, 2018). One principle of contract interpretation in Delaware is that the use of different language in different sections of a contract suggests the difference is intentional—*i.e.*, the parties intended for the sections to have different meanings. *See MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *7 (Del. Ch. Dec. 30, 2010).

it did so, it had not satisfied conditions set forth in § 6.03(a)-(b), then it must reimburse Williams the WPZ Termination Fee Reimbursement.[124]

ETE nonetheless argues, for two reasons, that this is not so.

First, ETE argues that the exclusion of § 6.01(h) (the 721 Opinion condition precedent) from § 5.06(f) shows that the parties were not allocating the reimbursement risk to ETE if—as happened—the lack of the 721 Opinion ultimately proved the Merger's undoing.[125] In other words, ETE argues that because the Merger's termination did not *result from* the failure of one of the sections listed in § 5.06(f), Williams is not entitled to collect the WPZ Termination Fee Reimbursement.[126] It argues that Williams is "attempt[ing] to collect a Termination Fee based on purported breaches that had nothing to do with the termination of the Merger Agreement."[127] ETE argues that the inclusion of four conditions precedent, §§ 6.01(b)-(e) (each having to do with regulatory approval) and the exclusion of four other conditions precedent demonstrates the risk allocation scheme. According to ETE, the WPZ Termination Fee Reimbursement is only triggered if the failure of something listed in § 5.06(f) *itself* unraveled the Merger. Such an argument ignores

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[124] *See Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009) ("In interpreting contract language, clear and unambiguous terms are interpreted according to their ordinary and usual meaning." (quoting *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006))).

[125] ETE Opening Br., at 12–13.

[126] *Id.*

[127] *Id.* at 13.

the plain text, which here is unambiguous and therefore must control. Nowhere does § 5.06(f) connect the cause of the termination to the failure to satisfy the other conditions that trigger the WPZ Termination Fee Reimbursement. The only requirement is that the Merger is terminated "pursuant to . . . Section 7.01(b)(i)," which undisputedly occurred. Therefore, if "at the time of any such termination" a condition enumerated in any of §§ 6.01(b)-(e) or §§ 6.03(a)-(b) was not satisfied, ETE owes the WPZ Termination Fee Reimbursement. ETE's preferred construction—a preference arising I assume from a potential $410 million liability—would require a rewriting of the contract for which the parties bargained. This I may not do.[128]

Second, ETE argues that Latham's inability to issue the 721 Opinion excuses it from any further performance of any part of the Merger Agreement because "[t]he failure of a condition precedent excuses a party from its remaining obligations under a contract."[129] Thus, according to ETE, because its obligation to "effect the Merger" was "subject to the satisfaction" of the 721 Opinion under § 6.01(h), when the 721

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[128] ETE has not sought reformation of the Merger Agreement. *See Am Gen. Hldgs. LLC v. The Renco Grp., Inc.*, 2020 WL 3484069, at *5 (Del. Ch. June 26, 2020) ("[T]o the extent this distinction represents a 'bad deal' for [defendant], it must be remembered that Delaware courts 'will not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contracts; the law enforces both.'" (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010))).

[129] ETE Opening Br., at 13 (citing *REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, at *3 n.22 (Del. Ch. Feb. 28, 2018); 13 Williston on Contracts § 39:4 (4th ed. 1990)).

Opinion failed to appear, this "extinguished ETE's conditional obligations to perform *any further task or requirement* related to the conclusion of the Merger. . . ."[130]

As I understand ETE's argument, it is thus: Latham was unable to provide the 721 Opinion as of closing, a condition precedent. As a result, ETE was able to terminate the Merger Agreement, which it did. At that point, the trigger conditions in § 5.06(f)—those set forth in §§ 6.01(b), (c), (d), (e) and §§ 6.03(a) and (b)—were no longer conditions binding on ETE; all its obligations fell away due to the failure of the condition precedent, the Latham tax opinion, as a matter of law. Thus, there is nothing left to trigger the WPZ Termination Fee Reimbursement.

ETE's argument ignores the survival clause in § 7.02. Under that provision, the parties agreed:

> In the event of termination of this Agreement . . . this Agreement shall forthwith become void and have no effect, without any liability or obligation on the part of TopCo, Parent or the Company, other than the provisions of . . . [several Sections, including] Section 5.06 . . . which provisions shall survive such termination.[131]

Latham's inability to provide the 721 Opinion relieved ETE of the "obligation . . . to effect the Merger."[132] It was, therefore, permitted to terminate after the passing

[130] *Id.* at 14 (emphasis added).

[131] Merger Agreement, § 7.02.

[132] Id. § 6.01.

of the Closing Date. The parties agreed in § 7.02, however, that "any liability and obligation" provided in § 5.06(f)[133]—that is, the WPZ Termination Fee Reimbursement—would survive termination.[134] For the WPZ Termination Fee Reimbursement to survive requires reference to the underlying conditions that trigger that fee. To say that those enumerated conditions became a null set because they were extinguished by the termination would be oxymoronic, and inconsistent with a plain reading of the Merger Agreement as a whole. That is because the benefits of § 5.06(f) would be illusory if (as ETE argues) the termination, or the failure of the condition that permitted the termination, *relieved ETE of all the conditions that could trigger the WPZ Termination Fee Reimbursement*.[135] In interpreting the contract, I must harmonize its parts, including § 5.06(f), § 7.01(b)(i) and § 7.02.[136] I reject ETE's argument that the Merger's legitimate failure to close "extinguished" all its obligations, including those referenced in § 5.06(f).[137]

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[133] Among other sections.

[134] Merger Agreement, § 7.02.

[135] *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 n.21 (Del. 2010) (citing *Gore v. Beren*, 867 P.2d 330, 337 (Kan. 1994)) ("In placing a construction on a written instrument, reasonable rather than unreasonable interpretations are favored by law. Results which vitiate the purpose or reduce terms of the contract to an absurdity should be avoided.").

[136] *See Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998) ("It is well established that a court interpreting any contractual provision . . . must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument.").

[137] I also note that the failure of the 721 Opinion under § 6.01(h) relieved *both* parties of the obligation to close. Thus, under ETE's argument, Williams was relieved of *its* "obligation to perform any further task or requirement related to the conclusion of the Merger." ETE Opening

In sum, I find the language in § 5.06(f) unambiguous, and that the obligations it imposes survive termination. ETE terminated the Merger Agreement under § 7.01(b)(i). If, as Williams alleges, ETE failed to satisfy its material obligations under a condition enumerated in any of §§ 6.01(b)-(e) or §§ 6.03(a)-(b), then, subject to affirmative defenses, it is obliged to pay Williams the WPZ Termination Fee Reimbursement. The pertinent question therefore becomes whether it failed to satisfy any of these conditions.

B. Williams Did Not Concede the Immateriality of ETE's Alleged Breaches

ETE's second overarching argument is that Williams conceded that any possible breach ETE may have committed was not material, and thus cannot trigger the WPZ Termination Fee Reimbursement. On the Closing Date, Williams made itself available to consummate the Merger.[138] When the Merger nonetheless failed, it stated that it would have waived any of ETE's breaches under §§ 6.03(a)-(b) had ETE agreed to close.[139] Thus, according to ETE, because each of the provisions at

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Br., at 14. Nonetheless, following termination, ETE maintained its countersuit against Williams for performance failures completely unrelated to the 721 Opinion. That action tends to demonstrate that ETE understood the plain meaning of the survival clause and its intended operation.

[138] Clark Aff., Ex. 40, Declaration of Richard Hall, ¶¶ 3–4; Clark Aff., Ex. 41, at -1002872.

[139] Potts Aff., Ex. 24 (Letter from Williams General Counsel stating, "Williams was prepared yesterday to waive the failure of the conditions in Sections 6.03(a) and 6.03(b) and close, but in light of ETE's refusal to close and subsequent termination, Williams is now entitled to receive the WPZ Termination Fee Reimbursement."). I note that Williams' letter appears to reflect its belief that ETE's breaches excused Williams' performance under the Merger Agreement, suggesting

issue contain materiality qualifiers, as a matter of law, it cannot have been in breach of those provisions.

Faced with a material breach of a contract, a non-breaching party has two options: it may choose to cease performance, or it may continue performance of the contract.[140] Continuing performance waives the argument that the waiving party's performance obligation was discharged, but it does not waive recovery for the material breach.[141] By extension of this logic, the non-breaching party's continued performance does not admit or concede or conclusively establish that a breach was immaterial. ETE cites no case law for the proposition that a party's willingness to proceed with an agreement *must* mean that any violations did not matter to it.[142] And such a construction makes no sense as a matter of English usage. Merriam-Webster's first definition of "material" (in the sense obviously intended by the parties) is "being of real importance or consequence – SUBSTANTIAL."[143] This

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Williams had a contemporaneous belief that such alleged breaches were material. I need not make a finding on this issue at this time.

[140] 14 Williston on Contracts § 43:15 (4th ed.). This principle of contract law has been cited approvingly by this Court in *In re Mobilactive Media, LLC*, 2013 WL 297950, at *14 (Del. Ch. Jan. 25, 2013).

[141] 14 Williston on Contracts § 43:15 (4th ed.) ("While the acceptance of the defective performance operates to waive the right to declare that the material breach discharged the obligor from further performance, it does not waive the right to obtain damages for the breach.").

[142] *See* Defs.' and Countercl. Pls.' Response to Pl.'s Mot. for Partial Summ. J., D.I. 480 ("ETE Answering Br."), at 42–44.

[143] *Material*, *Webster's 3d Third New International Dictionary* (1961) (capitalization in original).

comports, for instance, with our jurisprudence in the realm of disclosure by a company to its stockholders: information of substantial importance must be disclosed regardless of whether it would necessarily change the vote of a stockholder on the issue presented.[144] A contractual breach may be "substantial" to a counterparty without necessarily causing that counterparty to conclude that the consummation of the contract is against its interests as a result. What is material is a matter of context.[145]

Cast correctly, ETE's argument is really a factual one: did Williams' perfervid desire to proceed despite the alleged breaches indicate that it found ETE's alleged violations immaterial? I need not resolve this question at this juncture: this factual argument will resurface later. Having addressed ETE's two overarching arguments and rejected them, I now turn to the four specific allegations of breach by which

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[144] *Morrison v. Berry*, 191 A.3d 268, 283 (Del. 2018), (finding that a "fact is material if there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.' But, to be sure, this materiality test 'does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote.'" (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985))); *see also City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 2020 WL 3529586 (Del. June 30, 2020) (holding that materiality in the context of information owed by a director to her board includes information "relevant and of a magnitude to be important" to the board's determination) (internal citations omitted).

[145] This is a general discussion on materiality as it relates to ETE's overarching argument here. The Merger Agreement specifically defines several different materiality qualifiers, and these are discussed separately below. Nothing here precludes any party from arguing a particular meaning of "material" in context.

Williams seeks to recover the WPZ Termination Fee Reimbursement and other damages.

C. The Best Efforts Clauses

ETE (but not Williams) has moved for summary judgment as to whether it breached its obligations under § 5.03 and § 5.07 to use its best efforts to close the Merger, as alleged in Count I of Williams' Amended Complaint. ETE argues that its best efforts are now law of the case, based on my 2016 trial opinion (the "2016 Trial Opinion"). In that opinion, I stated:

> There is simply nothing that indicates to me that [ETE] has manipulated the knowledge or ability of Latham to render the 721 Opinion, or failed to fully inform Latham, or do anything else, whether or not commercially reasonable, to obstruct Latham's issuance of the condition-precedent 721 Opinion, or that had a material effect on Latham's decision. Therefore, I have no basis to find that [ETE] is in material breach of the commercially reasonable efforts requirement. . .[146]

In affirming the 2016 Trial Opinion, the Supreme Court found, "ETE did meet its burden of proving that any alleged breach of covenant did not materially contribute to the failure of the [721 Opinion]."[147] In other words, ETE successfully proved it did not *cause* the failure of the 721 Opinion. ETE argues that Williams is foreclosed

[146] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *17 (Del. Ch. June 24, 2016).

[147] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 268 (Del. 2017).

by the law of the case from continuing to litigate best efforts issues. For two reasons discussed below, I disagree. Disputes of material fact remain.

First, my analysis in the 2016 Trial Opinion focused exclusively on § 5.07(b).[148] That provision required both parties to "each use its commercially reasonable efforts to obtain the Tax opinion[] described in <u>Section[]</u> 6.01(h)," *i.e.*, the 721 Opinion.[149] As described, I found that ETE was not in breach of § 5.07(b) because it had taken no affirmative actions preventing Latham from issuing the 721 Opinion and there were no "actions available to [ETE] that would have caused Latham, acting in good faith, to issue the 721 Opinion."[150] This is the finding that ETE relies on as law of the case. But § 5.07(b) is not the only efforts clause. There is the general "Reasonable Best Efforts" clause in § 5.03(a), which requires each party to "use its reasonable best efforts to . . . take . . . all actions . . . to consummate and make effective in the most expeditious manner practicable, the Transactions. . ."[151] Then, there is the more specific tax-related efforts clause in § 5.07(a), requiring each party to "use its commercially reasonable efforts to cause (i) the Merger to

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[148] *See Williams Cos.*, 2016 WL 3576682, at *16. In my analysis, I found that ETE "was contractually obligated to use commercially reasonable efforts to obtain the 721 Opinion from Latham," and I cited to § 5.07(b). I continued, "Williams argues that [ETE] is in material breach of *that contractual provision*." *Id.* (emphasis added).

[149] *See id.* at *16–17; Merger Agreement, § 5.07(b).

[150] *Williams Cos.*, 2016 WL 3576682, at *16–17.

[151] Merger Agreement, § 5.03(a).

qualify for the Intended Tax Treatment," *i.e.*, to be tax-free.[152] These efforts clauses implicate issues of material fact not resolved by my findings in the 2016 Trial Opinion, which focused on ETE's actions related to Latham's inability to issue the 721 Opinion. Here, additional questions are at issue.[153]

Second, and more fundamentally, the Supreme Court, while affirming the ruling permitting termination, *disagreed* with my analysis of ETE's best efforts, writing, "covenants like the ones involved here impose obligations to take all reasonable steps to solve problems and consummate the transaction."[154] The Supreme Court found that the language in the best efforts covenants "not only prohibited the parties from preventing the merger, but obligated the parties to take all reasonable actions to complete the merger."[155] Because my finding that ETE did not cause the condition precedent to fail was itself sufficient for the Supreme Court to affirm, it did so. However, the Court stated that my focus on the *absence* of affirmative Merger-scuttling acts by ETE to find compliance with best efforts was in error and noted that "[t]here was evidence, recognized by the Court of Chancery,

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[152] *Id.* § 5.07(a).

[153] Williams points to new evidence casting doubt on who at ETE in fact discovered the issue with the 721 Opinion and to what extent ETE's *laissez-faire* approach actively prevented the parties from finding a solution. *E.g.*, Shen Aff., Ex. 82, Dep. of Darryl A. Krebs dated Oct. 25, 2018, at 97:6–98:18, 100:7–102:8; Shen Aff., Ex. 87, Dep. of T. Eiko Stange dated Oct. 26, 2018, at 105:22–106:6, 109:11–112:18, 120:6–23, 128:5–15, 204:10–15, 233:21–234:8.

[154] *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 272 (Del. 2017).

[155] *Id.* at 273.

from which it could have concluded that ETE did breach its [efforts] covenants. . ."[156] This referred to my finding that ETE "generally did not act like an enthusiastic partner in pursuit of consummation of the [Merger Agreement]."[157] I confirmed to the parties in August 2017 that a potential breach by ETE of the efforts clauses was a "live" issue due to the Supreme Court's commentary.[158]

Based on the foregoing, I deny ETE's Motion for Summary Judgment on this issue.[159] Disputes of material fact remain as to whether ETE's approach to consummating the Merger fulfilled its contractual duties.

D. The Tax Representation Clause

Williams and ETE have cross-moved for summary judgment as to whether ETE was in breach of its tax representation obligations as of the Merger termination, triggering liability for the WPZ Termination Fee. To recapitulate, where, as here, a party has withdrawn from the Merger due to the passing of the Outside Date, ETE is liable to Williams for the WPZ Termination Fee Reimbursement if, but only if, any of several enumerated "conditions" remain "[un]satisfied."[160] Included among

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[156] *Id.*

[157] *Williams Cos.*, 2016 WL 3576682, at *17.

[158] *See* Tr. of Aug. 29, 2017 Telephonic Status Conference, D.I. 287, at 4:2–23.

[159] Accordingly, Count I of Williams' Amended Complaint, which addresses the best efforts clauses, remains for trial. I note that ETE's Counterclaim regarding *Williams'* alleged failure to use its best efforts also remains.

[160] Merger Agreement, § 5.06(f).

such conditions are those "set forth" in §§ 6.03(a) and (b).[161] Section 6.03(a) provides one such condition: that certain representations and warranties shall be true as of the Closing Date. The Section, at 6.03(a)(i)-(iii), enumerates several representations which, if false[162] as of closing, excuse performance. With respect to non-enumerated representations and warranties, § 6.03(a)(iv) imposes the following condition:

> each of the other representations and warranties of [ETE not enumerated in §§ 6.03(a)(i)-(iii)] set forth in this Agreement shall be true and correct . . . as of the Closing Date [June 28, 2016] as though made on such date . . . except . . . where the failure of such representations and warranties to be so true and correct would not reasonably be expected to have, individually or in the aggregate, a Parent Material Adverse Effect."[163]

One such un-enumerated representation and warranty subject to § 6.03(a)(iv) is set out in § 3.02(n)(i), where the parties represent that they do not "know[] of the existence of any fact that would reasonably be expected to prevent (A) the Merger from qualifying for the Intended Tax Treatment or (B) the Contribution and Parent Class E Issuance from qualifying as an exchange to which Section 721(a) of the

[161] *Id.* § 6.03.

[162] The falsehood of these enumerated representations is qualified by its materiality: § 6.03(a)(i) must be "true and correct . . . except for any immaterial inaccuracies," (ii) must be "true and correct in all material respects," and (iii) must simply be true and correct. *Id.* §§ 6.03(a)(i)-(iii).

[163] *Id.* § 6.03(a)(iv).

Code applies."[164] That condition remained unsatisfied as of the Closing Date and at the time ETE terminated the Merger Agreement.

As ETE points out, in the 2016 Trial Opinion, I noted that the purpose of ETE's tax representation as of the time of signing was "that all sides can be fully informed as of the time the agreement is reached. There are no facts here that [ETE] failed to disclose. Both [ETE] and Williams understood all the facts at issue."[165] I found that Latham's future analysis of the transaction—which gave rise to its inability to issue the 721 Opinion—was not a "fact," and thus that ETE had not breached it tax representation as of the time of signing.[166] However, under § 6.03(a)(iv), a condition of the Merger is that such representations must also be "true and correct . . . as though made on" the Closing Date, which the parties agreed would be June 28, 2016. As of that date, ETE was aware of facts that "would reasonably be expected to prevent" the equity component of the deal from qualifying under Section 721(a): The value of the unit equity component of the Merger consideration had shrunk, and its own tax advisor, Latham, had informed ETE that it could *not* certify that the deal qualified under Section 721(a). Knowing these facts, ETE, as

[164] *Id.* § 3.02(n)(i).

[165] *Williams Cos.*, 2016 WL 3576682, at *18.

[166] *Id.* at *19.

of the Closing Date, could not make a representation, truthfully, consistent with § 3.02(n)(i).

However, the tax representation just referred to is not among those enumerated in §§ 6.03(a)(i)-(iii); a failure of such a representation, under § 6.03(a)(iv), shall be considered a condition excluding merger obligations—and a trigger to liability for the WPZ Termination Fee Reimbursement—*only* where the failure[167] could reasonably be expected to cause a "Parent Material Adverse Effect." The Merger Agreement defines Parent Material Adverse Effect as follows:

> "Parent Material Adverse Effect" means any change, effect, event, occurrence, circumstance, development or state of facts that, with all other changes, effects, events, occurrences, circumstances, developments and states of fact, is or would reasonably be expected to be materially adverse to the business, financial condition or results of operations of Parent and its Subsidiaries, taken as a whole, other than any change, effect, event, occurrence, circumstance, development or state of facts to the extent relating to (i) the economy in general, (ii) the Energy Product gathering, processing, treating, transportation, storage and marketing industries generally or related products and services . . . (viii) the announcement of this Agreement or the Transactions or the consummation of the Transactions . . . provided, however, that the changes, effect, events, occurrences, circumstances, developments or states of facts set forth in the foregoing clauses . . . shall be taken into account in determining whether a "Parent Material Adverse Effect" has occurred to the extent such changes, effects, events, occurrences, circumstances, developments or states of facts have a disproportionate effect on Parent and its Subsidiaries, taken as a whole, when compared

[167] Considering such failure "individually or in the aggregate. . ." Merger Agreement, § 6.03(a)(iv).

> to other participants in the industries in which Parent and its Subsidiaries operate.[168]

The question of whether the failure of the tax representation amounted to such a Parent Material Adverse Effect is intensely factual, and should, to my mind, be based on a trial record.

E. The "Ordinary Course" Operating Covenant Provisions

Williams and ETE have cross-moved for summary judgment regarding whether ETE breached its operating covenants. The WPZ Termination Fee Reimbursement obligation is triggered by a failure of "conditions" including those in § 6.03(b) of the Merger Agreement. In that section, ETE agreed that it "shall have, in all material respects, performed or complied with all obligations required by the time of the Closing to be performed or complied with by it under this Agreement. . ."[169] Lack of compliance (absent affirmative defenses) would trigger ETE's obligation to pay Williams the WPZ Termination Fee Reimbursement.

Section 6.03(b) required ETE, among other things, to abide by its "Covenants Relating to Conduct of Business" under § 4.01(b). Section 4.01(b) requires that "Except as set forth in <u>Section 4.01(b)</u> of the Parent Disclosure Letter," ETE "shall . . . carry on its business in the ordinary course. . ."[170] Section 4.01(b) also contains

[168] *Id.* § 8.03, *Parent Material Adverse Effect*.

[169] *Id.* § 6.03(b).

[170] *Id.* § 4.01(b).

several subsections with more specific operating covenants. Williams asserts that as a result of the Preferred Offering, ETE breached its operating covenants in four ways, each relating to the Preferred Offering.

First, Williams argues that ETE breached its general obligation in § 4.01(b) to operate "in the ordinary course." It bases its argument on my finding in another matter, *In re Energy Transfer Equity, L.P. Unitholder Litig.*,[171] later affirmed by the Supreme Court, that the Preferred Offering breached ETE's limited partnership agreement.[172] Based on the testimony of ETE's own personnel, breaching its limited partnership agreement is not "ordinary course" for the company.[173]

Second, § 4.01(b)(ii) provides that ETE would not "take any action that would result in [ETE] . . . becoming subject to any restriction not in existence on the date hereof with respect to the payment of distributions or dividends[.]"[174] The Preferred Offering required ETE to make distributions to the participating preferred unitholders regardless of distributions to the common unitholders.[175]

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[171] 2018 WL 2254706 (Del. Ch. May 17, 2018), *aff'd sub nom. Levine v. Energy Transfer L.P.*, 223 A.3d 97 (Del. 2019).

[172] *See id.* at *25.

[173] *E.g.*, Clark Aff., Ex. 15, Dep. of Kelcy Warren dated December 4, 2019, at 97:9–12; Clark Aff., Ex. 25, Dep. of McReynolds dated Oct. 8, 2019, at 189:7–10.

[174] Merger Agreement, § 4.01(b)(ii).

[175] *See* Clark Aff., Ex. 45, at -199855.

Third, § 4.01(b)(iii) provides that ETE would not "split, combine or reclassify any of its equity securities or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for equity securities. . ."[176] Through the Preferred Offering, ETE issued one preferred unit for each participating common unit, and thus, Williams contends, issued "securities in respect of . . . equity securities."[177]

Fourth, in § 4.01(b)(vi), ETE represented it would not "amend (A) the organizational documents of [ETC, or] (B) the [ETE] Certificate of Partnership or the Partnership Agreement. . ."[178] To make the Preferred Offering, ETE amended its limited partnership agreement.[179]

ETE does not dispute any of the facts cited above regarding the Preferred Offering and its effect with regard to the operating covenants. Simply put, the Preferred Offering did not comport with the requirements set forth in the operating covenants. ETE raises two arguments as to why the Preferred Offering nonetheless did not cause it to breach these operating covenants. The first is that any violations of the operating covenants were immaterial, and that the Merger Agreement does

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[176] Merger Agreement, § 4.01(b)(iii).

[177] Clark Aff., Ex. 25, Dep. of McReynolds dated October 8, 2019, at 202:11–14.

[178] Merger Agreement, § 4.01(b)(vi).

[179] *See* Clark Aff., Ex. 46, at 1; *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *4 (Del. Ch. June 24, 2016).

not prohibit immaterial noncompliance with the operating covenants. ETE's second argument is that the Merger Agreement was explicitly modified by another agreement, the Parent Disclosure Letter, which specifically authorized "issuances of equity securities with a value of up to $1.0 billion" notwithstanding the prohibition on equity issuances in the Merger Agreement. The Preferred Offering was an issuance of just under $1 billion. ETE reasons that, to the extent that any acts undertaken in connection with the Preferred Offering are in apparent material violation of the operating covenants, therefore, those covenants are overridden by the equity-issuance carve-out in the Parent Disclosure Letter.

I discuss each in turn.

1. Materiality Qualifiers in the Operating Covenants

ETE argues that if it violated any operating covenants, it did not do so in a way material to Williams. Under § 6.03(b), ETE agreed that it "shall have, *in all material respects*, performed or complied with all [operating covenants]."[180] This provision covers the performance obligations detailed in § 4.01(b). ETE argues that the Preferred Offering—which is the source of the alleged violations—would have had no serious effect on Williams, and, further, that Williams knew about it and was nonetheless eager to close. The parties disagree about the meaning of "in all material

[180] Merger Agreement, § 6.03(b) (emphasis added).

respects," a disagreement I need not address here, because applying any standard awaits resolution of issues of fact.

The parties contest what effect the Preferred Offering actually would have had on Williams, and thus whether the violations it represented were material. The factual nature of this issue is complicated by the way events transpired. The Merger failed to close, and so Williams' stockholders were never subjected to the effects of the Preferred Offering. Moreover, the market rebounded, and so even ETE common units were not subjected to the effects of the Preferred Offering.[181] As a result, neither party can point to a concrete effect to demonstrate its materiality or immateriality as a matter of law. Williams cites to ETE's financial advisors, who noted that if ETE had cut distributions as it anticipated would be required, the Preferred Offering would "represent a wealth transfer from non-participating to participating units."[182] Williams asserts that the Preferred Offering would have created a price differential that would devalue and dilute the Williams stockholders.[183] ETE argues that Williams' willingness to close is the strongest kind

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[181] *See In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *14 (Del. Ch. May 17, 2018) ("ETE ended up not cutting distributions: About a month after the merger was terminated, ETE announced that its distributions to common unitholders would stay flat at $0.285 per unit. On October 26, 2017, ETE announced that it would increase its quarterly distributions to $0.295 per common unit.") (internal citations and footnotes omitted).

[182] Clark Aff., Ex. 55, at -6114.

[183] *See* Clark Aff., Ex. 13, at -011.

of evidence that the Preferred Offering was not material. Addressing the issue, to my mind, requires a trial record.

2. The Parent Disclosure Letter

ETE argues that even if its actions in connection with the Preferred Offering appear to be in material violation of its operating covenants, any such violation is excused under the terms of the Parent Disclosure Letter. That document, incorporated into the Merger Agreement, per ETE contains a carve-out that permits the Preferred Offering. In general, the Parent Disclosure Letter provides disclosures and permits ETE to take enumerated actions otherwise *explicitly* prohibited by the Merger Agreement. Section 4.01(b)(v)(1) of the Parent Disclosure Letter provides, "[ETE] may make issuances of equity securities with a value of up to $1.0 billion in the aggregate."[184] ETE argues that because the Preferred Offering has a maximum potential value underneath the $1 billion ceiling, the offering was permitted, regardless of whether it otherwise violated any operating covenant.[185]

The relationship between the Parent Disclosure Letter and the Merger Agreement is, both parties agree, a matter of contract interpretation. It is clear that the agreement between the parties was that ETE was prohibited by § 4.01(b)(v) from issuing new equity, per the Merger Agreement, but that such prohibition was

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[184] Parent Disclosure Letter, § 4.01(b)(v)(1).

[185] *See* ETE Opening Br., at 24–29; *see also* Potts Aff., Ex. 21, at 2 (noting maximum value of $942,508,720 for the Preferred Offering).

overridden by the specific permission incorporated into the Merger Agreement via the Parent Disclosure Letter. What is less clear is to what extent that permission also overrode the four operating conditions cited by Williams here.

The parties address at great length in briefing the interplay between the various sections of the Parent Disclosure Letter and the Merger Agreement in way of the operating-condition covenants. To my mind, at this stage, the effort is misdirected. Trial in this matter will create a factual record, informing me of the potential effect on Williams of any breaches of the covenants inherent in the Preferred Offering. To the extent I find any nominal breaches to be material under the meaning of that term in the Merger Agreement, I must then evaluate whether those nominal breaches are nonetheless permitted under the equity issuance provision in the Parent Disclosure Letter. Addressing the latter issue in the abstract risks an advisory opinion, and I decline to do so here.

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Based on the foregoing, I deny the parties' cross-motions for summary judgment regarding ETE's alleged violations of the operating covenants.

F. The Capital Structure Representation Clause

Williams and ETE have cross-moved for summary judgment regarding whether ETE breached its representation regarding its capital structure. Under § 6.03(a) of the Merger Agreement, ETE agreed that "[t]he representations and warranties of [ETC] and [ETE] set forth in Sections 3.02(c)(i) and 3.02(c)(ii) (Capital Structure) shall be true and correct as of the Closing Date as though made on such date . . . except for any immaterial inaccuracies. . . ."[186] In § 3.02(c)(i), ETE represented that as of the signing date, it had three classes of equity, as well as a specific number of shares in each class:

> The authorized equity interests of Parent consist of common units representing limited partner interests in Parent ("Parent Common Units"), Class D Units representing limited partner interests in Parent ("Parent Class D Units") and a general partner interest in Parent ("Parent General Partner Interest"). At the close of business on September 25, 2015 (the "Parent Capitalization Date"), (i) 1,044,764,836 Parent Common Units were issued and outstanding, of which 5,776,462 consisted of Parent Restricted Units, (ii) 2,156,000 Parent Class D Units were issued and outstanding and (iii) there was an approximate 0.2576% Parent General Partner Interest.[187]

The bring-down clause in § 6.03(a) meant that ETE's representation regarding the number of classes of equity was made on both the signing and the Closing Date.[188]

It is undisputed that the Preferred Offering created a fourth class of equity.[189] Thus, at the Closing Date, ETE could no longer represent that the three-class equity

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[186] Merger Agreement, §6.03(a)(i).

[187] *Id.* § 3.02(c)(i).

[188] *Id.* §6.03(a)(i). However, as Williams points out, the representations regarding the *number* of shares in each equity class was only represented to be accurate as of the signing date. *See id.* § 3.02(c)(i) (representing number of shares only "[a]t the close of business *on September 25, 2015*") (emphasis added). I agree that this suggests the parties intended to permit the number of shares to change, but not the number of classes of shares (subject, of course, to exceptions in the Parent Disclosure Letter).

[189] Clark Aff., Ex. 45, at -199834; Clark Aff., Ex. 46, at 1; Clark Aff., Ex. 47, at F-7 through F-8.

structure described in § 3.02(c)(i) was accurate. The language providing the materiality standard for the capital structure representation differs from that of the operating covenants. It requires that ETE's representations be true as of the Closing Date "except for any immaterial inaccuracies."[190] Williams argues that "immaterial inaccuracies" here is limited to a "de minimis" breach—essentially, a small error as to the accuracy of the number of shares.[191]

ETE offers the same counterarguments regarding the capital structure representation as it offered for the operating covenants. First, it argues that a new class of equity is an immaterial inaccuracy. Second, it argues that the Parent Disclosure Letter permits the change. The same reasons underlying my denial of summary judgment regarding the operating covenants apply here. I require a trial record to resolve these disputes. Based on the foregoing, I deny the parties' cross-motions for summary judgment regarding ETE's alleged violations of its capital structure representations.

G. ETE's Affirmative Defenses and Motion for Sanctions

As noted, ETE has brought counterclaims for breach of contract and declaratory judgment. It also asserts affirmative defenses based on several issues in those counterclaims, including that Williams failed to substantially comply with the

[190] Merger Agreement, §6.03(a)(i).

[191] Williams Opening Br., at 30–31.

Merger Agreement, that Williams has unclean hands, and that even if ETE's Preferred Offering violated the Merger Agreement, it was Williams' wrongful refusal to consent to the Public Offering that caused that breach. Having denied Williams' requested relief at this stage, I need not address these affirmative defenses at this time.

More than two months after arguing the cross-motions for summary judgment, ETE filed a Motion for Sanctions against Williams. The Motion for Sanctions brings allegations of litigation misconduct, chiefly against Williams' CEO Armstrong, conduct that ETE wishes to impute to Williams. After review, I find that the Motion for Sanctions will not alter the outcome of the cross-motions for summary judgment at issue here, and that the allegations should be dealt with at trial or a separate evidentiary hearing.

IV. CONCLUSION

Based on the foregoing, the parties' cross-motions for summary judgment are denied except with respect to the contractual issues resolved here. The parties should confer and submit a form of order consistent with this Memorandum Opinion.

EXHIBIT D

EFiled: Dec 29 2021 04:01PM EST
Transaction ID 67200761
Case No. Multi-Case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant,	)	
v.	)	C.A. No. 12168-VCG
ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., and LE GP, LLC, Defendants and Counterclaim Plaintiffs.	)	
THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant,	)	
v.	)	C.A. No. 12337-VCG
ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER CORP LP, ETE CORP GP, LLC, LE GP, LLC and ENERGY TRANSFER EQUITY GP, LLC, Defendants and Counterclaim Plaintiffs.	)	

<u>MEMORANDUM OPINION</u>

Date Submitted: September 23, 2021
Date Decided: December 29, 2021

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GLASSCOCK, Vice Chancellor

This matter first came before me on Plaintiff The Williams Companies, Inc.'s ("Plaintiff" or "Williams") motion to specifically enforce a merger agreement (the "Merger") with Defendant Energy Transfer LP ("ETE"). Between signing and closing, market conditions changed, making the Merger less favorable to ETE, to the point that ETE's CEO and board chairman, Kelcy Warren, foresaw a credit-ratings downgrade and regretted agreeing to the Merger. The same market conditions caused the failure of a condition precedent: that Latham & Watkins be able to certify that the Merger was structured in such a way that it should be a tax-free exchange of partnership units (the "721 Opinion").

In 2016, Williams sued to prevent ETE from terminating the merger agreement due to the failure of this condition. Despite recognizing that ETE wanted out of the merger agreement, I determined that the failure of the condition precedent independently gave ETE an exit right. Left in the case was Williams' pursuit of a contractual breakup fee.[1] In denying specific performance, I noted ETE's strong desire not to close, but also that "even a desperate man can be an honest winner of the lottery," analogizing such luck to the tax-representation-out that had presented itself. In this action for liquidated damages, however, I also note that even this lucky winner must face the tax man. Having called a dirge for the Merger, ETE must pay

[1] As detailed below, Williams and ETE negotiated a $410 million reimbursement that ETE was required to pay Williams in the event that the Merger failed and certain conditions were met.

the piper. For the reasons given below, I find that ETE is contractually obligated to pay the breakup fee.

I. BACKGROUND[2]

The facts recited in this post-trial Opinion are the Court's findings based on the record presented at trial. The following facts were either uncontested or proven by a preponderance of the evidence. "The reader is forewarned that this case involves a maze of corporate entities and an alphabet soup of corporate names."[3] This Opinion includes only those facts necessary to my analysis.

A. The Parties

Plaintiff and Counterclaim Defendant Williams is a Delaware corporation with its principal executive offices located in Tulsa, Oklahoma.[4] Williams is a North American energy company focused on providing infrastructure to deliver natural gas products to market.[5] Williams owns and operates interstate natural gas pipelines and gathering and processing operations throughout the country.[6] Williams stock is traded on the New York Stock Exchange (the "NYSE") under the symbol "WMB."[7]

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[2] Where the facts are drawn from exhibits jointly submitted at trial, they are referred to according to the numbers provided on the parties' joint exhibit list and with page numbers derived from the stamp on each JTX page ("JTX-__.__").
[3] *Williams Cos., Inc. v. Energy Transfer Equity*, 2017 WL 5953513 (Del. Ch. Dec. 1, 2017) (quoting *Chester Cnty. Emps.' Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at *1 (Del. Ch. Oct. 6, 2017)).
[4] Pre-Trial Stipulation and Order, Dkt. No. 577 ¶ 10 [hereinafter "Stip."].
[5] *Id.*
[6] *Id.*
[7] *Id.*

Williams is a party to the Agreement and Plan of Merger entered on September 28, 2015 (the "Merger Agreement").[8]

Defendant and Counterclaim Plaintiff Energy Transfer LP, formerly known as Energy Transfer Equity, L.P.,[9] is a Delaware limited partnership with its principal executive offices located in Dallas, Texas.[10] ETE's family of companies owns and operates approximately 71,000 miles of natural gas, natural gas liquids, refined products and crude oil pipelines.[11] ETE's common units are traded on the NYSE under the symbol "ET."[12]

Defendant and Counterclaim Plaintiff Energy Transfer Corp LP ("ETC") is a Delaware limited partnership taxable as a corporation.[13] Pursuant to the Merger, Williams would have merged with and into ETC.[14] ETC is a party to the Merger Agreement and would have been the managing member of the general partner of ETE following the consummation of the Merger.[15]

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[8] *Id.*

[9] On October 19, 2018, Energy Transfer, L.P. changed its name to "Energy Transfer LP." *Id.* ¶ 12. The parties agree that Energy Transfer Equity, L.P. is the same entity as Energy Transfer LP for the purposes of this litigation. *Id.*

[10] *Id.* ¶ 11.

[11] *Id.*

[12] *Id.*

[13] *Id.* ¶ 13.

[14] *Id.*

[15] *Id.*

Defendant and Counterclaim Plaintiff ETE Corp GP, LLC is a Delaware limited liability company, the general partner of ETC, and a party to the Merger Agreement.[16]

Defendant and Counterclaim Plaintiff LE GP, LLC ("LE GP") is a Delaware limited liability company, the general partner of ETE, and a party to the Merger Agreement.[17]

Defendant and Counterclaim Plaintiff Energy Transfer Equity GP, LLC ("ETE GP") is a Delaware limited liability company and a party to the Merger Agreement.[18] Pursuant to the Merger, ETE GP would have merged with LE GP such that ETE GP would have been the surviving company and general partner of ETE.[19]

Unless otherwise specified, I refer to these Defendants and Counterclaim Plaintiffs collectively as "ETE."

B. Factual Background

1. <u>Williams Agrees to the WPZ Roll-Up</u>

Before ETE submitted an offer to purchase Williams, Williams entered into an agreement to undertake a separate roll-up transaction with its master limited

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[16] *Id.* ¶ 14.
[17] *Id.* ¶ 15.
[18] *Id.* ¶ 16.
[19] *Id.*

partnership, Williams Partners, L.P. ("WPZ").[20] The Williams Board approved the WPZ transaction on May 12, 2015.[21] Williams and WPZ executed the transaction documents that day, and the next day, May 13, 2015, they issued a joint press release announcing the execution of the agreement.[22] The WPZ agreement required Williams to pay WPZ a termination fee of $410 million if it later terminated the WPZ transaction.[23]

At the time the WPZ transaction was announced, ETE had not made a formal offer to purchase Williams, though it had expressed interest in doing so. Specifically, on May 6, 2015, a week before the WPZ transaction was announced, ETE's Chief Executive Officer ("CEO"), Kelcy Warren, hosted a dinner at his home with Williams' CEO, Alan Armstrong, Williams' Chief Financial Officer ("CFO") Don Chappel, and ETE's then-CFO, Jamie Welch for the purpose of asking whether Williams would be interested in a merger with ETE.[24] Warren did not make a formal offer to purchase Williams at this dinner,[25] nor had he decided whether he wanted to make an offer.[26] Warren did not propose a price term for a potential offer,[27] but

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[20] JTX-1218.0130.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] Trial Tr. at 137:21–138:3(Chappel); *id.* at 313:23–314:3(Warren).
[25] *Id.* at 138:4–6(Chappel).
[26] *Id.* at 312:15–314:19(Warren).
[27] *Id.* at 138:7–9(Chappel).

Welch did outline a potential transaction structure.[28] Armstrong did not brief the Williams board of directors (the "Williams Board") about the dinner.[29]

2. The Parties Negotiate the Merger Agreement

On May 19, 2015, ETE submitted a bid to purchase Williams in an all-equity deal.[30] As a condition to its offer, ETE required Williams to terminate the roll-up transaction with WPZ, which, as detailed above, would require Williams to pay WPZ a $410 million termination fee.[31] Negotiations proceeded through the summer of 2015.[32] Williams was represented by Cravath, Swaine & Moore ("Cravath"), and ETE was represented by Wachtell, Lipton, Rosen & Katz ("Wachtell"). The Williams Board formed a Strategic Review Administration Committee to evaluate and oversee a potential sale.[33]

a. Economic Equivalence Was "Paramount" to Williams

The Merger contemplated an "Up-C" structure, in which Williams stockholders would receive shares in a new entity, ETC, instead of receiving ETE common units directly.[34] The Williams Board was therefore concerned that ETC shares could trade at a discount to ETE common units.[35] The Williams Board was

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[28] *Id.* at 601:24–602:6(Armstrong).
[29] *Id.* at 603:1–3(Armstrong).
[30] Stip. ¶ 17.
[31] JTX-0202.0004.
[32] Stip. ¶ 17.
[33] JTX-1218.0134.
[34] JTX-0026.0004.
[35] *E.g.*, Trial Tr. at 18:10–15(Chappel); *id.* at 316:24–317:9(Warren).

likewise concerned that, because Warren personally owned a significant number of ETE units and would control both ETE and ETC after the Merger, he might take actions that benefitted ETE at ETC's expense.[36]

As a result, achieving economic equivalence between the ETE common units and the ETC shares was a key point of negotiation. Warren wrote to the Williams Board in a June 18, 2015 letter that Williams "stockholders would receive common shares in [ETC] that would mirror the economic attributes of ETE common units."[37] Chappel testified at trial that "economic equivalence was paramount" and that there was "engineering that was done to ensure that" ETE common units and ETC shares "traded as closely as we possibly could."[38] Warren admitted at trial that "equality of distributions between ETC shares and ETE units was a key aspect of the merger."[39] Al Garner, a financial advisor to Williams from Lazard, testified that bargaining for economic equivalence was "the subject of most of the negotiations on the transaction" and "the most important and time-consuming part of the[] negotiations."[40] Garner further testified that in the final months leading up to the execution of the merger agreement, economic equivalence took up the "lion's share of the negotiation."[41]

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[36] Trial Tr. at 482:9–483:2(McReynolds); *id.* at 605:7–22(Armstrong); JTX-1218.0161.
[37] JTX-0026.0004.
[38] Trial Tr. at 18:24–19:3(Chappel).
[39] *Id.* at 316:24–318:17(Warren).
[40] *Id.* at 146:11–147:6(Garner).
[41] *Id.* at 147:24–148:3(Garner).

As a result, the Merger Agreement featured various terms that were designed to achieve economic equivalence. For instance, the parties agreed that ETC would pay dividends on ETC shares that were equal to distributions paid on ETE common units through 2018.[42] In addition, ETE agreed to provide ETC stockholders with an equalizing payment at the end of two years if ETC shares traded at a discount to ETE common units.[43] Finally, the parties agreed to replace a portion of the all-equity consideration with a $6.05 billion cash payment that would be used by ETE to purchase shares in ETC, known as "hook stock," which ensured that ETE's and ETC's interests were aligned.[44] ETC would distribute this consideration to its stockholders, formerly Williams stockholders.[45]

3. The Merger Agreement

The parties executed the Merger Agreement on September 28, 2015.[46] Following the consummation of the Merger, ETC would own Class E Units representing approximately 57% of the limited partner interest of ETE, and the existing limited partners of ETE would own the remaining approximately 43% limited partner interest.[47] ETE would own the Williams assets, as well as

[42] JTX-0189.0006–.0007 (§5.15(b)(iii)); Trial Tr. at 19:5–20:16(Chappel); *id.* at 146:11–147:14(Garner); *id.* at 317:24–318:5(Warren).
[43] Trial Tr. at 19:5–20:16(Chappel).
[44] *Id.* at 20:17–21:7(Chappel); *id.* at 147:7–14(Garner); *id.* at 418:19–422:1(Welch); *id.* at 988:16–989:3(Needham); *id.* at 1230:23–12:31:1(Whitehurst).
[45] Stip. ¶ 18.
[46] *Id.* ¶ 17. *See also* JTX-0209.
[47] Stip. ¶ 18.

approximately 19% of the outstanding ETC shares.[48] The former Williams stockholders would own the remaining approximately 81% of the ETC shares and would receive approximately $6.05 billion in cash consideration.[49] Williams and ETE eventually agreed to a Closing Date of June 28, 2016 at 9:00 AM.[50]

The Merger Agreement featured several provisions that are at issue in this litigation, including a Capital Structure Representation, an Ordinary Course Covenant, and three Interim Operating Covenants.

a. The Capital Structure Representation

Under the Merger Agreement, ETE represented at signing that its capital structure was composed of three classes of equity securities—common units and Class D Units representing limited partnership interests in ETE, and a general partner interest in ETE—as well as the number of outstanding units in each class and the percentage of the general partner interest (the "Capital Structure Representation"):

> Capital Structure. (i) The authorized equity interests of Parent consist of common units representing limited partner interests in Parent ("Parent Common Units"), Class D Units representing limited partner interests in Parent ("Parent Class D Units") and a general partner interest in Parent ("Parent General Partner Interest"). At the close of business on September 25, 2015 (the "Parent Capitalization Date"), (i) 1,044,764,836 Parent Common

[48] *Id.*
[49] *Id.*
[50] *Id.* ¶ 34.

> Units were issued and outstanding, of which 5,776,462 consisted of Parent Restricted Units, (ii) 2,156,000 Parent Class D Units were issued and outstanding and (iii) there was an approximate 0.2576% Parent General Partner Interest. Except as set forth above, at the close of business on the Parent Capitalization Date, no equity securities or other voting securities of Parent were issued or outstanding.[51]

The parties agreed that the representation regarding the three existing classes of equity—but not the representation regarding the number of outstanding units—would be brought down to closing, "except for any immaterial inaccuracies":

> The representations and warranties of the Company set forth in Sections 3.01(c)(i) [] (Capital Structure) shall be true and correct as of the Closing Date as though made on such date (except to the extent any of such representations and warranties speak as of an earlier date, in which case such representations and warranties shall be true and correct as of such earlier date), except for any immaterial inaccuracies.[52]

Therefore, if ETE issued more units within its existing classes between signing and closing, the representation would remain true. If, however, ETE created a new class of equity interests, the representation would no longer be true at closing. The Capital Structure Representation was a "key element . . . in addressing the [Williams] [B]oard's concerns about economic equivalence" because it ensured that ETE could not "issue a new security with rights that shifted value from what was

[51] JTX-0209.0030 (§3.02(c)(i)). The Merger defines "Parent" to mean ETE, and "TopCo" to mean ETC. JTX-0209.0004.
[52] *Id.* at .0063 (§6.03(a)(i)).

expected and what was modeled," which could result in "a deal that was quite a bit different than the deal that was bargained for."[53]

b. The Ordinary Course and Interim Operating Covenants

ETE agreed to several covenants in the Merger Agreement regarding its conduct between signing and closing, four of which are at issue here. Each of these covenants are subject to exceptions, discussed below, identified in the Parent Disclosure Letter for Agreement and Plan of Merger (the "Parent Disclosure Letter").

First, ETE agreed to operate its business "in the ordinary course" (the "Ordinary Course Covenant"):

> *Except as set forth in Section 4.01(b) of the Parent Disclosure Letter*, expressly permitted by this Agreement, required by applicable Law or consented to in writing by the Company (such consent not to be unreasonably withheld, conditioned or delayed), during the period from the date of this Agreement to the Effective Time, *Parent shall, and shall cause each of its Subsidiaries to, carry on its business in the ordinary course* and shall use commercially reasonable efforts to preserve substantially intact its current business organizations, maintain its rights, franchises and Parent Permits and to preserve its relationships with significant customers and suppliers.[54]

The "ordinary course" obligation in turn entailed several specific restrictions on ETE between signing and closing (the "Interim Operating Covenants"). As with

[53] Trial Tr. at 204:19–205:3(Van Ngo); *id.* at 28:3–11(Chappel).
[54] JTX-0209.0045 (§4.01(b)) (emphasis added).

the general Ordinary Course Covenant, the Interim Operating Covenants were subject to exceptions provided in the Parent Disclosure Letter:

> Without limiting the generality of the foregoing, *except as set forth in Section 4.01(b) of the Parent Disclosure Letter*, expressly permitted by this Agreement, required by applicable Law or consented to in writing by the Company (such consent not to be unreasonably withheld, conditioned or delayed), during the period from the date of this Agreement to the Effective Time, Parent shall not, and shall not permit any of its Subsidiaries to . . . .[55]

Three of the Interim Operating Covenants are at issue here. First, ETE agreed that it would not take any actions resulting in new restrictions on distributions and payments of dividends:

> [Parent shall not, and shall not permit any of its Subsidiaries to] take any action that would result in Parent or any of its Subsidiaries becoming subject to any restriction not in existence on the date hereof with respect to the payment of distributions or dividends[.][56]

Second, ETE agreed to refrain from certain actions regarding its equity securities:

> [Parent shall not, and shall not permit any of its Subsidiaries to] split, combine or reclassify any of its equity securities or issue or authorize the issuance of any other securities in respect of, in lieu of or in substitution for equity securities, other than transactions by a wholly owned Subsidiary of Parent which remains a wholly owned Subsidiary after consummation of such transaction[.][57]

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[55] *Id.* (emphasis added).
[56] *Id.* at .0045 (§4.01(b)(ii)).
[57] *Id.* at .0045 (§4.01(b)(iii)).

Third, ETE agreed not to amend certain organizational documents:

> [Parent shall not, and shall not permit any of its Subsidiaries to] amend (A) the organizational documents of TopCo, (B) the Parent Certificate of Partnership or the Parent Partnership Agreement (other than the Parent Partnership Agreement Amendment) or (C) the comparable organizational documents of any Subsidiary of Parent in any material respect[.][58]

Section 6.03(b) of the Merger Agreement required ETE to have "performed or complied" with each of the Ordinary Course Covenant and the Interim Operating Covenants "by the time of the Closing" "in all material respects":

> <u>Performance of Obligations of TopCo and Parent</u>. Each of TopCo and Parent shall have, in all material respects, performed or complied with all obligations required by the time of the Closing to be performed or complied with by it under this Agreement, and the Company shall have received a certificate signed on behalf of Parent by the chief executive officer or the chief financial officer of Parent to such effect.[59]

These covenants were designed to ensure that, between signing and closing, "the deal that was struck [wa]s preserved through the closing date" and were "part of the package of protections that the [Williams B]oard requested to address their concerns around economic equivalence."[60]

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[58] *Id.* at .0046 (§4.01(b)(vi)).
[59] *Id.* at .0063 (§6.03(b)).
[60] Trial Tr. at 21:8–23(Chappel); *id.* at 203:8–23(Van Ngo).

c. The Parties Negotiate the $1 Billion Equity Issuance Exception

As I noted above, the Ordinary Course Covenant and each of the Interim Operating Covenants were subject to exceptions "set forth in Section 4.01(b) of the Parent Disclosure Letter."[61] Section 4.01(b) of the Parent Disclosure Letter, in turn, identifies these exceptions.[62] The exceptions are organized under headers that correspond to specific sections within Section 4.01(b) of the Merger Agreement.[63] Under the header "Section 4.01(b)(v)," the Parent Disclosure Letter states, "Parent may make issuances of equity securities with a value of up to $1.0 billion in the aggregate" (the "$1 Billion Equity Issuance Exception").[64]

The parties dispute whether the $1 Billion Equity Issuance Exception applies to all of the Ordinary Course and Interim Operating Covenants, or just the Interim Operating Covenant located within Section 4.01(b)(v) of the Merger Agreement, which prohibits ETE from issuing equity between signing and closing. The transaction documents include two provisions that are relevant to this interpretive question. First, the Parent Disclosure Letter states that "[t]he headings contained in this Parent Disclosure Letter are for reference only and shall not affect in any way

[61] JTX-0209.0045 (§4.01(b)).
[62] JTX-0194.0017–.0019.
[63] *Id.* Specifically, there are headers titled, "Section 4.01(b)(i)," "Section 4.01(b)(ii)," "Section 4.01(b)(v)," "Section 4.01(b)(vii)," "Section 4.01(b)(ix)," "Section 4.01(b)(x)," "Section 4.01(b)(xi)," "Section 4.01(b)(xii)," and "Section 4.01(b)(xiii)." *Id.*
[64] *Id.* at .0018.

the meaning or interpretation of this Parent Disclosure Letter."[65] Second, the Merger Agreement includes a savings clause stating that the disclosures in any section of the Parent Disclosure Letter apply to the corresponding section of the Merger Agreement, as well as to any other section of the Merger Agreement so long as the "relevan[ce]" to the other section "is reasonably apparent on its face":

> [A]ny information set forth in one Section or subsection of the Parent Disclosure Letter shall be deemed to apply to and qualify the Section or subsection of this Agreement to which it corresponds in number and each other Section or subsection of this Agreement to the extent that it is reasonably apparent on its face in light of the context and content of the disclosure that such information is relevant to such other Section or subsection[.][66]

The parties also introduced extrinsic evidence at trial regarding their intent with respect to these exceptions. Since the initial drafts, the Merger Agreement had included a prohibition on issuing equity between signing and closing.[67] ETE then proposed adding the $1 Billion Equity Issuance Exception directly into this prohibition, rather than adding it into the Parent Disclosure Letter.[68] The $1 Billion Equity Issuance Exception was negotiated by Chappel and Welch, the CFOs for both parties.[69] As the parties exchanged subsequent drafts, the $1 Billion Equity Issuance Exception remained directly within the equity issuance covenant of the Merger

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[65] *Id.* at .0002.
[66] JTX-0209.0030 (§3.02).
[67] JTX-0056.0064 (§5.2(b)(xi)); JTX-0058.0047 (§4.01(b)(iv)).
[68] JTX-0064.0170–.0171 (§4.01(b)(iv)(A)); Trial Tr. at 408:19–409:1(Welch).
[69] Trial Tr. at 22:8–15(Chappel); *id.* at 404:15–405:1(Welch).

Agreement, instead of the Parent Disclosure Letter.[70] Chappel and Welch both testified that they both understood the $1 Billion Equity Issuance Exception to apply only to the Interim Operating Covenant prohibiting equity issuances in Section 4.01(b)(v).[71]

The day before signing, on September 27, 2015, Williams and ETE each moved several exceptions that had been drafted into individual covenants in the Merger Agreement to their respective disclosure letters.[72] When the parties did so, they tied each exception to the corresponding Interim Operating Covenant from which it had been moved through the use of headers identifying those individual covenants by section.[73] The $1 Billion Equity Issuance Exception was one of the exceptions that ETE moved into its Parent Disclosure Letter.[74] ETE removed the $1 Billion Equity Issuance Exception from Section 4.01(b)(v) of the Merger Agreement and placed it under a header in Section 4.01(b) of the Parent Disclosure Letter titled, "Section 4.01(b)(v)."[75]

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[70] *E.g.*, JTX-0146.0003; Tr.211:17–212:19(Van Ngo).
[71] Trial Tr. at 24:2–25:7(Chappel); *id.* at 409:2–413:5(Welch).
[72] *Compare* JTX-0139.0055–.0061, *with* JTX-0160.0029–.0032 (moving exceptions from Merger Agreement §4.01(a) to Company Disclosure Letter); *compare* JTX-0162.0175–.0179, *with* JTX-0167.0019–.0021 (moving exceptions from Merger Agreement §4.01(b) to Parent Disclosure Letter).
[73] *See* JTX-0160.0029–.0032 (Company Disclosure Letter); JTX-0162.0175–.0179 (Parent Disclosure Letter).
[74] JTX-0194.0018.
[75] *Compare* JTX-0162.0176 (Merger Agreement §4.01(b)(v)), *with* JTX-0167.0020 (Parent Disclosure Letter).

The evidence presented at trial established that the parties moved the exceptions into the disclosure letters to maintain their confidentiality, and that they did not intend the moves to be substantive. Chappel testified at trial that the exceptions were moved to the disclosure letters "to maintain confidentiality" with respect to "sensitive issues," and that they intended "no change in rights."[76] Welch agreed that the exceptions were moved for confidentiality reasons.[77] Likewise, Minh Van Ngo, the Cravath attorney advising Williams on the Merger, testified that Cravath told Wachtell at that time "that we were fine with th[e] movement, with the understanding that it was nonsubstantive," meaning, "just like it operate[d] if it were in the body of the merger agreement, . . . the exceptions in the disclosure schedule would apply only to the corresponding section of the merger agreement."[78] Van Ngo also testified that he told Wachtell that he understood the disclosure letters to be "section-specific."[79]

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[76] Trial Tr. at 25:12–26:6(Chappel).
[77] *Id.* at 415:19–416:5(Welch).
[78] *Id.* at 213:13–21(Van Ngo).
[79] *Id.* at 215:3–8 (Van Ngo). Although David Katz, one of ETE's deal counsel at Wachtell, testified in a deposition that he believed the $1 Billion Equity Issuance Exception applied to each of the covenants within Section 4.01(b) of the Merger Agreement, he admitted that he was not involved in drafting the Parent Disclosure Letter and that he did not know how his team determined the structure of the exceptions in the letter. Katz Dep. at 88:21–91:25. Rather, his interpretation was based solely on his reading of the Merger Agreement and Parent Disclosure Letter on the day of the deposition. *Id.* Accordingly, I find this testimony to be unpersuasive regarding the parties' intent.

Van Ngo also testified that he told Wachtell he preferred the "'reasonably apparent on its face' formulation for the savings clause" and Wachtell responded, "[t]hat's fine."[80] Van Ngo testified that he understood the "reasonably apparent on its face" formulation was meant "to address obvious drafting errors and[/]or manifest errors on the parties" because "when you move sections . . . to a disclosure schedule," "there's a heightened risk that you have misalignment of the sections or that . . . you miss . . . certain cross references."[81]

In addition, the parties' conduct after signing the Merger Agreement further demonstrates that they intended the exceptions that were moved into the disclosure letters to apply only to the specific covenants from which they were moved. After signing, Williams planned its own equity issuance.[82] Like ETE, Williams was also subject to a restriction on the issuance of equity,[83] and its Company Disclosure Letter included an exception permitting Williams to issue up to $1 billion in equity securities.[84] And like the Parent Disclosure Letter, the Company Disclosure Letter was structured so that each exception fell under a header that corresponded to a specific covenant in the Merger Agreement.[85]

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[80] Trial Tr. at 215:3–8(Van Ngo).
[81] *Id.* at 215:3–23 (Van Ngo).
[82] *Id.* at 29:13–32:10(Chappel); *id.* at 416:6–417:18(Welch); JTX-0246.0001–.0002.
[83] JTX-0209.0042 (§4.01(a)(v)).
[84] JTX-0196.0025.
[85] *Id.* at .0025–.0029.

Although Williams was therefore permitted to issue equity under this Company Disclosure Letter exception, the particular issuance that Williams planned involved the waiver of incentive distribution rights ("IDRs"),[86] which was prohibited by a separate interim operating covenant.[87] Accordingly, before going forward with the planned issuance, Williams requested ETE's consent to the waiver of IDRs.[88] ETE refused to consent, and Williams did not proceed with the issuance.[89] If the parties had intended the $1 billion equity issuance exception in the Company Disclosure Letter to apply to all of Williams' interim operating covenants, rather than just the equity issuance covenant, ETE's consent would not have been required.

d. The Merger Agreement Was Conditioned on a Tax Opinion

The Merger Agreement was conditioned on ETE's tax counsel, Latham & Watkins LLP ("Latham"), rendering the 721 Opinion—that the contribution by ETC of the Williams assets to ETE in exchange for the issuance of Class E units "should" be treated as tax free under Section 721 of the Internal Revenue Code.[90]

The Merger Agreement also included certain representations and covenants related to the Section 721 tax treatment. First, ETE represented that it did not "know[] of the existence of any fact that would reasonably be expected to prevent"

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[86] Trial Tr. at 29:13–33:13(Chappel); *id.* at 416:6–417:23(Welch); JTX-0246.0001–.0002.
[87] JTX-0209.0043 (§4.01(a)(x)).
[88] Trial Tr. at 32:11–33:13(Chappel); *id.* at 417:2–18(Welch); JTX-0246.0001–.0002.
[89] Trial Tr. at 33:14–20(Chappel); *id.* at 417:19–23(Welch).
[90] JTX-0209.0062 (§6.01(h)).

the Merger "from qualifying as an exchange to which Section 721(a) of the Code applies."[91] This representation was brought down to closing, subject to the "Parent Material Adverse Effect" materiality standard.[92] Williams also made a reciprocal representation, which was also brought down to closing, subject to a "Company Material Adverse Effect" materiality standard.[93] Second, the Merger Agreement included covenants that required ETE and Williams to use reasonable best efforts to consummate the Merger and commercially reasonable efforts to cause the contribution to qualify as tax-free under Section 721(a).[94]

4. The Williams Board Approves the Merger

Following negotiations, the Williams Board met on September 24 and 25, 2015 to discuss the Merger.[95] At the September 24, 2021 meeting, the Board took a "straw poll" and preliminarily rejected the Merger by a 6-to-7 vote.[96] The next day, two Williams directors—Janice Stoney and Joe Cleveland—changed their votes, and the Board voted to approve the Merger 8-to-5.[97]

ETE contends that threats of a consent solicitation from two activist directors on the Williams Board, Keith Meister and Eric Mandelblatt, were a significant factor

[91] *Id.* at .0038 (§3.02(n)(i)).
[92] *Id.* at .0063 (§6.03(a)(iv)).
[93] *Id.* at .0026 (§3.01(n)(i)), .0062 (§6.02(a)(iv)).
[94] *Id.* at .0053 (§5.03), .0060 (§5.07).
[95] JTX-0137.
[96] *Id.* at .0005.
[97] *Id.* at .0006.

in the Williams Board's decision to approve the Merger.[98] The evidence presented at trial, however, established that Meister and Mandelblatt did not make any such threats. Both Meister and Mandelblatt testified that they did not threaten a consent solicitation.[99] This is consistent with testimony from other Williams directors, who generally testified that they did not perceive or recall perceiving threats from Meister and Mandelblatt.[100] Although one director, Kathleen Cooper, testified equivocally during a 2016 deposition that she thought she recalled Meister stating that he and Mandelblatt would initiate a consent solicitation if a deal was not reached,[101] her uncertain testimony is outweighed by the testimony of the other Williams directors. In any event, she acknowledged that to the extent there was such a threat, it did not "affect[] [her] feelings about the deal."[102]

The other evidence presented by ETE does not support their argument that purported threats from Meister and Mandelblatt were a significant factor in the Williams' Board's decision to approve the Merger. Cooper's October 22, 2015 email to Stoney lamenting that "we succumbed to the threats just at the wrong time rather than fighting for long-term shareholder value at [Williams]" referred to threats

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[98] Defs.' and Countercl. Pl.'s Post-Trial Br., Dkt. No. 637 at 9–11 [hereinafter "ETE OB"].
[99] Meister Dep. at 402:25–403:13; Mandelblatt Dep. at 377:19–25.
[100] Trial Tr. at 856:18–21(Stoney); *id.* at 859:17–860:12(Stoney); Hinshaw Dep. at 276:9–14; Sugg Dep. at 314:11–18 (2018); Nance Dep. at 62:19–63:10; Izzo Dep. at 107:18–24; Smith Dep. at 167:9–169:15 (2018). ETE did not depose Cleveland, whose deposition was cancelled for medical reasons in 2019. ETE OB at 10 n.20.
[101] Cooper Dep. at 31:11–33:25 (2016).
[102] *Id.* at 32:21–23.

from when Meister and Mandelblatt joined the Board in early 2014, not threats in connection with the Merger.[103] Likewise, Armstrong's notes to himself regarding "[t]hreatening Proxy contests" and "[t]hreatening personal liability in case of proxy fight"[104] referred to these perceived 2014 threats and his general thoughts about the presence of activists in the Williams boardroom.[105] Finally, while the September 24-25, 2015 Williams Board meeting minutes do discuss "appreciation of the practical consequences of a rejection of the" Merger, including "the likelihood of a consent solicitation to replace all or certain Directors" and the "expected response of Messrs. Mandelblatt and Meister,"[106] the minutes make no mention of "threats" from Mandelblatt and Meister. This is consistent with Stoney's testimony, during which she stated that the Board discussed the likelihood of a consent solicitation being launched and the likelihood of the outcome, but that no one had threatened a consent solicitation.[107] Williams disclosed to stockholders in the Form S-4 registration statement (the "S-4") filed with the Securities Exchange Commission (the "SEC") that the Williams Board discussed a potential consent solicitation when evaluating the Merger.[108]

[103] JTX-0235.0001; JTX-0012.
[104] JTX-0223.0003.
[105] Trial Tr. at 713:24–714:21(Armstrong); *id.* at 706:9–707:4(Armstrong).
[106] JTX-0137.0004.
[107] Trial Tr. at 854:7–856:21(Stoney).
[108] JTX-1218.0148.

On September 28, 2015, the Williams Board approved and declared advisable the Merger.[109] As a result, Williams terminated the WPZ agreement and paid the $410 million termination fee to WPZ.[110] Under the Merger Agreement, if the Merger failed and certain conditions were met, ETE was required to reimburse Williams for the $410 million termination fee (the "WPZ Termination Fee Reimbursement").[111]

5. The Energy Market Deteriorates

In late 2015, commodity prices declined sharply, leading to a deterioration of the energy market.[112] As a result, both Williams and ETE reassessed the Merger in light of their changing financial positions.

ETE was concerned about its ability to finance the Merger. Warren was concerned that the $6.05 billion cash component of the Merger consideration was a "problem"[113] because the debt required to finance it could lead to a "potential ratings downgrade" to "junk status."[114] The ETE senior management team was likewise concerned about the cash component of the Merger consideration.[115]

In light of these concerns about financing the cash consideration, by January 2016, Warren no longer wanted to close the Merger as it was structured.[116] On

[109] Stip. ¶ 33.
[110] Trial Tr. at 13:15–14:12(Chappel); JTX-0202.0004.
[111] JTX-0209.0059 (§5.06(f)).
[112] Trial Tr. at 33:21–34:3(Chappel).
[113] *Id.* at 308:16–22(Warren).
[114] *Id.* at 325:14–21(Warren).
[115] *Id.* at 330:20–331:1(Warren).
[116] *Id.* at 296:3–18(Warren).

January 7, 2016, Warren called a meeting of ETE executives and lawyers to discuss ETE's "rights and obligations under the merger agreement" because, "as structured," Warren believed the Merger "was not in ETE's best interests."[117] At the meeting, Warren expressed that he believed that the Merger, as structured with a cash consideration component, "would create a ratings downgrade" that would lead to an "implosion."[118] Warren indicated that he was "very much opposed to the" Merger and would "walk away" "[i]f he could, under the merger agreement."[119]

Four days later, on January 11, 2016, Warren spoke over the phone with Frank MacInnis, the Williams Chairman.[120] On the call, Warren proposed a meeting to discuss a "restructuring" or "changes" to the Merger Agreement.[121] Warren stated that ETE also would not be able to restructure the deal to be "all-equity."[122] The Williams Board minutes describing MacInnis's summary of the call state that Warren "discussed the possibility of terminating the transaction and had mentioned the possibility of cutting distributions."[123] At trial, Warren acknowledged it was possible that he told MacInnis that ETE might have to cut distributions if the Merger closed as structured.[124] The following day, on January 12, 2016, Armstrong and

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[117] JTX-0331; Trial Tr. at 422:2–13(Welch).
[118] Trial Tr. at 422:21–423:5(Welch).
[119] *Id.* at 423:23–424:14(Welch).
[120] JTX-0357.0005.
[121] *Id.*
[122] JTX-0378.0002; Trial Tr. at 334:13–17(Warren).
[123] JTX-0378.0002; Trial Tr. at 333:18–334:17(Warren); *id.* at 207:7–14(Van Ngo).
[124] Trial Tr. at 333:18–334:7(Warren).

Chappel met with Tom Long, the then-CFO of an ETE subsidiary, who proposed changes to the terms of the deal.[125]

Two days later, on January 14, 2016, Chappel and Williams' financial advisor from Lazard, Al Garner, met with Warren and Welch.[126] At this meeting, Warren and Welch expressed that the Merger was now "a problem."[127] In a contemporaneous email describing the discussion, a Lazard employee wrote that Warren and Welch stated that "ETE may be forced to cut distribution[s] to zero for 2 years."[128] Likewise, both Chappel and Garner testified at trial that at this meeting, Warren and Welch stated "that they would have to cut distributions to zero for two years."[129] Although Warren and Welch indicated that they "plan[ned] to 'honor [the] agreement,'" they stated that if Williams were to "walk, ETE would not require [a] breakup fee" and they "also offered to 'help' purchase WPZ assets if [the] deal [is] called off."[130] Welch also stated that he believed the S-4 needed to disclose that Williams would be worth more as a standalone company than with "ETE with no distr[ibutions]."[131]

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[125] *Id.* at 34:15–35:23(Chappel).
[126] *Id.* at 35:24–36:8(Chappel); *id.* at 150:4–7(Garner); JTX-0374.0001.
[127] JTX-0374.0001.
[128] *Id.*
[129] Trial Tr. at 36:9–23(Chappel); *id.* at 150:8–24(Garner); JTX-0327.0001.
[130] JTX-0374.0001.
[131] *Id.*

For its part, the Williams Board and management also had some internal dissent with respect to the merits of the Merger. As I discussed above, the Williams Board had approved the Merger in an 8-to-5 vote.[132] This internal dissent continued during the market collapse. In December 2015, the Williams Board called a meeting to discuss the "dire" "state of the markets."[133] Armstrong wanted to terminate the Merger, and he was a "strong voice" in that discussion.[134]

Armstrong encouraged Williams' CFO, Chappel, to "accept forecast assumptions for Williams" and "pessimistic forecast assumptions for ETE," though Chappel, who supported the Merger, had "strong support from the [B]oard to ensure that the forecasts were thoughtfully prepared, well-vetted, and balanced between optimism and pessimism and provided transparency to the [B]oard."[135] Armstrong did, however, present optimistic projections of Williams as a standalone company to the Board in February 2016 without vetting them with Chappel.[136] Armstrong and other dissenting directors also included Stoney and Cleveland on emails expressing their disagreement regarding the merits of the Merger, including their

[132] JTX-0137.0006.
[133] JTX-0308.0001–.0002.
[134] Trial Tr. at 120:7–23(Chappel).
[135] *Id.* at 121:13–22(Chappel).
[136] *Id.* at 124:10–125:2(Chappel).

criticism of Williams' banker's financial analysis.[137] Stoney testified that she nonetheless never felt pressure to reconsider her position.[138]

Despite the internal dissent at Williams, the Williams Board determined at a January 15, 2016 meeting that the Merger Agreement was a "valuable asset" and resolved to issue a press release expressing its unanimous support for the Merger.[139] The Williams Board issued that press release the same day, stating that it was "unanimously committed to completing the transaction."[140] Williams also asked its financial advisors, Lazard and Barclays, to assess the value of the Merger to Williams stockholders in light of the changing market conditions,[141] and to assess to value of a potential breakup fee from ETE.[142] Both concluded that the Merger still provided Williams stockholders with billions of dollars in value.[143]

In response to ETE's concerns about financing the cash component of the consideration, Williams proposed restructuring the Merger by swapping the cash component for equity at the then-current market value of ETE units.[144] ETE refused

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137 *See* JTX-0437; JTX-0439; JTX-0755; JTX-1019; Tr.127:8–16(Chappel); JTX-0727; JTX-0743.

138 Trial Tr. at 865:5–866:7(Stoney). As I noted above, Cleveland did not testify at trial or deposition, after his deposition was cancelled for medical reasons in 2019. ETE OB at 10 n.20.

139 JTX-0378.0002.

140 JTX-0379.0001.

141 JTX-0441; JTX-0449; Trial Tr. at 38:3–39:18(Chappel); *id.* at 157:6–158:2(Garner).

142 JTX-0742; JTX-0741; Trial Tr. at 888:3–889:6(Stoney).

143 JTX-0441.0006, .0025; JTX-0449.0085; Trial Tr. at 38:3–39:18(Chappel); *id.* at 159:1–160:16(Garner).

144 JTX-0382.

and countered with an offer to replace the cash consideration with ETE units at a valuation from before the energy market decline.[145]

a. ETE Crafts a Public Offering with a Distribution Preference

To solve its leverage issues, ETE structured two equity issuances—a public offering, which Williams rejected (the "Proposed Public Offering"); and a private offering, which ETE completed without Williams' consent (the "Preferred Offering"). The Preferred Offering ultimately became the subject of an action brought by ETE unitholders, in which I found that ETE breached its partnership agreement in connection with the offering (the "*Unitholder* action").[146]

Shortly after ETE raised the possibility of distribution cuts to Williams in January 2016, ETE retained Perella Weinberg Partners ("Perella") to advise ETE on solutions to its potential leverage issues.[147] One of the solutions Perella presented was the Proposed Public Offering.[148] Perella and ETE explored other options too, such as selling assets and issuing common units, but concluded that those were not viable.[149] Perella and ETE also raised the possibility of cutting distributions,[150]

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[145] JTX-0382; Trial Tr. at 310:24–312:1(Warren).
[146] *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *22–25 (Del. Ch. May 17, 2018), *aff'd sub nom. Levine v. Energy Transfer L.P.*, 223 A.3d 97 (Del. 2019).
[147] Trial Tr. at 152:8–153:16(Garner); JTX-0382.0001; Trial Tr. at 435:13–19(McReynolds); *id.* at 458:4–459:19(McReynolds).
[148] JTX-0330.0033; JTX-0426.0034; Trial Tr. at 340:9–343:2(Warren).
[149] Trial Tr. at 436:19–437:14(McReynolds); *id.* at 438:19–439:13(McReynolds); *id.* at 1654:21–1656:18(Bednar); Long Dep. at 96:9–19 (2019); Trial Tr. at 384:12–385:10(Warren).
[150] Trial Tr. at 339:1–340:3(Warren); *id.* at 1662:18–21(Bednar); JTX-0400.0001.

though they deemed that "an option of last resort" due to the potential negative "longer-term implications" of cutting distributions, including on ETE's credit rating.[151] However, ETE received positive responses from its credit rating agencies when it previewed to them the Proposed Public Offering.[152] As originally conceived, participants would forgo distributions on their common units for a set period.[153] In exchange for forgoing such distributions, participants would receive preferred units that paid discretionary distributions of up to 40% of the distributions paid on common units.[154] At the end of the period, the distributions on participants' common units would become unrestricted, and the participants' preferred units would convert into additional common units, calculated based on the amount of distributions that participants forwent.[155]

Perella first presented the Proposed Public Offering to ETE at a meeting with Warren on January 27, 2016.[156] As originally proposed, the offering did not feature any distribution preference for participants.[157] Warren testified at trial that, at the time, ETE had considered the possibility of a two-year distribution cut, even though

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[151] Trial Tr. at 1648:22–1652:8(Bednar); *id.* at 438:3–18(McReynolds); *id.* at 1565:3–17(Bramhall); *id.* at 301:14–23(Warren); McGovern Dep. at 32:24–34:9 (2018); JTX-0598.0016; Long Dep. at 65:23–67:3 (2016); JTX-0399.0006.
[152] JTX-0679.0002.
[153] JTX-0330.0033.
[154] *Id.*
[155] *Id.*
[156] *Id.*; JTX-0426.0034; Trial Tr. at 340:9–343:2(Warren).
[157] JTX-0330.0033; JTX-0426.0034; Trial Tr. at 340:9–343:2(Warren).

distribution cuts are "the last bucket you go to."[158] As the holder of over 190 million ETE units, however, Warren would lose over $200 million per year in personal cash flow if ETE eliminated distributions.[159] Warren therefore proposed that Perella add a distribution preference for participants in the offering.[160] In response, ETE's advisors revised the offering to feature an 11 cent per quarter distribution preference,[161] a reduction from ETE's historic distribution of 28½ cents per quarter.[162]

Despite Warren's support for a distribution preference, ETE's CFO, Welch, expressed reservations.[163] Welch expressed to Warren and other ETE executives that he believed there was no justification for a distribution preference, and that a distribution preference would create "a superpriority class of holders versus all other common holders."[164] Welch believed that Warren was "looking to . . . ensure that there was a certain amount of cash, annual cash flow, that he would receive with certainty to, basically, support his living" if ETE cut distributions.[165] Warren insisted, however, that "there needed to be a minimum level of certainty on cash

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[158] Trial Tr. at 339:1–340:8(Warren); *id.* at 347:9–348:4(Warren); *see also id.* at 426:4–429:19(Welch).
[159] Trial Tr. at 334:18–335:24(Warren); *id.* at 388:6–389:24(Welch).
[160] JTX-0434.0001; Trial Tr. at 464:24–466:6(McReynolds); *id.* at 399:3–401:24(Welch).
[161] JTX-0434.0001; JTX-0457.0008; Trial Tr. at 464:24–466:6(McReynolds); *id.* at 1668:4–1671:5(Bednar).
[162] JTX-0430.0001.
[163] Trial Tr. at 399:3–401:24(Welch).
[164] *Id.* at 390:22–393:3(Welch); *id.* at 398:21–400:10(Welch); *id.* at 401:4–24(Welch).
[165] *Id.* at 402:1–14(Welch); *id.* at 428:14–429:19(Welch).

flow on a going-forward basis, if he was to support" an offering.[166] Warren asserted that "the preferred payment was a necessary core part of [the] program . . . which was needed for him to support it."[167]

On February 8, 2016, Perella presented a revised proposal to the ETE Board.[168] This time, the proposal featured the 11-cent cash distribution preference, which would be paid regardless of whether ETE cut distributions on common units.[169] One ETE director, John McReynolds, questioned whether the offering would "really save up to $1B[illion] if distributions actually later get cut."[170] At trial, he acknowledged that if distributions were cut to zero, the offering would not save ETE any money during that period.[171]

In its February 8 presentation, Perella also posed distribution cuts as a potential alternative that would have "[n]o execution risk" and would "[s]atisf[y] rating agencies."[172] ETE sought additional advice from a second financial advisor, Goldman Sachs & Co. ("Goldman Sachs"), who gave a February 12, 2016 presentation suggesting a "[s]ubstantial distribution / dividend cut" if the Merger closed, among other alternatives.[173] Goldman Sachs advised that a distribution cut

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[166] *Id.* at 389:5–24(Welch).
[167] *Id.* at 390:22–391:12(Welch).
[168] JTX-0482.0002–.0016; Trial Tr. at 343:3–10(Warren).
[169] JTX-0482.0008, .0012; Trial Tr. at 343:3–345:10(Warren).
[170] JTX-0465.0003.
[171] *Id.*; Trial Tr. at 468:13–17(McReynolds).
[172] JTX-0486.0004–.0005.
[173] JTX-0506.0003.

was "likely to be well received by [the] market given current trading levels and investor concerns."[174] In February 2016, ETE also ran models evaluating distribution cuts.[175]

ETE sent the terms of the Proposed Public Offering to Williams on February 12, 2016.[176] ETE was not able to complete the offering unless Williams instructed its independent registered accounting firm to provide consent to the incorporation by reference of the firm's report on Williams' audited financial statements.[177] ETE therefore requested Williams' auditor's consent to file with the SEC.[178] The next day, on February 13, 2016, Williams responded that it believed the Proposed Public Offering would violate the Merger Agreement and that the Board was required to assess it.[179] Chappel also noted that Williams "reviewed potential additional actions that we could take to strengthen the WPZ and [Williams] credit profile."[180]

In the meantime, the ETE Board met again on February 15, 2016, and discussed the Proposed Public Offering.[181] At this meeting, the ETE Board revised

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[174] *Id.*
[175] JTX-0461.0002; JTX-0475.0002; JTX-0579; JTX-0500.0001; Trial Tr. at 1579:7–1583:15(Bramhall).
[176] JTX-0507; Trial Tr. at 52:6–13(Chappel).
[177] Stip. ¶ 25.
[178] Trial Tr. at 52:14–20(Chappel).
[179] JTX-0517.0001; Trial Tr. at 208:11–20(Van Ngo); *id.* at 53:10–22(Chappel); JTX-0537.0002.
[180] JTX-0517.0001.
[181] JTX-0535; JTX-0536.0001–.0002.

the distribution preference to include an additional 17½ cents of accrual credits, toward new units, per quarter, in addition to the 11-cent cash distribution.[182] This had the effect of preserving ETE's historic distribution of 28½ cents for Proposed Public Offering participants, and therefore eliminated the risk of a distribution cut for those participants. Although ETE asserts that it added the accrual credits to ensure that the Proposed Public Offering would be marketable,[183] the elimination of downside risk was an advantage to ETE insiders, including Warren and ETE senior management, who had pledged to "commit their units to th[e] program."[184]

ETE made this change itself before consulting Perella.[185] After ETE informed Perella of the change, a Perella analyst remarked that "[i]f cash distributions on common units are cut to zero, the preferred [payment in kind ("PIK")] distributions don't conserve cash in and of themselves—rather, they represent a wealth transfer from non-participating to participating units."[186]

b. Williams Declines to Consent to the Proposed Public Offering

The Williams Board asked its financial advisors, Lazard and Barclays, to assess the Proposed Public Offering.[187] On February 17, 2016, both advisors

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182 JTX-0535.0019; JTX-0538.0002; Trial Tr. at 351:1–352:10(Warren).
183 ETE OB at 26–27; Trial Tr. at 1656:19–1658:3(Bednar); *id.* at 441:17–442:11(McReynolds); *id.* at 450:3–21(McReynolds).
184 JTX-0518.0001; JTX-0512.0001.
185 Trial Tr. at 1677:2–19(Bednar); JTX-0532.0001.
186 JTX-0537.0001.
187 Trial Tr. at 53:10–55:1(Chappel).

recommended that the Williams Board decline to consent.[188] Although Williams believed that the Proposed Public Offering would have a positive impact on ETE's leverage issues,[189] the advisors determined that because the Proposed Public Offering would allow participants to benefit disproportionately over nonparticipating unitholders (including future ETC stockholders) in the event of a distribution cut, it "would have an extraordinary detrimental impact on Williams shareholders."[190] Chappel agreed with this analysis.[191] The Williams Board therefore declined to provide consent.[192]

On February 18, 2016, Williams informed ETE that it would not provide consent.[193] Although ETE contends that it was surprised by this news,[194] ETE's CFO admitted in the *Unitholder* action that Chappel had already informed him on February 13, 2016 that "he was not going to allow [Williams Co.'s] auditors to provide the consent."[195] The next day, Chappel and Williams' general counsel met with Welch and ETE's general counsel, and Chappel stated that Williams was open to other solutions, "including an offering that Williams shareholders could participate in on an equivalent basis to ETE shareholders, one that would treat

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[188] *Id.* at 54:5–22(Chappel).
[189] *Id.* at 113:5–16(Chappel).
[190] *Id.* at 54:9–22(Chappel); *id.* at 162:22–168:23(Garner); JTX-0551.0008, .0010.
[191] Trial Tr. at 54:23–55:1(Chappel).
[192] Stip. ¶ 25. JTX-0549.0003.
[193] Trial Tr. at 54:5–55:16(Chappel); JTX-0561.0002.
[194] ETE OB at 27.
[195] *Energy Transfer*, 2018 WL 2254706, at *6.

Williams shareholders fairly and so they would be in the same class as ETE shareholders."[196]

ETE refused this proposal.[197] Instead, ETE devised the private Preferred Offering, featuring a similar distribution preference, which I found in the *Unitholder* action was "a hedge meant to protect insiders from the anticipated bad effects of the coming merger."[198]

c. ETE Makes the Private Preferred Offering

Unlike the Proposed Public Offering, the private Preferred Offering did not require the consent of Williams' auditors.[199] On February 25, 2016, a few days before the ETE Board approved the Preferred Offering, Warren was asked on earnings call about potential distribution cuts at ETE and an ETE affiliate, ETP.[200] Warren stated that there were "no contemplated distribution cuts at ETP whatsoever."[201] With respect to ETE, however, Warren stated that although "ETE is very healthy" and "distribution cuts are not required," "everybody knows obviously that that's an option."[202] Warren added that "[i]t would be one of the last [buckets] that we would reach to, but it's certainly possible."[203]

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[196] JTX-0561; Trial Tr. at 56:1–57:7(Chappel).
[197] Trial Tr. at 57:8–14(Chappel).
[198] *Energy Transfer*, 2018 WL 2254706, at *1.
[199] *Id.* at *8.
[200] JTX-0595.0013; Trial Tr. at 355:9–357:8(Warren).
[201] JTX-0595.0013.
[202] *Id.*
[203] *Id.*

The next day, on February 26, 2016, Warren called an ETE Board meeting to discuss the Preferred Offering.[204] The ETE Board met on February 28, 2016 and approved the Preferred Offering,[205] in a process which I found in the *Unitholder* action breached ETE's limited partnership agreement because it involved, among other things, a "fatally flawed" conflicts committee and "untrue" board resolutions.[206] ETE instructed its counsel not to inform Williams of the Preferred Offering until after it closed.[207]

ETE closed the Preferred Offering on March 8, 2016.[208] The Preferred Offering created a new class of equity—Series A Convertible Preferred Units[209]—which featured an increased distribution preference of 28½ cents.[210] 17½ cents of this was to be an accrual credit toward PIK distributions, saving ETE cash if common unit cash distributions continued without diminution.[211] Unlike the Proposed Public Offering, the Preferred Offering was made available only to ETE insiders.[212] Warren, McReynolds, and Ray Davis, ETE's co-founder, received over 85% of the

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[204] JTX-0606.
[205] *Id.* at .0002; JTX-0638; Trial Tr. at 357:9–360:2(Warren).
[206] *Energy Transfer*, 2018 WL 2254706, at *12, 20, 24–25.
[207] Trial Tr. at 209:2–15(Van Ngo); Katz Dep. at 64:4–65:10; McReynolds Dep. at 191:11–192:17 (2019).
[208] Stip. ¶ 26.
[209] *Id.*
[210] JTX-0713.0008; Trial Tr. at 169:9–172:3(Garner); *id.* at 490:13–492:11(Ruback).
[211] JTX-1218.0045–.0046.
[212] Trial Tr. at 169:9–170:10(Garner); JTX-0713.0008.

total preferred units.[213] Those to whom the Preferred Offering was extended were invited to participate pro rata based on their holdings of existing units.[214] Warren and McReynolds participated in the Preferred Offering with respect to substantially all of their units.[215]

The market's reaction to the Preferred Offering was mixed. One ETE investor suggested that the Preferred Offering could be a "sub-rosa plan to give management the ability to preserve payments to itself while shutting off distributions to common unit-holders entirely," which "would not be consistent with [ETE's] well-earned reputation."[216] An analyst wrote to McReynolds that "it looks to me (and the market, apparently) that [Warren] has insulated himself from a distribution cut, but ETE common holders are still on the hook for a potential distribution cut should one be required."[217]

Williams and its stockholders were also concerned. One Williams stockholder admonished that "[t]he insiders at ETE are enriching themselves at the expense of the rest of the ETE shareholders" and decried the Preferred Offering as "something similar" to a "fraudulent conveyance."[218] Garner testified that he

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[213] Trial Tr. at 1648:16–1750:18(Atkins).
[214] JTX-1218.0045.
[215] Trial Tr. at 1748:16–19(Atkins); *id.* at 449:2–450:10(McReynolds); JTX-1218.0046.
[216] JTX-0702.0001.
[217] JTX-0705.0001. Trial Tr. at 474:9–24(McReynolds).
[218] JTX-0711.0001–.0002; Trial Tr. at 475:1–17(McReynolds).

believed the Preferred Offering was "more outrageous than the prior one,"[219] and Chappel testified that he believed it "was a complete game changer with respect to what was bargained for in the merger agreement."[220] Likewise, Stoney described the Preferred Offering "as a sweetheart deal" for "the CEO of ETE and some small selected group of people."[221]

Meanwhile, ETE's credit ratings agencies responded positively to the Preferred Offering.[222] Indeed, Fitch, one of the three major rating agencies, described the Preferred Offering as "a proactive step in enhancing [ETE's] liquidity and managing acquisition leverage in a credit neutral manner."[223]

d. ETE Announces Plans to Cut Distributions

In February and April 2016, Williams provided ETE with financial projections.[224] The February 10, 2016 projections, which were ratings agency updates, included both base-case and downside case forecasts.[225] Dylan Bramhall, ETE's Vice President of Financial Planning and Analysis,[226] testified at trial that these forecasts indicated to ETE that Williams had "bottomed out" from late 2015 declines, "the numbers had stepped back up a little bit," and ETE "felt that business

[219] Trial Tr. at 169:16–18(Garner).
[220] *Id.* at 58:21–59:10(Chappel).
[221] *Id.* at 866:17–867:5(Stoney).
[222] JTX-0716.
[223] *Id.* at .0001; *Energy Transfer*, 2018 WL 2254706, at *14.
[224] JTX-0495.
[225] *Id.* at .0010, .0022.
[226] Trial Tr. at 1564:17–20(Bramhall).

was performing well enough to cover current distribution levels."[227] Bramhall testified that ETE understood the base-case projections to reflect Williams' view "as [to] what was most expected."[228]

In late March and early April 2016, ETE asked Williams to provide updated projections to incorporate in an amendment to the S-4.[229] Williams sent updated projections to ETE on April 7, 2016.[230] Williams' April 7 projections were bleaker than its projections from February 10. Compared to the February 10 base-case forecast, Williams' April 7 forecast projected lower distributable cash flows for WPZ—by 15.8% in 2016 and 21.7% in 2017.[231] But when compared against the February 10 downside forecast, the April 7 projections for WPZ's distributable cash flows were lower by just 5.9% in 2016 and 11.3% in 2017.[232]

When Chappel sent the projections to ETE, he presented them as "based on the Downside Case that we presented . . . in February."[233] However, Long asked Chappel on April 15, 2016 whether the updated projections "represent [Williams'] most realistic projections," or whether there were additional "adjustments that should be made to the projections to reflect [Williams'] most realistic

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[227] *Id.* at 1571:6–1572:5(Bramhall).
[228] *Id.* at 1632:16–1633:3(Bramhall).
[229] *Id.* at 1572:6–20; JTX-0807.
[230] JTX-0846.
[231] Plaintiff's Demonstrative Ex. 5 at 3.
[232] *Id.* at 4.
[233] JTX-0846.0001.

projections."[234] Chappel replied that Williams viewed the April 7 projections "as appropriately capturing a discount for customer credit risk, a realistic risk in this environment," and that he "d[id] not believe that additional adjustments [were] necessary."[235] Bramhall testified that the projections in the April 7 update were a "surprise" that "caught everyone off guard" and demonstrated to ETE that "it was going to be difficult for WPZ to maintain [its] current distribution levels and keep leverage below five times."[236] But he also acknowledged that by this point, ETE had already been "looking at what would happen on the [Williams] downside case as well."[237]

In addition to Williams' declining projections, ETE also revised its synergies estimates downward between February and April 2016. On February 23, 2016, ETE estimated Merger synergies between \$195–\$879 million annually.[238] ETE increased its synergies estimate to between \$403–889 million on March 9, 2016,[239] but on April 15, 2016, it reduced its base-case estimate to \$126 million.[240]

On April 18, 2016, six weeks after closing the Preferred Offering, ETE announced publicly in an amendment to the S-4 that if the Merger closed, it expected

[234] JTX-0963.0001.
[235] *Id.*
[236] Trial Tr. at 1572:6–1575:6(Bramhall).
[237] *Id.*
[238] JTX-0581.0003.
[239] JTX-0686.0004.
[240] JTX-0957.0002.

to eliminate common unit distributions for two years.[241] ETE restated this expectation in the amended S-4 filed on May 24, 2016.[242]

The parties dispute what precipitated this announcement. Williams contends that ETE had anticipated a potential distribution cut since January 2016, shortly after the energy market began to crater.[243] In contrast, ETE asserts that it only decided to cut distributions in April 2016, after a confluence of the bleaker financial projections from Williams on April 7, 2016 and the decreased synergies estimates in April 2016.[244]

The evidence presented at trial demonstrated that ETE anticipated the potential distribution cuts as early as January 2016. As I noted above, Warren and Welch both raised the possibility of distribution cuts in January 2016, including specifically a two-year distribution cut mirrored by the anticipated cut that ETE ultimately announced.[245] Warren also testified that when Perella first presented the Proposed Public Offering in late January 2016, ETE had been considering the possibility of a two-year distribution cut.[246] In February 2016, both of ETE's advisors, Goldman Sachs and Perella, suggested distribution cuts as possible

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241 JTX-0992.0046; Trial Tr. at 362:17–364:1(Warren).
242 JTX-1218.0046; Trial Tr. at 483:3–11(McReynolds).
243 Pl.'s and Countercl. Def.'s Posttrial Br., Dkt. No. 630 at 37–43 [hereinafter "Williams OB"].
244 ETE OB § II.D.4.
245 *See supra* notes 123–24, 128–29 and accompanying text.
246 *See supra* note 158 and accompanying text.

alternatives,[247] and ETE ran models involving distribution cuts.[248] On the February 25, 2016 earnings call, Warren definitively ruled out a distribution cut at ETP, but equivocated regarding an ETE distribution cut.[249]

ETE's evidence that it only began to expect post-closing distribution cuts in April 2016 is unconvincing. When Long testified at the *Unitholder* trial that ETE only expected a distribution cut after it received Williams' April 7 projections, he asserted that the new projections showed a "huge" "50 percent" drop in distributable cash flow.[250] That was incorrect: As discussed above, even when compared to the more positive February 10 base-case projections instead of the downside case projections, the drop was actually 15.8% in 2016 and 21.7% in 2017.[251] When deposed in this matter, Long acknowledged that the drop "wasn't nearly as large" as what he had previously testified.[252] Bramhall also admitted at trial that what Long characterized "as a 50 percent decrease . . . was, in fact, a 21 percent decrease."[253]

Moreover, although Bramhall testified on direct examination that ETE did not begin to expect distribution cuts until early April 2016 and that before then, "executives at Energy Transfer were very opposed to distribution cuts,"[254] he

[247] *See supra* notes 172–74 and accompanying text.
[248] *See supra* note 175 and accompanying text.
[249] *See supra* notes 200–03 and accompanying text.
[250] JTX-1387.0274:16–.0275:4 (Long *Unitholder* testimony).
[251] *See supra* note 231 and accompanying text.
[252] Long Dep. at 164:23–165:12 (2019).
[253] *Id.* at 1594:6–20(Bramhall).
[254] *Id.* at 1565:3–12(Bramhall); *id.* at 1567:5–12(Bramhall).

admitted on cross-examination that distribution cuts were "above [his] pay grade" and he "did not know what the executive team was discussing."[255] Bramhall also conceded at trial that, even before receiving Williams' April 7 projections, ETE had already incorporated Williams' February 10 downside projections—which more closely approximated the April 7 projections—into its S-4 projections.[256]

As of the Closing Date, ETE continued to state that it expected to cut distributions on common units, including common units held by former Williams stockholders, to zero until March 31, 2018.[257] Meanwhile, ETE expected that participants in the Preferred Offering would receive 28½ cents in value per quarter during the same period—including up to 11 cents in cash,[258] which would amount to over $150 million in cash flow for Warren personally.[259]

6. Williams Defends Stockholder Actions

Between signing and closing, Williams faced multiple stockholder actions challenging the Merger. Williams managed to prevent each of them from blocking the Merger by obtaining either a dismissal or settlement.[260]

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[255] *Id.* at 1576:4–1578:19(Bramhall).
[256] *Id.* at 1572:6–20(Bramhall).
[257] *See* JTX-1218.0046.
[258] *Id.* at .0045–.0046, .0054.
[259] Trial Tr. at 371:20–373:1(Warren); JTX-1218.0046.
[260] *In re The Williams Cos., Inc. Merger Litig.*, No. 11844-VCG (Del. Ch. dismissed July 19, 2017); *In re The Williams Cos., Inc. Stockholder Litig.*, No. 11236-VCG (De. Ch. dismissed Mar. 31, 2016); *City of Birmingham Retirement & Relief Sys. v. Armstrong*, No. 16-17-RGA, Dkt. No. 59, (D. Del. dismissed Mar. 7, 2016); *Bumgarner v. Williams Cos., Inc.*, 2016 WL 1717206 (N.D. Okla. Apr. 28, 2016).

One of those lawsuits, brought by Williams stockholder and former executive John Bumgarner,[261] was at issue in this litigation. ETE contends that Armstrong, who was "tasked with executing the Board's directive to close the transaction,"[262] flouted this directive by working covertly with Bumgarner to support his lawsuit and put a stop to the Merger.[263] But the evidence presented at trial demonstrated that, although Armstrong did regularly communicate with Bumgarner, he did so in an attempt to allay Bumgarner's opposition to the Merger, not in connection with a clandestine plot to thwart it.[264]

Bumgarner had worked at Williams for approximately 25 years, retiring around 2001.[265] At one time, Bumgarner was in charge of mergers and acquisitions at Williams and he was an advisor to the then-CEO.[266] After the Merger was announced, Bumgarner approached Armstrong and threatened litigation regarding the synergies estimates contained in joint press release announcing the Merger.[267] In particular, Bumgarner took issue with a $2 billion estimate made by ETE that was

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261 *See generally Bumgarner*, 2016 WL 1717206.
262 Trial Tr. at 657:2–7(Armstrong).
263 ETE OB § II.B.1.
264 This is not to say that Armstrong's tactics in attempting to assuage Bumgarner's concerns represented a model of corporate governance best practices.
265 Trial Tr. at 903:6–904:11(Bumgarner); *id.* at 620:6–23(Armstrong).
266 *Id.* at 903:11–904:11(Bumgarner); *id.* at 620:6–23(Armstrong).
267 *Id.* at 625:3–626:19(Armstrong); *id.* at 699:6–700:3(Armstrong); *id.* at 719:22–720:3(Armstrong).

referenced in the press release.[268] As former colleagues, Armstrong and Bumgarner were friends.[269] Armstrong testified that, leveraging this relationship, he tried to explain to Bumgarner that the $2 billion estimate came from ETE, and that the Williams Board relied on its own synergies estimate of $200 million, which would be disclosed in the S-4.[270]

Armstrong did not notify Williams' counsel of Bumgarner's threats, though he did inform the Chairman of Williams' Board, Frank MacInnis.[271] At trial, Armstrong testified that he did not notify Williams' counsel because he thought that it would lead to a counterproductive "very aggressive fight," and he believed he could "keep [Bumgarner] . . . at bay" in light of their personal and professional relationship.[272] Armstrong also testified that he believed that when the S-4 was filed, it would "satisfy [Bumgarner's] concerns."[273] This is consistent with contemporaneous emails: On January 11, 2016, Bumgarner emailed MacInnis and Armstrong, challenging the S-4, and wrote, "I briefly jumped Alan about this matter and got the 'My hands are tied; I have to support the deal.' response."[274] Armstrong

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[268] *Id.* at 623:20–626:19(Armstrong); *id.* at 921:8–15(Bumgarner). Bumgarner's concerns were ultimately validated; as I discussed above, ETE and Williams later revised their synergies estimate downward to $126 million. JTX-0957.0002.

[269] Trial Tr. at 620:6–13(Armstrong); *id.* at 908:18–910:10(Bumgarner).

[270] *Id.* at 624:6–24(Armstrong); *id.* at 919:15–19(Bumgarner).

[271] *Id.* at 637:12–638:17(Armstrong).

[272] *Id.* at 637:19–638:17(Armstrong).

[273] *Id.* at 638:6–13(Armstrong).

[274] JTX-0356.0002.

forwarded the thread to MacInnis and asked, "[d]o you think we should call him? Or just let this run its course."[275]

From November 2015 through July 2016, Armstrong and Bumgarner met approximately weekly.[276] Much of their communication occurred either in person or via Armstrong's personal email accounts; Armstrong testified that he was "pretty careful to have most of [his] conversation[s] with [Bumgarner] in person."[277] The bulk of the email communication between Armstrong and Bumgarner during this time involved two of Armstrong's personal email addresses at Gmail.com and Cox.net.[278] In 2016, two days after being asked at a deposition whether he emailed Bumgarner, Armstrong deleted his Gmail account, though he did not delete his Cox.net account.[279] At trial, Armstrong testified that he deleted the Gmail account because it had been corrupted and was sending unsolicited spam messages to his contacts, including Chappel.[280] As discussed below, I find this testimony unconvincing.[281]

Although Armstrong deleted his Gmail account, ETE was able to uncover much of his email communication by subpoenaing Bumgarner's accounts.[282] On

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[275] *Id.* at .0001.
[276] Trial Tr. at 621:7–13(Armstrong); *id.* at 910:12–14(Bumgarner).
[277] *Id.* at 623:2–12(Armstrong).
[278] Defendants' Demonstrative Ex. 3.
[279] JTX-1437.0008–.0009; Trial Tr. at 632:1–18(Armstrong).
[280] Trial Tr. at 632:5–18(Armstrong).
[281] *See infra* § II.E.
[282] JTX-1394.

December 6, 2015, Bumgarner emailed Armstrong and requested Armstrong's "edits and corrections" to a document compiling purported factual errors in Williams' and ETE's public statements about the Merger.[283] According to the document, the supposed errors suggested that it was "rational[] [to] conclude there has been a deliberate attempt to deceive public investors on the part of the directors of [Williams] and the investment banks that advised them."[284] Armstrong met with Bumgarner in person to discuss the document,[285] which later evolved[286] into a federal securities class action complaint filed by Bumgarner.[287]

Before filing the federal complaint, Bumgarner emailed his lawyer, with Armstrong blind-carbon-copied, and asked, "when can we file ? how can we also join/help the Delaware cases ?"[288] On December 26, 2015, Armstrong also answered various factual questions from Bumgarner related to the joint press release.[289] Bumgarner filed the lawsuit against Williams and ETE on January 14, 2016, alleging federal securities violations and seeking to enjoin the Merger.[290] After filing the

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[283] JTX-0273.0001.
[284] *Id.* at .0004.
[285] JTX-0275; JTX-0276.
[286] Trial Tr. at 932:22–9:33:10(Bumgarner).
[287] *See generally* JTX-0368.
[288] JTX-0300.0003. This presumably referred to cases seeking to enjoin the Merger.
[289] JTX-0320.
[290] JTX-0368.0018.

lawsuit, Bumgarner continued to correspond with Armstrong about facts related to the Merger.[291]

Bumgarner also obtained a copy of Armstrong's notes to himself regarding the S-4, and he emailed a document to the Wall Street Journal that mirrored the structure and substance of those notes.[292] Armstrong testified at his deposition[293] and at trial that he did not recall supplying those notes to Bumgarner, though he "t[ook] responsibility" at trial for the fact that Bumgarner "got ahold of th[e] document[]."[294] Bumgarner also sought Armstrong's review of a draft letter to the SEC reporting purported misleading statements and omissions in the S-4.[295]

Armstrong testified that he did not try to help Bumgarner with the lawsuit, and merely attempted to "educate him on the synergies" and "show him where all the public information was."[296] Likewise, Bumgarner testified that Armstrong did not help with the lawsuit, had nothing to do with Bumgarner's decision to sue, and told Bumgarner that he did not "have a very good case."[297] Bumgarner also testified that Armstrong "played it straight," behaved like a "Boy Scout," and "represented the company."[298]

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[291] JTX-0522; Trial Tr. at 947:14–19(Bumgarner); *id.* at 668:10–13(Armstrong).
[292] *Compare* JTX-0223, *with* JTX-0252.
[293] Armstrong Dep. at 156:13–161:7 (2019).
[294] Trial Tr. at 631:3–14(Armstrong)
[295] JTX-0801.
[296] Trial Tr. at 626:3–627:2(Armstrong).
[297] *Id.* at 906:15–20(Bumgarner); *id.* at 970:20–23(Bumgarner); *id.* at 971:15–972:3(Bumgarner).
[298] *Id.* at 910:20–22(Bumgarner).

Ultimately, Bumgarner's claims were each dismissed or settled before the agreed-upon June 28, 2016 Closing Date. On April 28, 2016, several of Bumgarner's claims were dismissed,[299] and his remaining claims were settled on June 16, 2016.[300]

Although the evidence demonstrates that Armstrong's communications with Bumgarner were intended to assuage concerns about the Merger synergy disclosures, Armstrong did communicate anti-merger sentiments to others that were then relayed to Bumgarner.[301] In a December 22, 2015 email, Keith Bailey, Williams' former CEO, wrote to Bumgarner, "[h]eard this morning that Alan [Armstrong] told the guy I had breakfast with that he had a 7/6 majority the night before. That the activist investors threatened to sue if the deal wasn't approved and that flipped the two directors. . . . Alan also told this guy that at the December board meeting he 'unloaded' on the directors who supported the deal for being cowards."[302] However, when Bailey encouraged Armstrong to "give [ETE] the out" to make it easier to address potential credit issues at Williams, Armstrong demurred, stating that he preferred "other levers . . . to address ratings agency concerns."[303]

[299] *Bumgarner*, 2016 WL 1717206, at *6.
[300] JTX-1295.
[301] *See* JTX-0313.0001.
[302] *Id.*
[303] JTX-0369.0001.

Bailey subsequently authored two letters to Williams stockholders encouraging them to vote down the Merger.[304]

7. Williams Encourages Its Stockholders to Approve the Merger

Although some Williams directors and executives continued to question the merits of the Merger during the energy market tohubohu,[305] the record demonstrates that Williams worked to obtain stockholder approval of the Merger and pressed towards closing.

On November 24, 2015, the Williams Board recommended that Williams stockholders vote for the Merger.[306] As I noted above, after the energy market began to deteriorate, the Williams Board issued a press release on January 15, 2016 announcing that it was "unanimously committed to completing the transaction with [ETE] per the [M]erger [A]greement . . . as expeditiously as possible and delivering the benefits of the transaction to Williams' stockholders."[307] Williams publicly reaffirmed this position on February 17, 2016,[308] although two directors expressed disagreement internally about the use of the word "unanimous," which they described as "trickery."[309] Williams also sued ETE on April 6 and May 13, 2016, seeking specific performance of the Merger Agreement, and issued press releases in

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304 JTX-0580; JTX-1244.
305 *See supra* at 26–27.
306 Stip. ¶ 33.
307 JTX-0379.0001.
308 JTX-0553.0004.
309 JTX-0545.0001.

connection with those lawsuits stating that the Williams Board was "unanimously committed to enforcing its rights under the merger agreement."[310]

On May 24, 2016, the parties filed an updated S-4 with the SEC.[311] In the S-4, the Williams Board recommended that stockholders vote for the Merger, though it disclosed that certain Williams directors voted against the Merger and "continue . . . to disagree with the recommendation of" the majority of the Williams Board.[312] On May 25, 2016, Williams scheduled a special stockholder meeting to vote on the Merger and reaffirmed that Williams "remain[ed] committed to holding the stockholder vote and closing the transaction as soon as possible."[313] On June 15, 2016, Williams restated its recommendation that the stockholders approve the Merger.[314] The Williams Board committee that was responsible for overseeing the Merger also conducted a week-long investor roadshow during which they made in-person visits and phone calls to discuss the Merger with institutional investors and other stockholders.[315]

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[310] JTX-0826.0001; *see also* JTX-0935.0001; JTX-1179.0001.
[311] JTX-1218.
[312] *Id.* at .0029–.0031.
[313] JTX-1221.0001.
[314] JTX-1287.
[315] Trial Tr. at 61:14–23(Chappel); Sugg Dep. at 334:21–335:9.

On June 27, 2016, Williams held a special meeting of its stockholders to approve the combination with ETE.[316] Over 80% of votes cast were in support of the Merger.[317]

8. <u>Latham Declines to Render the 721 Opinion</u>

The Merger ultimately failed to close due to the failure of a condition precedent: Latham's determination that it could not render the 721 Opinion. This determination ultimately became the basis for my decision in 2016 declining to enjoin ETE from terminating the Merger Agreement.[318]

At trial in 2016, ETE's head of tax, Brad Whitehurst, testified that he had an "epiphany" in March 2016 that the precipitous drop in the value of ETE's units during the market turmoil could trigger a tax liability.[319] Whitehurst testified that, when reviewing the draft S-4 in March 2016, he realized for the first time that the number of ETC shares that ETE would receive in exchange for the $6 billion cash component—the hook stock—was fixed, not floating.[320] He testified that he believed the fixed nature of the hook stock could pose a potential Section 721 issue, and therefore brought the issue to Latham's attention.[321]

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[316] Stip. ¶ 33.
[317] *Id.*
[318] *See generally Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017).
[319] *Williams Cos.*, 2016 WL 3576682, at *12.
[320] JTX-1304.0038 at 150:19–151:23 (Whitehurst 2016 trial testimony).
[321] JTX-1304.0041 at 162:23–163:22 (Whitehurst 2016 trial testimony).

The record in this trial proved Whitehurst's 2016 testimony to be false. Instead, it was Darryl Krebs, a vice president in ETE's tax department who reported to Whitehurst, who first identified that the hook stock was fixed. Krebs testified that when he reviewed the S-4 in March 2016, he noticed that ETE's hook stock appeared to be fixed at 19% of ETC shares.[322] This "stuck out to [Krebs] as a little surprising," so he raised it with Whitehurst, who reported back to Krebs a week later that the hook stock was indeed fixed at 19% of ETC shares.[323] Whitehurst therefore asked Krebs to "think about it and see if there's any other implications."[324]

On March 28, 2016, Krebs emailed Whitehurst with the subject line, "Disaster or Opportunity," and wrote that he "was thinking about the ETC share issue some more and another potential issue occurred to [him]."[325] Krebs raised the possibility that the hook stock could pose "a disguised sale issue under [Section] 721," and asked whether Latham had "looked at / evaluated this potential outcome in their 721 [O]pinion."[326] He recommended that Latham assess this issue, and added that if Latham could not issue the 721 Opinion, "we can't meet all of the conditions required to complete the merger," and Williams "will either have to renegotiate or

[322] Trial Tr. at 1080:20–1081:17(Krebs); *id.* at 1162:8–17(Whitehurst).
[323] *Id.* at 1081:11–1082:12(Krebs); *id.* at 1162:8–1165:7(Whitehurst).
[324] *Id.* at 1082:13–18(Krebs); *id.* at 1164:18–1165:7(Whitehurst).
[325] JTX-0757.0001.
[326] *Id.*

the merger can't be completed."[327] Krebs concluded his email by observing that "[m]aybe there is a silver lining to the issue identified today."[328]

The next day, on March 29, 2016, Whitehurst called a Latham tax partner, Tim Fenn, and asked that Latham investigate the issue.[329] Latham then undertook an "all hands on deck" analysis, during which it "pull[ed] in all of the associates in Houston to start working on the transaction and doing research."[330] In April 2016, Latham devoted over 1,000 hours to the Section 721 issue.[331] Another partner at Latham who worked on the matter, Larry Stein, described the task as "among the most intense, if not the most intense process" he had experienced in his entire career.[332] While conducting its analysis, Latham participated in six calls with ETE's deal counsel, Wachtell, to "pressure test" Latham's analysis.[333] Stein and Fenn each testified that these conversations with Wachtell reinforced Latham's confidence in its analysis that the 721 Opinion was problematic.[334]

In addition, on April 7, 2016, ETE retained William McKee, a tax attorney at Morgan Lewis & Bockius ("Morgan Lewis"), to provide a second opinion and

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[327] *Id.*
[328] *Id.*
[329] Trial Tr. at 1462:1–13(Fenn); *id.* at 1129:24–1130:7(Whitehurst).
[330] *Id.* at 1465:1–16(Fenn); *id.* at 1360:10–24(Stein).
[331] *Id.* at 1465:1–1466:12(Fenn).
[332] *Id.* at 1360:10–24(Stein); *id.* at 1468:10–1469:2(Fenn).
[333] JTX-0837; JTX-0847; JTX-0848; JTX-0876; JTX-0892; JTX-0990; Trial Tr. at 1372:19–1373:20(Stein); *id.* at 1435:9–1436:1(Stein); *id.* at 1485:23–1488:5(Fenn).
[334] Trial Tr. at 1372:19–1373:20(Stein); *id.* at 1485:23–1488:22(Fenn).

determine whether there was a solution to the Section 721 issue.[335] McKee concluded on April 11, 2016 that he would not be able to render a should-level 721 Opinion, albeit for reasons different than Latham's.[336] McKee then discussed his conclusion with Latham.[337]

On April 12, 2016, Latham reached a "tentative conclusion" that it could not render the 721 Opinion, and then informed Williams' deal counsel at Cravath.[338] Less than three hours later, Cravath called Latham, disagreeing with Latham's conclusion, and stating that it believed it could render a "will-level" 721 Opinion.[339] Cravath also discussed the issue with McKee the next day, at Whitehurst's request.[340]

Despite disagreeing with Latham's assessment, Cravath proposed two alternatives to Latham on April 14, 2016 that it contended would resolve the Section 721 issue.[341] Latham analyzed these proposals and, after consulting with Wachtell and Morgan Lewis,[342] determined that neither proposal would solve the

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[335] *Id.* at 1137:18–1138:3(Whitehurst); JTX-1306.0060 at 568:20–570:21 (McKee 2016 trial testimony).
[336] JTX-1306.0061 at 574:2–14 (McKee 2016 trial testimony).
[337] Trial Tr. at 1484:23–1485:10(Fenn); *id.* at 1372:21–1373:20(Stein); *id.* at 1437:22–1438:8(Stein); *id.* at 1147:13–20(Whitehurst).
[338] JTX-1531; Trial Tr. at 1376:18–1377:15(Stein); Stip. ¶ 28.
[339] JTX-0881.0001; JTX-0884.0001.
[340] JTX-1306.0062 at 578:10–582:2 (McKee 2016 trial testimony); Trial Tr. at 1143:15–1144:2(Whitehurst).
[341] JTX-0950.
[342] Trial Tr. at 1386:4–1391:11(Stein); *id.* at 1488:6–13(Fenn); JTX-0990; JTX-0877.0013–.0014; JTX-0993; JTX-1119.

issue.[343] Latham reasoned that, because the proposals would not alter the economics of the deal (which Cravath acknowledged[344]), they would conflict with a line of tax cases declining to give weight to non-economic amendments to transactions made solely to avoid taxation.[345]

On April 18, 2016, the parties filed an Amendment to the Form S-4, stating that "Latham & Watkins LLP has recently advised ETE that if the closing of the merger were to occur as of the date of this proxy statement/prospectus it would not be able to deliver the 721 Opinion."[346]

In late April 2016, Williams sought its own second opinion from Eric Sloan of Gibson, Dunn & Crutcher.[347] After three weeks of analysis, Sloan initially determined that "it is tough to get to a should,"[348] though he concluded the next day in a "close call"[349] that he would be able to render a "weak should."[350]

On May 13, 2016, Williams sued ETE seeking to enjoin it from terminating the Merger Agreement based on the failure of the 721 Opinion, which I denied on

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343 Trial Tr. at 1379:13–1384:2(Stein); *id.* at 1481:21–1482:18(Fenn); *id.* at 1151:18–24(Whitehurst); JTX-0986.0002–.0003; *Williams Cos.*, 2016 WL 3576682, at *15–16.
344 Trial Tr. at 1008:1–4(Needham); JTX-1304.0015 at 58:8–17 (Van Ngo 2016 trial testimony).
345 *See Comm'r v. Ct. Holding Co.*, 324 U.S. 331 (1945); Trial Tr. at 1380:16–1382:6(Stein); *id.* at 1404:12–1407:3(Stein); *id.* at 1440:22–1441:11(Stein); *id.* at 1150:6–1151:3(Whitehurst).
346 Stip. ¶ 29.
347 JTX-1053.
348 Trial Tr. 1052:5–8(Needham); JTX-1170.0001.
349 JTX-1199.0002.
350 JTX-1177.0001.

June 24, 2016 after trial.[351] In my post-trial opinion denying specific performance, I found that Latham's determination that it would be unable to deliver the 721 Opinion was made in good faith and was not improperly motivated by any pressure from ETE to avoid closing the Merger.[352] I further held that because the 721 Opinion was a condition precedent to closing, Williams was not entitled to an injunction prohibiting ETE from terminating the Merger Agreement after the passage of the Closing Date.[353]

9. ETE Terminates the Merger After the Failure of the 721 Opinion

Williams and ETE had agreed to meet on June 28, 2016 at 9:00 AM to close the Merger.[354] On June 28, 2016 at 9:00 AM, counsel for both parties met at the offices of Wachtell, ETE's counsel, with the necessary authority and all paperwork to close, except for the 721 Opinion.[355] The parties agree that Williams was ready, willing, and able to close on June 28, 2016.[356] Counsel for ETE, however, informed Williams that ETE would not close and would instead rely on the failure of the condition precedent of Latham's 721 Opinion.[357] Both before the market opened and after it closed on June 28, 2016, Latham sent ETE and Williams letters indicating

[351] *Williams Cos.*, 2016 WL 3576682, at *2, 21.
[352] *Id.* at *16.
[353] *Id.* at *21.
[354] Stip. ¶ 34.
[355] *Id.* ¶ 35.
[356] *Id.* ¶ 36.
[357] *Id.*

that it could not deliver the 721 Opinion at those times.[358] On June 29, 2016, ETE terminated the Merger Agreement due to the passage of the Outside Date under Section 7.01(b)(i) of the Merger Agreement.[359]

C. The Plaintiff Brings These Actions

This matter first came to me on April 6, 2016, when Williams filed an expedited complaint challenging the Preferred Offering.[360] Williams also filed a lawsuit in Texas state court against Warren on the same day, also challenging the Preferred Offering and contending that it constituted tortious interference with the Merger Agreement.[361] The Texas lawsuit was dismissed on May 24, 2016 because it conflicted with a forum selection clause in the Merger Agreement.[362] On April 19, 2016, Williams filed an amended complaint in this matter.[363] ETE filed counterclaims on May 3, 2016.[364]

On May 13, 2016, Williams initiated a separate action in this Court seeking to enjoin ETE from terminating the Merger Agreement due to the failure of the 721 Opinion.[365] On May 24, 2016, the Defendants filed amended affirmative defenses

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358 *Id.* ¶ 37.
359 *Id.* ¶ 38; *Williams Cos.*, 2017 WL 5953513, at *8.
360 Verified Compl., Dkt. No. 1, Apr. 6, 2016.
361 JTX-0819.
362 JTX-1220.
363 Verified Am. Compl., Dkt. No. 48.
364 Def.'s Answer Pl.'s Verified Am. Compl., Affirmative Defenses, and Original Verified Countercl., Dkt. No. 58.
365 Verified Compl., Dkt. No. 1, May 13, 2016.

and counterclaims, addressing both actions in this Court.[366] On June 14, 2016, I ordered that the parties consolidate briefing and scheduling of the two actions to litigate the issues concurrently.[367] I held a two-day expedited trial in both actions on June 20 and 21, 2016 in Georgetown.

On June 24, 2016, I issued a post-trial memorandum opinion denying Williams' request to enjoin ETE from terminating the Merger because Latham's inability to deliver a 721 Opinion was a failure of a condition precedent under the Merger Agreement.[368] On June 27, 2016, the same day that Williams stockholders approved the Merger, Williams appealed, and the Supreme Court affirmed my Opinion in relevant part on March 23, 2017.[369]

The parties thereafter filed amended claims and counterclaims.[370] On December 1, 2017, I granted Williams' motion to dismiss ETE's counterclaims in part, denying ETE's request for a breakup fee for the terminated Merger.[371] I denied ETE's motion for reargument of that decision on April 16, 2018.[372] On January 14, 2020, the parties filed cross-motions for summary judgment on the remaining

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366 Defs.' and Countercl. Pls.' Am. Affirmative Defenses and Verified Countercl., Dkt. No. 79.
367 Scheduling and Coordination Order, Dkt. No. 101.
368 *See generally Williams Cos.*, 2016 WL 3576682.
369 *Williams Cos.*, 159 A.3d; *see also* JTX-1327.0001.
370 Verified Am. Compl., Dkt. No. 215; Defs.' and Countercl. Pl.'s Second Am. and Suppl. Affirmative Defenses and Verified Compl., Dkt. No. 219.
371 *See generally Williams Cos.*, 2017 WL 5953513.
372 *See generally Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2018 WL 1791995 (Del. Ch. Apr. 16, 2018).

claims, which "centered largely on Williams' right to the WPZ Termination Fee Reimbursement."[373] ETE filed a motion for sanctions on May 20, 2020 (the "Motion for Sanctions").[374] I issued an opinion on July 2, 2020 denying summary judgment but resolving certain non-dispositive contractual issues, and I held that the Motion for Sanctions was best dealt with at trial or a separate evidentiary hearing.[375]

I held a six-day trial in May 2021. The parties submitted post-trial briefing,[376] and I heard oral argument on September 17, 2021. On September 23, 2021, the parties submitted flowcharts outlining their claims, counterclaims, and defenses,[377] and I considered the matter fully submitted as of that date.

II. ANALYSIS

A. Legal Standards

The disputes in this case primarily concern the application of the Merger Agreement. "Delaware law adheres to the objective theory of contracts, *i.e.*, a contract's construction should be that which would be understood by an objective, reasonable third party."[378] In practice, the objective theory of contracts requires the

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[373] *Williams Cos., Inc. v. Energy Transfer LP*, 2020 WL 3581095, at *10 (Del. Ch. July 2, 2020).
[374] Defs. and Countercl. Pls.' Mot. Sanctions or, Alternatively, an Evidentiary Hearing Spoliation Evid., Dkt. No. 503 [hereinafter "Motion for Sanctions"].
[375] *Williams Cos.*, 2020 WL 3581095, at *21.
[376] Williams OB; ETE OB; Pl.'s and Countercl.-Def.'s Posttrial Reply Br., Dkt. No. 640; Defs.' and Countercl. Pls.' Reply Br. Supp. Its Countercl., Dkt. No. 645.
[377] *See* Dkt. Nos. 651, 652.
[378] *Salamone v. Gorman*, 106 A.3d 354, 367–68 (Del. 2014) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).

court to effectuate the parties' intent,[379] which, absent ambiguity, "must be ascertained from the language of the contract."[380] In other words, "[t]he Court will interpret clear and unambiguous terms according to their ordinary meaning."[381]

Where a contract is ambiguous, however, the Court "must look beyond the language of the contract to ascertain the parties' intentions."[382] "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction."[383] Instead, "ambiguity exists '[w]hen the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings.'"[384]

B. Williams Proved a Claim for the WPZ Termination Fee Reimbursement

In my summary judgment opinion, I held that the Merger Agreement permitted Williams the opportunity to recover the WPZ Termination Fee Reimbursement even though ETE validly terminated the Merger due to the failure of Latham's 721 Opinion.[385] Section 5.06(f) of the Merger Agreement allocates the risk regarding the WPZ Termination Fee Reimbursement as follows:

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379 *Zimmerman v. Crothall*, 62 A.3d 676, 690 (Del. Ch. 2013).
380 *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1030 (Del. Ch. 2008) (quoting *In re IAC/InterActive Corp.*, 948 A.2d 471, 494 (Del. Ch. 2008)).
381 *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012) (quoting *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997)).
382 *Id.* (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).
383 *Id.*
384 *Id.* (quoting *Eagle Indus.*, 702 A.2d at 1232).
385 *Williams Cos.*, 2020 WL 3581095, at *11–14.

> *If* the Company or Parent terminates this Agreement pursuant to (A) Section 7.0l(b)(ii), (B) Section 7.01(d) or (C) Section 7.01(b)(i) *and*, at the time of any such termination pursuant to this clause (C) any condition set forth in Section 6.01(b), 6.01(c), 6.01(d), 6.01(e), 6.03(a), or 6.03(b) shall not have been satisfied, *then*, in each case, Parent shall reimburse the Company for $410.0 million (the "WPZ Termination Fee Reimbursement") . . . . The Company agrees that in no event shall the Company be entitled to receive more than one WPZ Termination Fee Reimbursement.[386]

ETE terminated the Merger Agreement under § 7.01(b)(i) due to the passage of the Outside Date.[387] Therefore, ETE is liable to Williams for the WPZ Termination Fee Reimbursement if "any condition set forth in Section 6.01(b), 6.01(c), 6.01(d), 6.01(e), 6.03(a), or 6.03(b)" was unsatisfied at the time ETE terminated the Merger Agreement.[388] Thus the parties allocated the risk of a failed merger in light of Williams' payment of the WPZ termination fee to facilitate the Merger.

Williams asserts that four conditions set forth in those sections were unmet at the time ETE terminated the Merger Agreement. First, Williams claims that ETE breached the Capital Structure Representation by issuing the Preferred Offering.[389] Section 6.03(a)(i) of the Merger Agreement required the Capital Structure

[386] JTX-0209.0059 (§5.06(f)) (emphasis added).
[387] *See Williams Cos.*, 2020 WL 3581095, at *7.
[388] JTX-0209.0059 (§5.06(f)).
[389] Williams OB § I.A.

Representation to be true as of the Closing Date "except for any immaterial inaccuracies."[390]

Second, Williams claims that ETE breached the Ordinary Course Covenant and three Interim Operating Covenants by issuing the Preferred Offering.[391] Third, Williams claims that ETE breached its obligation to use reasonable best efforts to consummate the Merger, based on the failure of the 721 Opinion.[392] Section 6.03(b) of the Merger Agreement required ETE to "perform[] or compl[y]" with the Ordinary Course Covenant, Interim Operating Covenants, and best efforts obligations by the time of closing "in all material respects."[393] Finally, Williams argues that ETE breached a representation that it knew of no facts that would prevent the Merger "from qualifying as an exchange to which Section 721(a) of the [tax] Code applies."[394] Section 6.03(a)(iv) required this representation to be true as of the Closing Date except where the failure of the representation to be true "would not reasonably be expected to have . . . a Parent Material Adverse Effect," as defined in the Merger Agreement.[395]

The parties agree that, subject to ETE's affirmative defenses, Williams is entitled to the WPZ Termination Fee Reimbursement if it prevails under any one of

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390 JTX-0209.0063 (§6.03(a)(i)).
391 Williams OB § I.B.
392 *Id.* § II.B. *See* JTX-0209.0053 (§5.03(a)), .0060 (§5.07(a)).
393 JTX-0209.0063 (§6.03(b)).
394 Williams OB § II.A. *See* JTX-0209.0038 (§3.02(n)(i)).
395 JTX-0209.0063 (§6.03(a)(iv)).

these four theories. As explained below, I find that the Preferred Offering breached at least the Ordinary Course Covenant, the Interim Operating Covenants, and the Capital Structure Representation. I therefore need not consider whether ETE separately breached its obligations with respect to the failure of the 721 Opinion.

C. ETE Breached the Ordinary Course Covenant and Interim Operating Covenants

As described above, ETE agreed to several covenants restricting its actions between signing and closing—the Ordinary Course Covenant and three Interim Operating Covenants. In my summary judgment opinion, I held that "the Preferred Offering did not comport with the requirements set forth in the operating covenants."[396] Two issues were left for trial: First, whether ETE's violation of these covenants was excused under the "in all material respects" qualifier, and second, whether the Preferred Offering was nonetheless permitted under the $1 Billion Equity Issuance Exception in the Parent Disclosure Letter.[397]

I discuss both in turn.

1. The Preferred Offering Did Not Comply with the Interim Operating Covenants and Ordinary Course Covenant "In All Material Respects"

Section 6.03(b) of the Merger Agreement required, by the time of closing, ETE to have "performed or complied" with the operating covenants "in all material

[396] *Williams Cos.*, 2020 WL 3581095, at *18.
[397] *Id.* at *18–20.

respects."[398] ETE argues that the "in all material respects" qualifier adopts the common law "material breach" standard.[399] That is incorrect.

This Court has consistently interpreted the qualifier "in all material respects" to be "less onerous" for the party asserting breach than the common law material breach standard. In *Akorn, Inc. v. Fresenius Kabi AG*, Vice Chancellor Laster examined the meaning of the "in all material respects" qualifier in a merger agreement.[400] The Court reviewed treatises on M&A agreements and case law interpreting the word "material" and determined that "in all material respects" "limit[s] the operation of the [covenants to which it applies] to issues that are *significant in the context of the parties' contract*, even if the breaches are not severe enough to excuse a counterparty's performance under a common law [material breach] analysis."[401]

The Court therefore held that the "in all material respects" qualifier "calls for a standard that is different and less onerous than the common law doctrine of material breach": It is meant to "exclude small, *de minimis*, and nitpicky issues that should not derail an acquisition."[402] Since *Akorn*, this Court has repeatedly endorsed that meaning of the "in all material respects" qualifier in the context of merger

398 JTX-0209.0063 (§6.03(b)).
399 ETE OB § III.A.3.a.
400 *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *84–86 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018).
401 *Akorn*, 2018 WL 4719347, at *84–86 (emphasis added).
402 *Id.* at *85–86.

agreements.[403] And our Supreme Court recently adopted this interpretation in *AB Stable VIII LLC v. MAPS Hotels & Resorts One LLC*.[404] ETE offers no reason to depart from that meaning here.

Applying the "in all material respects" standard as set forth in *Akorn*, I find that the Preferred Offering's violation of the operating covenants is not excused by that standard. The record at trial demonstrated that achieving economic equivalence between the ETC shares, which the former Williams stockholders would receive, and the ETE common units, was "paramount" to Williams[405] and became "the most important and time-consuming part of the[] negotiations."[406] As Warren admitted at trial, "equality of distributions between ETC shares and ETE units was a key aspect of the merger."[407]

Of particular concern to Williams was the possibility that Warren, a significant ETE common unitholder who would control both ETE and ETC after the

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403 *Dermatology Assocs. of San Antonio v. Oliver St. Dermatology Mgmt. LLC*, 2020 WL 4581674, at *26 (Del. Ch. Aug. 10, 2020) ("in all material respects" excludes those "small, *de minimis*, and nitpicky issues that should not derail an acquisition"); *Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.*, 2021 WL 1714202, at *38 (Del. Ch. Apr. 30, 2021) (same); *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *73 (Del. Ch. Nov. 30, 2020) (same), *aff'd*, 2021 WL 5832875 (Del. Dec. 8, 2021); *Channel Medsystems, Inc. v. Bos. Sci. Corp.*, 2019 WL 6896462, at *17 (Del. Ch. Dec. 18, 2019) (applying *Akorn* standard); *In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556, at *134 n.426 (Del. Ch. Aug. 31, 2020) (distinguishing "material breach" standard from "in all material respects" standard), *aff'd sub nom. Cigna Corp. v. Anthem, Inc.*, 251 A.3d 1015 (Del. 2021) (TABLE).
404 2021 WL 5832875, at *13 (Del. Dec. 8, 2021).
405 *See supra* note 38 and accompanying text.
406 *See supra* note 40 and accompanying text.
407 *See supra* note 38 and accompanying text.

Merger, could take actions that benefitted ETE unitholders at the expense of ETC.[408] That is precisely what the Preferred Offering achieved. The Preferred Offering guaranteed participants a cash distribution preference of 11 cents, plus an additional 17½ cents in accrual credits, regardless of whether any distributions were made to common unitholders.[409] This had the effect of eliminating downside risk for participants in the event of a distribution cut, which ETE had anticipated since January 2016,[410] months before the Preferred Offering closed on March 8, 2016.[411]

Moreover, ETE made the Preferred Offering available only to ETE insiders, with Warren, McReynolds and Davis receiving over 85% of the total preferred units.[412] And on the Closing Date—the relevant date for the purpose of assessing materiality[413]—ETE had in fact declared that if the Merger closed, it would cut distributions on common units to zero for two years.[414] As one of ETE's financial advisors at Perella remarked, such a distribution cut "represent[ed] a wealth transfer from non-participating to participating units."[415]

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408 *See supra* note 36 and accompanying text.

409 Trial Tr. 371:20–373:1(Warren); JTX-0535.0019; JTX-0538.0002; Trial Tr. 351:1–352:10(Warren).

410 *See supra* notes 123–24, 128–29, 150–51 and accompanying text.

411 *See supra* note 208 and accompanying text.

412 *See supra* note 213 and accompanying text.

413 JTX-0209.0063 (§6.03(b)).

414 *See supra* notes 241–42, 257 and accompanying text.

415 *See supra* note 186 and accompanying text.

For these reasons, I found in the *Unitholder* action that the Preferred Offering "was a hedge meant to protect [ETE] insiders from the anticipated bad effects of the coming merger"—an "opportunity to eliminate downside risk" that ETE "insiders seized" "for themselves and their cronies."[416] Indeed, by transforming the ETE common units held by insiders into preferred units, ETE gained the ability to cut distributions to zero on ETE common units, along with its matching obligation regarding ETC dividends,[417] while shielding its own insiders from the downside. That is, ETE was able to preserve distributions to ETE insiders while cutting out (among others) the former Williams stockholders. And as of the Closing Date, that is exactly what ETE planned to do.[418] To Williams, the Preferred Offering destroyed the economic equivalence between the ETC shares and certain ETE units, and it signaled that Warren was willing to take actions adverse to ETC if they benefited him. That is hardly the type of picayune issue immaterial to a Merger where, as Warren himself admitted, "equality of distributions between ETC shares and ETE units was a key aspect."[419]

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[416] *Energy Transfer*, 2018 WL 2254706, at *1, 24.
[417] *See supra* note 42 and accompanying text.
[418] *See supra* notes 241–42, 257–59 and accompanying text.
[419] *See supra* note 39 and accompanying text.

ETE advances several arguments that, despite representing a wealth transfer to ETE insiders, the Preferred Offering complied with the operating covenants "in all material respects." I find none of them persuasive.

First, ETE contends that the distribution preference was ultimately "of no consequence" to Williams because the Merger never closed.[420] But ETE's obligation to pay the WPZ Termination Fee Reimbursement is only triggered if the Merger failed to close.[421] If ETE's argument was correct, Williams' right to recover the WPZ termination fee would be meaningless and unenforceable. Indeed, as I have already held, "the benefits of § 5.06(f) would be illusory if (as ETE argues) the termination . . . relieved ETE of all the conditions that could trigger the WPZ Termination Fee Reimbursement."[422]

Second, ETE contends that Williams was better off with the Preferred Offering than it would have been if ETE had undertaken a contractually compliant

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[420] ETE OB § III.A.3.b.i.

[421] JTX-0209.0059 (§5.06(f)).

[422] *Williams Cos.*, 2020 WL 3581095, at *13. None of ETE's cited cases are to the contrary. *Matthew v. Laudamiel* applied the common law materiality standard, which I have already held is more onerous. 2014 WL 5499989, at *2 (Del. Ch. Oct. 30, 2014). In *Great Lakes Chem. Corp. v. Pharmacia Corp.*, the holding to which ETE refers had nothing to do with materiality. 788 A.2d 544, 549–50 (Del. Ch. 2001). Rather, the court there held that the plaintiff failed to allege that the injury was caused by the breach. *Id.* Here, in contrast, I have already held at summary judgment that causation is irrelevant because the Merger Agreement "contains no causal language that suggests that to trigger the WPZ Termination Fee Reimbursement, the termination must result from the unsatisfied condition." *Williams Cos.*, 2020 WL 3581095, at *12. Finally, *Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.* dealt with the question of damages, not materiality. 2018 WL 4057012, at *12 (Del. Ch. Aug. 27, 2018).

equity issuance, such as an issuance of common units.[423] In particular, ETE contends that an issuance of common units would have been "more dilutive to Williams."[424] But the diversion of cash flow from Williams stockholders to ETE insiders is a distinct harm beyond the dilutive effect of an issuance of common units. Williams agreed to some dilution in connection with the $1 Billion Equity Issuance Exception, but it did not agree that ETE could divert distributions to ETE insiders while cutting out Williams stockholders.[425]

Third, ETE argues that the Preferred Offering did not disrupt any of Williams' contractual "economic equivalence rights."[426] Specifically, ETE argues that the Merger Agreement only guaranteed equivalence between dividends on ETC shares and distributions on ETE *common units*, not ETE senior securities.[427] But this proves too much; by creating a new class of securities to transfer wealth from common unitholders to those other, favored, common unitholders allowed to participate in the offering, ETE destroyed the equivalence between Williams stockholders and the latter group of common unitholders. ETE next argues it could have issued the very same Preferred Offering after closing.[428] That may be true, but is not pertinent. Regardless of what ETE could have done after closing relieved it

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[423] ETE OB § III.A.3.b.ii.
[424] *Id.* at 66.
[425] *See infra* § II.C.2.
[426] ETE OB § III.A.3.b.iii.
[427] *Id.*
[428] *Id.*

of its contractual duties, its obligation was to comply with the operating covenants at closing.[429] If ETE's ability to act inconsistently with its operating covenants post-closing excused its obligation to comply with them pre-closing, that obligation would be rendered nugatory.

Finally, ETE argues that any dilution to Williams stockholders caused by the Preferred Offering paled in comparison to the entire agreement's value, and that Williams demonstrated that the breach was immaterial by seeking to close the Merger regardless.[430] At summary judgment, I rejected the general "proposition that a party's willingness to proceed with an agreement must mean that any violations did not matter to it."[431] I instead cast the issue as a factual one for trial: "did Williams' perfervid desire to proceed despite the alleged breaches indicate that it found ETE's alleged violations immaterial?"[432]

The evidence shows that Williams found ETE's violations material. Multiple Williams witnesses testified that they viewed the Preferred Offering as an "outrageous"[433] "sweetheart deal" for "the CEO of ETE and some small[,] selected group of people"[434] that was "a complete game changer with respect to what was

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[429] JTX-0209.0063 (§6.03(b)).
[430] ETE OB § III.A.3.b.iv.
[431] *Williams Cos.*, 2020 WL 3581095, at *14.
[432] *Id.* at *15.
[433] *See supra* note 219 and accompanying text.
[434] *See supra* note 221 and accompanying text.

bargained for in the merger agreement."[435] One Williams stockholder lambasted the Preferred Offering as "something similar" to a "fraudulent conveyance."[436] Williams also sued ETE in this Court and Warren personally in Texas state court challenging the Preferred Offering while it was seeking to close the Merger.[437] The record therefore demonstrates that Williams viewed the Preferred Offering to be material despite its continued desire to close. A party may find a breach material in light of its bargain, but still conclude that the transaction, net, is favorable. Such a determination does not void its right to a remedy for the breach as provided by contract under an "in all material respects" standard.

Accordingly, I find that Williams has proven that the Preferred Offering failed to comply "in all material respects" with the operating covenants.

2. The $1 Billion Equity Issuance Exception Does Not Excuse ETE's Breach

The Ordinary Course Covenant and each of the Interim Operating Covenants were subject to certain exceptions in Section 4.01(b) of the Parent Disclosure Letter. With respect to the Ordinary Course Covenant, the Merger Agreement provided that "[e]xcept as set forth in Section 4.01(b) of the Parent Disclosure Letter . . . Parent shall, and shall cause each of its Subsidiaries to, carry on its business in the ordinary

435 *See supra* note 220 and accompanying text.
436 *See supra* note 218 and accompanying text.
437 *See supra* notes 360–61 and accompanying text.

course . . . ."[438] Likewise, each of the Interim Operating Covenants is preceded by an identical "except as set forth in Section 4.01(b) of the Parent Disclosure Letter" preamble.[439]

Section 4.01(b) of the Parent Disclosure Letter, in turn, organizes these exceptions under headers that correspond to specific sections within Section 4.01(b) of the Merger Agreement.[440] The $1 Billion Equity Issuance Exception falls under a header titled, "Section 4.01(b)(v)."[441]

The parties dispute whether the $1 Billion Equity Issuance Exception creates an exception to the Ordinary Course Covenant and all of the Interim Operating Covenants, or just the Interim Operating Covenant located within Section 4.01(b)(v) of the Merger Agreement, which prohibited the issuance of equity securities. As discussed below, I find that both interpretations are reasonable, and therefore, the "except as set forth in Section 4.01(b) of the Parent Disclosure Letter" qualifier in the Merger Agreement is ambiguous.

ETE argues that the "[e]xcept as set forth in Section 4.01(b) of the Parent Disclosure Letter" language in the Merger Agreement qualifies each of the operating covenants, meaning that ETE could disregard any of them if it did so in connection

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[438] JTX-0209.0045 (§4.01(b)).
[439] *Id.* at .0045 (§4.01(b)).
[440] JTX-0194.0017–.0019.
[441] *Id.* at .0018.

with an action permitted by Section 4.01(b) of the Parent Disclosure Letter.[442] I find this interpretation to be reasonable. I note that the "[e]xcept as set forth in Section 4.01(b) of the Parent Disclosure Letter" language is repeated twice—once before the Ordinary Course Covenant, and once before the Interim Operating Covenants.[443] Because Section 4.01(b) of the Parent Disclosure Letter contains no header corresponding to the Ordinary Course Covenant, it would be reasonable to apply all of the exceptions in Section 4.01(b) of the Parent Disclosure Letter to the Ordinary Course Covenant; otherwise, the qualifier that precedes the Ordinary Course Covenant would have no meaning. And if the phrase "[e]xcept as set forth in Section 4.01(b) of the Parent Disclosure Letter" creates an unqualified exception to the Ordinary Course Covenant, it is reasonable to conclude that, when the identical phrase appears again in front of the Interim Operating Covenants, it creates an identical unqualified exception to those covenants.

I also note that the Parent Disclosure Letter states, "[t]he headings contained in this Parent Disclosure Letter are for reference only and shall not affect in any way the meaning or interpretation of this Parent Disclosure Letter."[444] It is therefore reasonable to disregard the headers—including numerical designations—in the

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[442] ETE OB § III.A.2.a.
[443] JTX-0209.0045 (§4.01(b)).
[444] JTX-0194.0002.

Parent Disclosure Letter referring to specific sections within Section 4.01(b) of the Merger Agreement when interpreting the scope of the exceptions.

On the other hand, Williams argues that the exceptions in Section 4.01(b) of the Parent Disclosure Letter are limited by the numerical designations in each of their headers, such that the exceptions only qualify the covenants in the Merger Agreement that correspond to those numerical designations.[445] This, too, I find a reasonable interpretation. Through the headers, each exception in Section 4.01(b) of the Parent Disclosure Letter refers to a single covenant within Section 4.01(b) of the Merger Agreement.[446] And the substance of each exception matches the substance of the corresponding operating covenant. For example, the $1 Billion Equity Issuance Exception falls under the header "Section 4.01(b)(v)," which corresponds to a covenant in Section 4.01(b)(v) that prohibits the issuance of equity.[447] And Section 3.02 of the Merger Agreement explicitly provides that each exception applies to its corresponding section or subsection in the Merger Agreement.[448]

Moreover, the headers are not ordered consecutively. For example, although there are headers titled, "4.01(b)(ii)" and "4.01(b)(v)," there are no headers titled,

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[445] Williams OB § I.B.2.
[446] JTX-0194.0017–.0019.
[447] *Compare id.* at.0018 (Parent Disclosure Letter), *with* JTX-0209.0045(Merger Agreement).
[448] JTX-0209.0030 (§3.02).

"4.01(b)(iii) or "4.01(b)(iv)."[449] The nonconsecutive numbering of the headers indicates that the exceptions under each header are meant to refer specifically to the section in the Merger Agreement matching the header. Furthermore, Section 4.01(b) of the Parent Disclosure Letter repeats certain exceptions under multiple headers.[450] If each exception applied to all the operating covenants in Section 4.01(b) of the Merger Agreement, there would be no need for such repetition. Williams' proposed interpretation is also consistent with the phrase "[e]xcept as set forth in Section 4.01(b) of the Parent Disclosure Letter," which could reasonably be read to simply refer the reader to Section 4.01(b) of the Parent Disclosure Letter to determine whether there any exceptions to a particular covenant.

Because I find that both interpretations are reasonable, it is appropriate to examine the extrinsic evidence to determine the parties' intent. As I discussed above, the parties' drafting history demonstrates that they intended the $1 Billion Equity Issuance Exception, which fell under a header titled, "Section 4.01(b)(v)," to qualify only the Interim Operating Covenants in Section 4.01(b)(v) of the Merger Agreement. Up until the day before signing, the $1 Billion Equity Issuance Exception was located *within Section 4.01(b)(v) of the Merger Agreement*, not the Parent Disclosure Letter.[451] Witnesses aligned with both parties testified that they

[449] JTX-0194.0017–.0019.
[450] *Id.* at .0018–.0019 (§4.01(b)(v)(4), (x)(1), (xi)(4)); *id.* at .0017, .0019 (§4.01(b)(ii)(1), (xi)(3)).
[451] *See supra* notes 67–72 and accompanying text.

only moved it to the Parent Disclosure Letter—along with several other exceptions—to maintain confidentiality, and that they did not intend the moves to be substantive.[452]

The parties' conduct after signing also confirms that they intended this interpretation. Williams' Company Disclosure Letter was structured in the same manner as the Parent Disclosure Letter, with exceptions that fell under headers that referred to specific sections within Williams' operating covenants in the Merger Agreement.[453] After signing, Williams planned its own equity issuance, which was permitted by an exception in its Company Disclosure Letter but featured a waiver on IDRs that was prohibited under another operating covenant.[454] Consistent with the view that the equity issuance exception in the Company Disclosure Letter did not permit the IDR waiver, Williams requested ETE's consent, and ETE exercised its right to refuse, a right that would have been nonexistent under ETE's current litigation-driven view of the language.[455] Accordingly, I find that the parties intended the $1 Billion Equity Issuance Exception to qualify the covenants within Section 4.01(b)(v) of the Merger Agreement, but not the other Interim Operating Covenants or the Ordinary Course Covenant.

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452 *See supra* notes 76–79 and accompanying text.
453 *See supra* notes 83–85 and accompanying text.
454 *See supra* notes 82–84, 86–87 and accompanying text.
455 *See supra* notes 88–89 and accompanying text.

ETE next argues that, even if the $1 Billion Equity Issuance Exception refers only to the Interim Operating Covenants at Section 4.01(b)(v) of the Merger Agreement, it still cross-applies to other covenants, under the explicit terms of the Agreement, where its "relevan[ce]" to those covenants is "reasonably apparent on its face."[456] ETE relies on the following provision of the Merger Agreement to support this argument:

> [A]ny information set forth in one Section or subsection of the Parent Disclosure Letter shall be deemed to apply to and qualify the Section or subsection of this Agreement to which it corresponds in number *and* each other Section or subsection of this Agreement to the extent that it is reasonably apparent on its face in light of the context and content of the disclosure that such information is relevant to such other Section or subsection[.][457]

Relying on the broad definition of "relevant" applicable to the Delaware Rules of Evidence, ETE argues for a similarly broad interpretation of this provision, to mean that an exception in the Parent Disclosure Letter applies to any covenant in the Merger Agreement that is "logically related to" that covenant.[458] This reading ignores that the provision requires the "relevan[ce]" of the exception to be "reasonably apparent on [the] face" of the exception, which is clearly a limitation on the breadth of the provision.[459] Indeed, in its briefing, ETE reads the "on its face"

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[456] ETE OB § III.A.2.c.
[457] JTX-0209.0030 (§3.02) (emphasis added).
[458] ETE OB § III.A.2.c.
[459] JTX-0209.0030 (§3.02).

language out of the provision, describing it as the "reasonably apparent relevance" standard.[460] If ETE's reading were correct, the $1 Billion Equity Issuance Exception would permit violations of *any covenant* so long as the violation was done in connection with a compliant equity issuance. Accordingly, ETE argues that the "reasonably apparent on its face" provision permitted ETE to violate the Ordinary Course Covenant by engaging in a self-dealing transaction—the Preferred Offering—that breached ETE's own limited partnership agreement[461] because that transaction was an equity issuance of under $1 billion.[462] That is not a reasonable interpretation of the provision.

Instead, I find that the plain meaning of the provision—that contract language shall apply cross-sectionally where it is reasonably apparent on its face that the language is relevant cross-sectionally—excuses actions that would otherwise breach covenants where *facially necessary* to permit the activity provided by the provision—that is, where absent cross-sectional applicability an inconsistency in the contractual terms would result. For example, another exception under the "Section 4.01(b)(v)" header in the Parent Disclosure Letter allows ETE to "acquire units in any of its Subsidiaries in an amount up to $2.0 billion in the aggregate."[463] It is

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[460] *See* ETE OB at 60 ("The text of the 'reasonably apparent . . . relevance' clause . . . ."); *id.* at 61 ("Under the 'reasonably apparent relevance' standard . . . .").
[461] *Energy Transfer*, 2018 WL 2254706, at *25.
[462] *See* ETE OB at 61.
[463] JTX-0194.0018 (§4.01(b)(v)(3)).

"reasonably apparent on [the] face" of this exception that it must cross-apply to the covenant in Section 4.01(b)(iv) of the Merger Agreement, which states that ETE may not "purchase, redeem or otherwise acquire any shares of . . . its Subsidiaries' capital stock or other securities."[464] Otherwise, the exception would have no meaning. This interpretation of the "reasonably apparent on its face" provision comports with the ordinary meaning of the word "relevant,"[465] and gives effect to the requirement that the exception's relevance to a covenant be "reasonably apparent on [the] face" of the exception.[466] In other words, the provision is a savings clause for a draftsperson's failure to adequately cross-reference a provision in the Merger Agreement.[467]

Applying this standard, the "relevan[ce]" of the $1 Billion Equity Issuance Exception to the covenants ETE violated is not "reasonably apparent on [the] face" of the exception, because ETE could have undertaken an equity issuance pursuant to the exception that complied with each of the covenants. Because ETE could have acted in compliance with the covenants without the application of the exception, its relevance to the covenants is not facially apparent. Again, I held at summary judgment that the Preferred Offering did not comport with ETE's general Ordinary

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[464] JTX-0209.0045 (§4.01(b)(iv)).
[465] *Relevant*, MERRIAM-WEBSTER ("having significant and demonstrable bearing on the matter at hand").
[466] JTX-0209.0030 (§3.02).
[467] *See* Trial Tr. 215:3–216:1(Van Ngo).

Course Covenant because "breaching its limited partnership agreement is not 'ordinary course' for the company."[468] ETE does not dispute that it could have structured the equity offering in a way that did not breach its partnership agreement. And ETE also concedes that "ETE issued equity securities in the past, and it was reasonably expected to do so during the Merger's pendency."[469] In other words, ETE admits that certain equity issuances were ordinary course. Accordingly, the $1 Billion Equity Issuance Exception is not facially relevant to the Ordinary Course Covenant, because it is unnecessary to address a conflict with that covenant.

Likewise, I held at summary judgment that the Preferred Offering breached ETE's covenants that it would not (i) subject ETE to new distribution restrictions, (ii) issue "securities in respect of . . . equity securities," or (iii) amend its partnership agreement.[470] Again, ETE could have structured an equity offering in a way that complied with each of those covenants. As a result, the relevance of the Equity Issuance Exception to each is not facially apparent. For example, as ETE concedes, equity issuances do not necessarily feature distribution restrictions.[471] And if ETE had issued equity out of the existing classes instead of swapping common units for new preferred units, it would have complied with the covenant prohibiting ETE from

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[468] *Williams Cos.*, 2020 WL 3581095, at *18.
[469] ETE OB at 61.
[470] *Williams Cos.*, 2020 WL 3581095, at *18.
[471] ETE OB at 61.

issuing "securities in respect of . . . equity securities." Finally, ETE does not dispute that it could have issued common units without amending its limited partnership agreement.[472] Simply put, none of the operating covenants breached by ETE conflicted with the $1 Billion Equity Issuance Exception. Therefore, the exception's relevance to those covenants was not "reasonably apparent on its face." Accordingly, I find that the $1 Billion Equity Issuance Exception did not permit ETE's violations of its operating covenants.

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Because I have found that Williams proved a claim for the WPZ Termination Fee Reimbursement based on ETE's breach of the operating covenants, I need not discuss Williams' other independent bases for proving its claim.[473]

I note, however, that Williams has also established a claim for the WPZ Termination Fee Reimbursement based on the failure of the Capital Structure Representation. Pursuant to the Capital Structure Representation, ETE represented at signing that its capital structure consisted of three classes of equity securities:

> The authorized equity interests of Parent consist of common units representing limited partner interests in Parent ("<u>Parent Common Units</u>"), Class D Units representing limited partner interests in Parent ("<u>Parent</u>

[472] ETE argues only that it would have to amend its partnership agreement to issue "new securities." *Id.* at 62.
[473] Those bases generally involve the 721 Opinion.

> Class D Units") and a general partner interest in Parent ("Parent General Partner Interest").[474]

This representation was brought down to closing "except for any immaterial inaccuracies."[475] In my summary judgment opinion, I held that, because the Preferred Offering created a fourth class of equity that was part of ETE's capital structure on the Closing Date, the Capital Structure Representation was false on that date.[476] As with the covenant breaches, two issues were left for trial: first, whether that inaccuracy was "immaterial," and second, whether the $1 Billion Equity Issuance Exception in the Parent Disclosure Letter permitted the inaccuracy.[477]

I find that Williams proved that the falsity of the Capital Structure Representation was material. In the context of representations in merger agreements, this Court has held that "[a] fact is generally thought to be 'material' if [there] is 'a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[478] As I held above, the Preferred Offering was material to Williams stockholders because it created a new equity class that granted ETE insiders a distribution preference, allowing ETE to preserve cash flow to those

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[474] JTX-0209.0030 (§3.02(c)(i)).
[475] *Id.* at .0063 (§6.03(a)).
[476] *Williams Cos.*, 2020 WL 3581095, at *4, 20–21.
[477] *Id.* at *20–21.
[478] *Frontier Oil v. Holly Corp.*, 2005 WL 1039027, at *38 (Del. Ch. Apr. 29, 2005); *accord Akorn*, 2018 WL 4719347, at *86.

insiders while cutting out the Williams stockholders.[479] I therefore find that the Preferred Offering rendered the Capital Structure Representation materially inaccurate.

Furthermore, the $1 Billion Equity Issuance Exception did not permit the falsity of the Capital Structure Representation. Unlike the operating covenants, the Capital Structure Representation is not qualified by the "except as set forth in Section 4.01(b) of the Parent Disclosure Letter" preamble.[480] Accordingly, the only way that the $1 Billion Equity Issuance Exception could apply to the Capital Structure Representation is through the "reasonably apparent on its face" test.[481] For reasons similar to the related discussion above, the exception's applicability is not facially apparent, because there is no inconsistency in the language. ETE promised that its existing classes of equity would carry down to closing, but its representation concerning the number of outstanding *units* for each class was not so brought down.[482] In other words, ETE was free to issue up to $1 billion in equity out of an existing class, as provided for in the Parent Disclosure Letter, and in that case the Capital Structure Representation would have remained true at closing. Because ETE could have issued equity under the $1 Billion Equity Issuance Exception in a way

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479 *See supra* § II.C.1.
480 *See* JTX-0209.0030 (§3.02(c)(i)).
481 *See id.* at .0030 (§3.02).
482 *Id.* at .0063 (§6.03(a)(i)).

that complied with the Capital Structure Representation, it is not facially apparent that the exception is applicable to the Capital Structure Representation.

Accordingly, I find that Williams has independently proven a claim for the WPZ Termination Fee Reimbursement based on the Preferred Offering's violation of the Capital Structure Representation. Having found that Williams proved a claim for the WPZ Termination Fee Reimbursement, I turn to ETE's affirmative defenses.

D. ETE's Affirmative Defenses and Counterclaims Fail

ETE asserts three affirmative defenses and counterclaims that it contends prevent Williams from recovering the WPZ Termination Fee Reimbursement. First, ETE argues that Williams violated a provision requiring cooperation with respect to financing by refusing the Proposed Public Offering.[483] Second, ETE argues that Williams breached an obligation to notify ETE of purportedly material omissions from the S-4.[484] Third, ETE contends that Williams breached various obligations based on the purported actions taken by Armstrong and the dissenting Williams directors to thwart the Merger.[485]

"[A] defendant seeking to . . . assert [a] breach as an affirmative defense [to performance] . . . bears the burden to show that [the] breach . . . excused its non-

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[483] ETE OB § III.C.1.
[484] *Id.* § III.C.2.
[485] *Id.* § III.C.3.

performance."[486] As discussed below, I find that ETE has failed to prove each of these affirmative defenses and counterclaims.

1. <u>ETE Did Not Prove That Williams Violated the Financing Cooperation Provision</u>

ETE argues that by refusing to consent to the Proposed Public Offering, Williams breached its obligation under Section 5.14 of the Merger Agreement to "provide cooperation reasonably requested by [ETE] that is necessary or reasonably required in connection with . . . financing . . . arranged by [ETE]."[487] ETE contends that Section 5.14 provides "no reasonableness qualifier" on Williams' duty to provide cooperation.[488] I disagree. Section 5.14 provides that Williams was only required to "provide cooperation *reasonably requested by* [ETE]."[489] Williams was therefore under no obligation to cooperate with a request by ETE that was unreasonable.

It is reasonable for "a party [to] withhold consent to a transaction when the decision is made for a legitimate business purpose."[490] The record demonstrated that Williams withheld consent to the Proposed Public Offering on the advice of its financial advisors because it discriminated against Williams stockholders, who were

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486 *TA Operating LLC v. Comdata, Inc.*, 2017 WL 3981138, at *22 (Del. Ch. Sept. 11, 2017).
487 ETE OB § III.C.1.
488 *Id.* at 95.
489 JTX-0209.0061 (§5.14) (emphasis added).
490 *Union Oil Co. of California v. Mobil Pipeline Co.*, 2006 WL 3770834, at *11 (Del. Ch. Dec. 15, 2006).

unable to participate in the offering.[491] I find this to be a legitimate business purpose, particularly given that, instead of merely withholding consent, Williams offered to proceed with the offering if ETE allowed Williams stockholders to participate.[492] That was a reasonable counteroffer, which ETE refused.[493] Moreover, "an obligation to take reasonable actions . . . does not require a party 'to sacrifice its own contractual rights for the benefit of its counterparty.'"[494] The Proposed Public Offering violated the Merger Agreement for many of the same reasons that the Preferred Offering did—including because it involved new distribution restrictions and issued "securities in respect of . . . equity securities."[495] I therefore find that it was reasonable for Williams to refuse to consent to the Proposed Public Offering.

2. <u>ETE Did Not Prove a Disclosure Violation</u>

ETE next contends that Williams breached its obligation under Section 5.01 of the Merger Agreement to inform ETE of material facts omitted from the S-4 and to correct those omissions.[496] In particular, ETE contends that Williams did not disclose to ETE (i) the purported threats of consent solicitation from Meister and

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[491] *See supra* notes 187–92 and accompanying text.
[492] *See supra* note 196 and accompanying text.
[493] *See supra* note 197 and accompanying text.
[494] *Williams Field Servs. Grp., LLC v. Caiman Energy II, LLC*, 2019 WL 4668350, at *34 (Del. Ch. Sept. 25, 2019) (quoting *Akorn*, 2018 WL 4719347, at *91), *aff'd sub nom. Williams Field Servs. Grp., LLC v. Caiman Energy II, LCC*, 237 A.3d 817 (Del. 2020).
[495] *See supra* at 28–33, 81–82.
[496] ETE OB § III.C.2.

Mandelblatt, and (ii) certain Williams directors' criticism of its bankers' financial analyses.[497] Section 5.01 of the Merger Agreement provides, in relevant part,

> If at any time prior to receipt of the Company Stockholder Approval any information relating to TopCo, Parent or the Company, or any of their respective Affiliates, directors or officers, should be discovered by TopCo, Parent or the Company which is required to be set forth in an amendment or supplement to either the Form S-4 or the Proxy Statement, so that either such document would not include any misstatement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which they are made, not misleading, the party that discovers such information shall promptly notify the other parties hereto and an appropriate amendment or supplement describing such information shall be promptly filed with the SEC and, to the extent required by Law, disseminated to the stockholders of the Company.[498]

First, as discussed above, ETE failed to prove that Meister and Mandelblatt threatened the Williams directors with a consent solicitation, or that any perceived threats influenced the Williams Board's decision to approve the Merger Agreement.[499] Williams was under no obligation to inform ETE of threats that did not occur. Second, Williams disclosed that a minority of its directors voted against entering into the Merger Agreement and "continue to disagree with the recommendation of the majority of the [Williams] Board";[500] it was not required to

[497] *Id.* § III.C.2.
[498] JTX-0209.0051 (§5.01).
[499] *See supra* at 20–22.
[500] JTX-1218.0165.

disclose "the ground for a disclosed director dissent," including any purported disagreement with the analysis of Williams' bankers.[501] Accordingly, ETE has failed to prove a breach of Section 5.01.

3. Any Breach by Williams of the Best Efforts or Ordinary Course Provisions Was Cured by the Closing Date

Finally, ETE argues that Williams breached three covenants based on the actions of Armstrong and other dissenting Williams directors: Williams' obligations to (i) use reasonable best efforts to consummate the Merger;[502] (ii) "carry on its business in the ordinary course";[503] and (iii) use "reasonable best efforts to contest and resist" litigation challenging the Merger.[504] Williams was obligated to have "performed or complied" with these covenants "by the time of the Closing."[505]

ETE contends that Williams breached these covenants because Armstrong "covertly worked with anti-Merger co-conspirators."[506] As I have found, however, Armstrong's communications with Bumgarner, while not a model of corporate governance best practices, were intended to assuage Bumgarner's concerns about the synergies estimates, not to thwart the Merger.[507]

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[501] *Newman v. Warren*, 684 A.2d 1239, 1246 (Del. Ch. 1996).
[502] JTX-0209.0053 (§5.03(a)).
[503] *Id.* at .0041 (§4.01(a)).
[504] *Id.* at .0053 (§5.03(a)).
[505] *Id.* at .0063 (§6.02(b)).
[506] ETE OB at 98.
[507] *See supra* § I.B.6.

ETE also contends that Armstrong and other dissenting Williams directors tried to "fan the deal break flames" by attempting to dissuade Cleveland and Stoney from supporting the Merger, positioning Williams for a "walkaway payment," "working the press" to "write anti-ETE articles," and suing Warren "in a thinly-veiled publicity stunt."[508] The evidence at trial refuted each of these contentions. ETE introduced no evidence that Cleveland or Stoney felt pressured to switch their votes; to the contrary, Stoney testified that she never felt pressure to reconsider her position.[509] Moreover, although Williams did ask its financial advisors to assess the value of a potential breakup fee from ETE,[510] the Williams Board resolved to publicly support the Merger,[511] and ultimately sued to enjoin ETE from terminating the Merger Agreement.[512] And ETE has introduced no evidence that Williams' Texas lawsuit against Warren challenging the Preferred Offering was intended to be a "publicity stunt." Instead, the lawsuit represented Williams' view that the Preferred Offering breached the Merger Agreement and was unfair to Williams stockholders.

In any event, and more fundamentally, Williams' obligation to comply with these covenants was due "by the time of the Closing."[513] And by June 28, 2016, the

[508] ETE OB at 102.
[509] *See supra* note 138 and accompanying text.
[510] *See supra* note 142 and accompanying text.
[511] *See supra* notes 139, 307–08, 310, 312–14 and accompanying text.
[512] *See supra* note 351 and accompanying text.
[513] JTX-0209.0063 (§6.02(b)).

date on which Williams and ETE had agreed to close,[514] Williams was in full compliance: Williams had settled the Bumgarner lawsuit,[515] sued ETE seeking to enjoin it from terminating the Merger Agreement,[516] obtained stockholder approval of the Merger,[517] and showed up at the scheduled closing.[518] Indeed, ETE concedes that on June 28, 2016, Williams was ready, willing and able to close.[519] Therefore, even to the extent that, between signing and closing, the actions of Armstrong and the dissenting Williams directors violated covenants, Williams "had abandoned its flirtation" with those violations by the time of closing, "thereby curing its breach."[520]

Accordingly, I find that ETE failed to prove any of its affirmative defenses or counterclaims.

E. ETE Is Entitled to Monetary Sanctions for Armstrong's Deletion of His Gmail Account

On May 20, 2020, ETE filed the Motion for Sanctions based on Armstrong's deletion of the Gmail account he used to correspond with Bumgarner about the Merger.[521] ETE asks the Court to make adverse findings, draw adverse inferences,

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[514] *See supra* note 50 and accompanying text.
[515] *See supra* notes 299–300 and accompanying text.
[516] *See supra* note 351 and accompanying text.
[517] *See supra* note 317 and accompanying text.
[518] *See supra* note 355 and accompanying text.
[519] Stip. ¶ 36.
[520] *Akorn*, 2018 WL 4719347, at *100.
[521] *See generally* Motion for Sanctions.

award ETE attorneys' fees and costs, and prohibit Williams from recovering attorneys' fees and costs.[522]

"The Court has the power to issue sanctions for discovery abuses under its inherent equitable powers, as well as the Court's 'inherent power to manage its own affairs.'"[523] "Sanctions serve three functions: a remedial function, a punitive function, and a deterrent function."[524] With these functions in mind, the Court considers the following factors in determining whether sanctions are appropriate: (1) "the culpability or mental state of the party who destroyed the evidence"; (2) "the degree of prejudice suffered by the complaining party"; and (3) "the availability of lesser sanctions which would avoid any unfairness to the innocent party while, at the same time, serving as a sufficient penalty to deter the conduct in the future."[525] "The Court has wide latitude to fashion an appropriate remedy, but the remedy must be tailored to the degree of culpability of the spoliator and the prejudice suffered by the complaining party."[526]

With respect to the first element, I find that Armstrong's destruction of his Gmail account was spoliation of evidence. Although Armstrong testified at trial that he deleted the Gmail account because it was sending spam messages to his

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522 *Id.* ¶ 1.
523 *Beard Rsch., Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106 (2d Cir. 2002)).
524 *Id.*
525 *Id.*
526 *Id.* at 1189–90.

contacts,[527] Williams failed to introduce any evidence corroborating that testimony—such as an example of the spam emails. Given this lack of corroborating evidence, and the fact that Armstrong deleted the account just two days after being asked at a deposition if he emailed with Bumgarner about the Merger,[528] I do not find his testimony to be credible.

Turning to the second element, however, ETE has failed to demonstrate that Armstrong's destruction of his Gmail account ultimately prejudiced ETE. ETE was able to recover Armstrong's communications with Bumgarner by subpoenaing Bumgarner's emails.[529] Although ETE acknowledges this, it argues that Bumgarner discarded most of his paper records, which may have included handwritten notes from Armstrong, as well as Bumgarner's notes from meetings with Armstrong.[530] But even if true, ETE fails to explain how those handwritten notes would have been recoverable through Armstrong's deleted Gmail account. ETE also points out that Armstrong communicated with Williams' former CEO, Bailey,[531] and that he testified that he may have done so from that Gmail account.[532] But "an email, almost by definition, has a sender and a receiver."[533] Therefore, "[e]ven if [Armstrong] had

[527] *See supra* note 280 and accompanying text.
[528] *See supra* note 279 and accompanying text.
[529] *See supra* note 282 and accompanying text.
[530] ETE OB § III.C.5.
[531] *See supra* notes 301–03 and accompanying text.
[532] Trial Tr. 688:9–689:11(Armstrong).
[533] *Beard Rsch*, 981 A.2d at 1193 (declining to draw adverse inference based on deletion of emails).

destroyed certain emails [to Bailey] on his end, the emails still would exist on the other end and [c]ould have been produced."[534]

With respect to the third element, I find that making adverse inferences or findings would be unfair to Williams in light of ETE's lack of prejudice. Sanctions in some form, however, are appropriate given Armstrong's degree of culpability. I therefore find that ETE is entitled to recover its fees and costs in connection with subpoenaing Bumgarner's email, and for bringing the Motion for Sanctions.

F. Williams Is Entitled to Attorneys' Fees and Costs, and Interest

Section 5.06(g) of the Merger Agreement provides that Williams is entitled to fees, costs, and interest if it is forced to bring a suit to collect the WPZ Termination Fee Reimbursement and prevails:

> [I]f . . . Parent fails promptly to pay any amount due pursuant to Section . . . 5.06(f), and, in order to obtain such payment, . . . the Company commences a suit that results in . . . a judgment against Parent for the amount set forth in Section . . . 5.06(f) . . . Parent shall pay to the Company . . . the other party's costs and expenses (including reasonable attorneys' fees and expenses) in connection with such suit, together with interest on the amount of such payment from the date such payment was required to be made until the date of payment at the prime rate as published in the *Wall Street Journal* in effect on the date such payment was required to be made.[535]

[534] *Id.*
[535] JTX-0209.0059 (§5.06(g)).

Because I have found that Williams is entitled to the WPZ Termination Fee Reimbursement, Williams is also entitled to recover its reasonable fees and expenses in bringing about this result.

III. CONCLUSION

For the foregoing reasons, judgment is entered in favor of the Plaintiff in the amount of $410 million, plus interest at the contractual rate, and its reasonable attorneys' fees and expenses. The Defendants are entitled to their fees and expenses for subpoenaing Bumgarner's documents and bringing their Motion for Sanctions. The parties should confer and submit a form of order consistent with this Opinion.

EXHIBIT E

EFiled: Aug 25 2022 10:07AM EDT
Transaction ID 67972078
Case No. Multi-Case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., and LE GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12168-VCG
THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER CORP LP, ETE CORP GP, LLC, LE GP, LLC and ENERGY TRANSFER EQUITY GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12337-VCG

MEMORANDUM OPINION

Date Submitted: May 19, 2022
Date Decided: August 25, 2022

Kenneth J. Nachbar, Susan W. Waesco, and Matthew R. Clark, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Antony L. Ryan, Kevin J. Orsini, Michael P. Addis, and David H. Korn of CRAVATH, SWAINE & MOORE LLP, New York, New York, *Attorneys for Plaintiff and Counterclaim Defendant The Williams Companies, Inc*.

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GLASSCOCK, Vice Chancellor

This Memorandum Opinion considers, and grants in full, the Plaintiff's Motion for Entry of an Order and Final Judgment.[1] It addresses the only remaining issues; the reasonableness of the Plaintiff's fee request, the application of pretrial interest to the underlying contractual breakup fee, and whether such interest should be tolled.[2] The parties are large entities represented by sophisticated counsel. Assisted by counsel, they entered a contractual arrangement, a merger agreement, that contemplated a merger but also provided for contingencies, including an enforcement/damages action of the kind represented here, which followed a busted merger. The parties agreed contractually to a fee shifting provision, giving the prevailing party a right to recoup its "reasonable fees and expenses" as determined within this Court's discretion. The first question before me is whether the litigation costs Williams seeks—which after the injunctive-relief segment of this action proceeded under a contingent fee arrangement between Williams and its counsel—include a "reasonable" fee, based on the contingent nature of that fee. If I were a social scientist,[3] rather than a simple judicial officer, I would note at length the interesting incentives caused by imposing a contingent fee via a fee shifting provision. Fortunately, I am assisted here by case law, and most pertinently by the

[1] *See* The Williams Companies, Inc.'s Mot. Entry Order Final J., Dkt. No. 657 [hereinafter "Pl.'s Mot."].
[2] For the underlying dispute see *Williams Companies, Inc. v. Energy Transfer LP*, 2021 WL 6136723, (Del.Ch., 2021).
[3] Which I am not, and for which I am grateful.

contract entered by the parties themselves. That contract shifts cost to the prevailing party, Williams, but limits recovery to a reasonable fee—I need only determine here that a contingent fee was reasonable to impose it upon ETE. It is worth pointing out that these sophisticated parties surely were aware that post-merger-agreement litigation, seeking a break fee, could likely include representation on a contingent basis. They had every opportunity, therefore, to contract against use of a contingent fee to determine the amount of fees shifted, if they so desired. This, they failed to do. Because I find that Williams' agreement with counsel to a contingent representation was itself reasonable, and that the amount incurred under their agreement is likewise reasonable, I find the contingent fee appropriate under the fee-sifting provision of the merger agreement.

Similarly, I address the question of whether the contractual breakup fee should draw compound interest "from the date such payment was required to be made." Again, while the contract provides for interest, it is silent as to whether that interest should be simple or compound—and again, the parties should have anticipated this issue but chose not to address it. I find that compound interest best fulfills the intent of the award here, to make the Plaintiff whole. I also note that ETE has had the use of the funds to which Williams was entitled, and presumably used these funds for purposes it found advantageous in the interim. Accordingly, I find applying compound interest to the damages award appropriate. I also reject, for similar reasons, ETE's request to toll interest during a period when trial in the matter was continued. My reasoning is explained below.

I. BACKGROUND[4]

By way of background, I issued a post-trial Memorandum Opinion on December 29, 2021 awarding a $410 million judgment in favor of the Plaintiff, The Williams Companies, Inc. ("Williams"), as liquidated damages pursuant to a merger agreement (the "Merger Agreement") between Williams and the Defendants, "ETE."[5] The Merger Agreement provided that, if Williams prevailed, it was entitled to recover reasonable attorneys' fees and expenses, as well as prejudgment interest, from ETE:

> [T]he [Defendants] shall pay to the [Plaintiff] . . . the [Plaintiff's] costs and expenses (including reasonable attorneys' fees and expenses) in connection with such suit, together with interest on the amount of such payment from the date such payment was required to be made until the date of payment at the prime rate as published in the *Wall Street Journal* in effect on the date such payment was required to be made.[6]

[4] Where the facts are drawn from exhibits jointly submitted at trial, they are referred to according to the numbers provided on the parties' joint exhibit list and with page numbers derived from the stamp on each JTX page ("JTX- __ . ___"). Citations in the form of "Yoch Opp. Ex. —" refer to the exhibits attached to the Transmittal Aff. of James M. Yoch, Jr. Supp. of Defs.' and Countercl. Pls.' Opp'n. Pl.'s Mot. Entry J., Dkt. Nos. 666. Citations in the form of "Ryan Decl. —" refer to the Decl. Antony L. Ryan Supp. Williams' Mot. Entry Order and Final J., Dkt. No. 660, its supporting exhibits, and its appendixes.

[5] *Williams Companies, Inc. v. Energy Transfer LP*, 2021 WL 6136723, at *36 (Del. Ch. Dec. 29, 2021).

[6] JTX-0209.0059 (§5.06(g)).

I also awarded ETE reasonable attorneys' fees and expenses in connection with pursuing certain discovery and a related motion for sanctions.[7] I directed the parties to confer and submit a proposed form of order implementing the Memorandum Opinion.[8]

The parties have reached an impasse regarding three aspects of the proposed implementing order. First, the parties dispute whether Williams' attorneys' fees and expenses are "reasonable."[9] Second, the parties disagree as to whether the contractual prejudgment interest should be simple or compounded quarterly.[10] Finally, the parties dispute whether interest should be tolled for a period during which trial was postponed.[11] For the reasons explained below, I find that Williams' attorneys' fees and expenses were reasonable, and that Williams is entitled to compound interest with no tolling.

II. ANALYSIS

A. The Plaintiff's Attorneys' Fees and Expenses Are Reasonable

ETE challenges two aspects of Williams' attorneys' fees and expenses. First, Williams formed a contingent fee agreement with its out-of-state counsel, Cravath, Swaine & Moore ("Cravath"), under which Cravath is entitled to 15% of

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[7] *Williams Companies*, 2021 WL 6136723, at *36.
[8] *Id.*
[9] *See* Pl.'s Mot. § III; Defs.' and Counterclaim Pls.' Opp. Pl.'s Mot. Entry J. § I, Dkt. No. 664 [hereinafter "Defs.' AB"]; The Williams Companies, Inc.'s Reply Supp. Mot. Entry Order Final J. § I, Dkt. No. 668 [hereinafter "Pl.'s RB"].
[10] Pl.'s Mot. § I; Defs.' AB § III; Pl.'s RB § III.
[11] Pl.'s Mot. § II; Defs.' AB § II; Pl.'s RB § II.

the $410 million judgment, amounting to $74,846,161.32.[12] Cravath and Williams formed the contingent fee agreement partway through the litigation in this matter. Specifically, in mid-2017, Williams' new general counsel, Lane Wilson, approached Cravath to suggest switching from an hourly arrangement to a contingent arrangement.[13] At that time, the Supreme Court had recently affirmed, on March 23, 2017, my opinion declining to enjoin the Defendant from terminating the Merger Agreement,[14] and this action had thus evolved from an injunction case to a damages case. Wilson testified that he wanted to switch to a contingent fee arrangement because he wanted to "align Cravath and Williams [as] partners in this litigation."[15] Cravath and Williams memorialized their contingent fee arrangement in a written agreement dated September 19, 2017.[16]

ETE first contends that shifting the contingent fee in this case is not "reasonable" under the Merger Agreement or Delaware law.[17] ETE also challenges Cravath's "lodestar"—that is, the number of hours Cravath expended in this litigation multiplied by its hourly rate—that supports its contingent fee.[18] As discussed below, I find that both the contingent fee and the lodestar are reasonable.

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[12] Ryan Decl. ¶¶ 39, 41, and 45; For the fee agreement, see Ryan Decl. Ex. B.
[13] Yoch Opp. Ex. 3, at 43:12–46:18.
[14] *Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 266 (Del. 2017).
[15] Yoch Opp. Ex. 3, at 44:13–18.
[16] Ryan Decl. Ex. B.
[17] Defs.' AB § I.A.
[18] *Id.* § I.

1. <u>The Contingent Fee Is Reasonable</u>

The Merger Agreement contains no limitation on what kinds of attorneys' fees and expenses may shifted to the losing party, other than a requirement, which is already implied under Delaware law, that the shifted fees and expenses must be "reasonable."[19] The Merger Agreement also designates this Court as the "exclusive jurisdiction" in which all disputes "arising out of or relating to th[e] Agreement" must be brought.[20] The parties thus manifested an intent to shift to the losing party all attorneys' fees and expenses that are "reasonable," as determined by this Court.

At the time the parties signed the Merger Agreement on September 28, 2015, this Court had not yet opined on whether fees based on a percentage of recovery—contingent fees—may appropriately be shifted under a contractual fee shifting provision. But it was well established at that time that this Court applies the eight factors of Rule 1.5(a) of the Delaware Lawyers' Rules of Professional Conduct to evaluate whether the requested fees are reasonable in contractual

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[19] JTX-0209.0059 (§5.06(g)) ("[T]he [Defendants] shall pay to the [Plaintiff] . . . the [Plaintiff's] costs and expenses (including reasonable attorneys' fees and expenses) in connection with such suit . . . ."); *see also Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007) ("Delaware law dictates that, in fee shifting cases, a judge determine whether the fees requested are reasonable.").

[20] JTX-0209.0075 (§8.10(b)).

fee-shifting cases.[21] And it was also well established that there is nothing inherently unreasonable about contingent fees under Rule 1.5(a). Indeed, the eighth factor of Rule 1.5(a) explicitly contemplates contingent fees.[22] The comments to Rule 1.5 advise that "[c]ontingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule," and require that "[i]n determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances."[23] The parties thus knew at the time they entered into the Merger Agreement that their bargained-for "reasonableness" limitation on fee-shifting did not automatically prohibit contingent fees.

Consistent with Rule 1.5, this Court recently confirmed, in *Shareholder Representative Services LLC v. Shire US Holdings, Inc.*, that "there is nothing inherently unreasonable in enforcing a contractual fee-shifting arrangement to cover a contingent fee award."[24] *Shire* also involved a fee-shifting provision in a merger agreement.[25] During the litigation, the plaintiff and its counsel switched

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[21] *See, e.g.*, *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245–46 (Del. 2007); *see also Glob. Link Logistics, Inc. v. Olympus Growth Fund III, L.P.*, 2010 WL 692752, at *1 (Del. Ch. Feb. 24, 2010).
[22] Del. Lawyers' R. Prof'l Conduct R. 1.5(a).
[23] *Id.* R. 1.5 cmt. 3.
[24] 2021 WL 1627166, at *2 (Del. Ch. Apr. 27, 2021), *aff'd*, 267 A.3d 370 (Del. 2021).
[25] *See S'holder Representative Servs. LLC v. Shire US Holdings, Inc.*, 2020 WL 6018738, at *28 (Del. Ch. Oct. 12, 2020), *aff'd*, 267 A.3d 370 (Del. 2021).

from an hourly fee arrangement to a one-third contingent fee arrangement because the plaintiff was struggling to fund the litigation.[26] In finding the contingent fee reasonable, the Court reasoned that "[r]isk-taking of this nature is a normal part of litigation," and "[a] one-third contingent fee arrangement is quite typical and commercially reasonable."[27] The Court stressed that "[the defendant] could have contracted in the [m]erger [a]greement to avoid this outcome. It did not."[28]

As in *Shire*, the fee-shifting provision in the Merger Agreement here contains no prohibition on the shifting of contingent fees. And the contingent fee Williams agreed to, at 15%, is far below the 33% contingent fee approved in *Shire* and well within the range of contingent fees that have been approved as reasonable by this Court.[29]

ETE attempts to distinguish *Shire* because the plaintiffs there were stockholders who struggled to fund the litigation without a contingent fee.[30] ETE correctly points out that the *Shire* Court noted that "[r]isk-taking of this nature is a normal part of litigation, which Delaware public policy seeks to reward *when it*

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[26] *Shire*, 2021 WL 1627166, at *1.
[27] *Id.* at *2.
[28] *Id.*
[29] *See Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1260 & n.114 (Del. 2012) ("'A study of recent Delaware fee awards finds that the average amount of fees awarded when derivative and class actions settle for both monetary and therapeutic consideration is approximately 23% of the monetary benefit conferred; the median is 25%.' Higher percentages are warranted when cases progress to a post-trial adjudication.").
[30] Defs.' AB § I.A.

benefits stockholders."[31] In contrast, ETE contends, Williams was not pursuing this litigation as a stockholder, and it has presented no evidence that it struggled to fund this litigation, meaning that "it does not fall into the public policy reasons" articulated in *Shire*.[32] I do not find that to be a principled basis to distinguish *Shire*. In *Shire*, the plaintiff made a business judgment to switch to a contingent fee because it could not otherwise fund the litigation; here, Williams' general counsel likewise made a business judgment to switch to a contingent fee to "align Cravath and Williams [as] partners in this litigation."[33] This case, I note, had recently changed from one seeking injunctive relief (which called for non-contingent representation) to one seeking recovery of the break fee (for which contingent representation was a business option).

Although "there is nothing inherently unreasonable in enforcing a contractual fee-shifting arrangement to cover a contingent fee award,"[34] the decision to switch mid-litigation from an hourly arrangement to a contingent arrangement may, in some circumstances, be unreasonable. For instance, where the litigation has progressed significantly, if uncertainty regarding the outcome begins to fall away, it may be unreasonable for a party to then switch to a contingent fee in an attempt to penalize a party opponent. But that consideration is

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[31] *Shire*, 2021 WL 1627166, at *2.
[32] Tr. 5.19.22 Oral Arg. re Mot. Entry Order and Final J. 33:21–35:1, Dkt. No. 676.
[33] Yoch. Opp. Ex. 3, at 43:23–46:9.
[34] *Shire*, 2021 WL 1627166, at *2.

not present here. To the contrary, the record reflects that, shortly after the Supreme Court affirmed my post-trial opinion in the injunction phase of this litigation, Williams' new general counsel decided to switch to a contingent fee for the damages phase because he thought it would align Williams and Cravath.[35]

Accordingly, I find no reason to part from the Court's holding in *Shire* enforcing a contractual fee-shifting provision to cover a contingent fee. I find the particular contingent fee arrangement here to be reasonable.

2. Williams' Lodestar Is Reasonable

ETE also takes issue with the "lodestar" that Williams used to support its contingent fee. A "lodestar" is the "hours reasonably expended" multiplied by "a reasonable hourly rate," "which can then be adjusted through the application of a 'multiplier,' to account for additional factors such as the contingent nature of the case."[36]

Williams has produced a lodestar of $47,116,996.73.[37] Comparing Williams' contingent fee to its lodestar yields a lodestar multiple of 1.7x.[38] A 1.7x

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[35] *See supra* note 15 and accompanying text.
[36] *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1253 (Del. 2012).
[37] Pl.'s Mot. § III.B.
[38] *Id.*

lodestar multiple is well within the range of what this Court has deemed reasonable.[39]

With respect to the lodestar itself, ETE contends that Cravath expended an unreasonable number of hours in this litigation, and that Williams failed to review Cravath's bills to ensure compliance with Williams' billing policies after they switched to a contingent arrangement.[40] I disagree. First, the record reflects that Williams continued to review Cravath's bills after the switch from an hourly to a contingent arrangement.[41] And even before the switch, Williams only objected to "under 1 percent . . . of the amount billed" by Cravath.[42] Thus, although Williams did not review Cravath's bills with the same degree of scrutiny after switching to a contingent arrangement,[43] ETE has presented no reason to suggest that any potential write-downs after the switch would be material. Indeed, Cravath had every incentive to work efficiently, given that its compensation was not based on hours billed. In other words, *Cravath* bore the cost of any unnecessary litigation expense, without the opportunity to pass that through to a client.

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[39] *See Shire*, 2021 WL 1627166, at *3 ("multiplier of approximately 2.5x" was "on par with or less than awards this court has previously deemed reasonable in the post-trial or advanced-stage litigation context").
[40] Defs.' AB § I.B.
[41] Yoch Opp. Ex. 3, at 87:15–89:18.
[42] *Id.* Ex. 4, at 36:8–20; *see also* Ryan Decl. App. B, at 2 (showing $30,972.75 written-down on $4,358,372.70 paid).
[43] Yoch Opp. Ex. 3, at 88:11–89:25.

Second, ETE's challenge to Cravath's rates and hours is premised on a comparison between Cravath and ETE's counsel, Vinson & Elkins.[44] For instance, ETE points out that Cravath expended 81,864.8 hours, while Vinson & Elkins expended only 34,700.3.[45] But "any attempt to measure reasonableness by simple comparison of the opposing parties' lawyers' bills is inadequate,"[46] particularly in a case that imposed "asymmetric burdens" on either side.[47] ETE does not dispute that Williams produced approximately ten times as many documents as ETE in this action.[48] ETE has pointed to nothing that persuades me that the amount of hours expended by Cravath in this litigation is unreasonable. I find the time expended—again, used only as a proxy to measure the reasonableness of the contingent fee—reasonable.

ETE likewise notes that Cravath's hourly rate "is the highest of any counsel in this action," averaging $624.04 per hour, compared to Vinson & Elkins' own humble hourly rate of $472.60.[49] But ETE offers nothing to suggest that the rates Cravath used in its lodestar calculation were above the rates that the market would bear for Cravath's services. Nor could it: those rates reflected a discount and a rate

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[44] Defs.' AB § I.B.
[45] *Id.*
[46] *Bellmoff v. Integra Servs. Techs., Inc.*, 2018 WL 3097215, at *3 (Del. Super. Ct. June 22, 2018).
[47] *Cf. Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 999 (Del. Ch. 2012).
[48] *See* Pl.'s Mot. § III.B; Defs.' AB § I.B.
[49] Defs.' AB § I.B.

freeze from what Cravath customarily charges.[50] I find Cravath's hourly rates to be reasonable.

Accordingly, I find that the $47,116,996.73 lodestar Cravath used to support its contingent fee is reasonable, and the fees and expenses award sought likewise reasonable.

B. The Plaintiff is Entitled to Compound Interest

The parties to the merger agreement stipulated to an award of prejudgment interest; they dispute whether Williams is entitled to quarterly compound, or merely simple, prejudgment interest under the Merger Agreement's fee shifting provision. As with the ability to shift contingent fees, the Merger Agreement is silent with respect to whether interest should be compound or simple.[51] But the parties agreed to submit any dispute arising out of the Merger Agreement to the exclusive jurisdiction of this Court,[52] and this Court has the discretion, in the absence of a provision to the contrary, to award either compound or simple prejudgment interest.[53] Accordingly, by staying silent with respect to how interest

[50] Ryan Decl. ¶¶ 38, 48. *See Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *4 (Del. Ch. Apr. 27, 2004) (rates reasonable where "[t]he plaintiffs received a 10% 'courtesy discount'" and "[t]he lead partner on the plaintiffs' case kept his hourly rate constant following inception of representation, notwithstanding two subsequent increases in his hourly rate for new matters").
[51] *See* JTX-0209.0059 (§5.06(g)).
[52] JTX-0209.0075 (§8.10(b)).
[53] *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002) (recognizing "the discretion of the Court of Chancery to award compound interest").

should be calculated and agreeing to submit the matter to this Court, the parties manifested an intent to leave that determination to the discretion of this Court.

In my discretion, I find that prejudgment interest should be compounded quarterly. "Prejudgment interest serves two purposes: first, it compensates the plaintiff for the loss of the use of his or her money; and, second, it forces the defendant to relinquish any benefit that it has received by retaining the plaintiff's money in the interim."[54] In the context of sophisticated commercial parties, "[c]ompanies neither borrow nor lend at simple interest rates."[55] Instead, compound interest more accurately reflects the "fundamental economic reality" that "[c]ompound interest is 'the standard form of interest in the financial market.'"[56] Indeed, "even passbook savings accounts now compound their interest daily."[57] It is thus "hard[] to imagine a corporation today that would seek simple interest on the funds it holds."[58] By not promptly paying, ETE—not Williams—has retained use of the $410 million breakup fee. The parties did not pluck $410 million from the ether; this amount represents Williams' out-of-pocket cost should

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[54] *Brandywine Smyrna, Inc. v. Millennium Builders, LLC*, 34 A.3d 482, 486 (Del. 2011).
[55] *Glidepath Ltd. v. Beumer Corp.*, 2019 WL 855660, at *26 (Del. Ch. Feb. 21, 2019).
[56] *ONTI, Inc. v. Integra Bank*, 751 A.2d 904, 926 & n.88 (Del. Ch. 1999), *as revised* (July 1, 1999).
[57] *Id.* at 926.
[58] *Id.*

the merger fail.[59] The merger did fail, and Williams has been without the use of *its* money. Accordingly, I find that compound interest is appropriate here because it more accurately reflects the economic realities of the parties. Williams is entitled to prejudgment interest, compounded quarterly.

C. Tolling of Prejudgment Interest is Not Appropriate

ETE contends that interest should be tolled for the period during which the trial in this action was delayed.[60] Specifically, trial was initially delayed because of an inadvertent error made by Williams' discovery vendor.[61] The trial was then further delayed because of the COVID-19 pandemic.[62] ETE contends that interest must be tolled during the entire period of delay because Williams is the "but for" cause of all the delays.[63] Absent the discovery error, says ETE, trial would have occurred before the COVID-19 pandemic.[64]

I decline to toll interest. Although this Court has the discretion to reduce prejudgment interest for "delay that is the 'fault' or 'responsibility' of a plaintiff or

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[59] To enter the merger with ETE, Williams was forced to withdraw from another transaction which bore a $410 million termination fee, JTX-1218.0130. For a more detailed discussion of the transactions, see *Williams*, 2021 WL 6136723, at *2–3.
[60] Defs.' AB § II.
[61] Letter to Vice Chancellor Glasscock from Kenneth J. Nachbar Regarding Electronic Disc. Vendor Error, Which Parties Believe Requires Extension Case Schedule, Dkt. No. 407.
[62] Judicial Action Form Completed by Dennel Niezgoda, Ct. Rep., Dkt. No. 500, Granted (Stipulation and [Proposed] Third Am. Order Governing Case Schedule), Dkt. No. 502, Judicial Action Form Completed by Dennel Niezgoda, Ct. Rep., Dkt. No. 528, Granted (Stipulation and [Proposed] Forth Am. Order Governing Case Schedule), Dkt. No. 551, and Judicial Action Form Completed by Jeanne Cahill, Ct. Rep., Dkt. No. 594.
[63] Defs.' AB § II.
[64] *Id.*

his attorney,"[65] such a reduction is typically reserved for situations involving "inordinate" or deliberate delay.[66] Here, the discovery error was inadvertent, made by a third-party vendor, and was remedied within six months.[67] And Williams had nothing to do with the subsequent delays caused by COVID-19.

A prejudgment interest award is designed to "address the lost time value of money."[68] ETE, not Williams, had the use of Williams' $410 million judgment during the entirety of this litigation; ETE's use of those funds was not tolled during the period of delay. I find no reason to toll interest here.

III. CONCLUSION

For the foregoing reasons, I find that the contingent fee is reasonable under the Merger Agreement's fee-shifting provision and under Delaware law. I also find that Williams is entitled to pre-judgment interest, compounded quarterly, with no tolling of interest. The parties should submit a proposed form of order implementing the Memorandum Opinion dated December 29, 2021 and this Memorandum Opinion.

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[65] *Bishop v. Progressive Direct Ins. Co.*, 2019 WL 2009331, at *5 (Del. Super. Ct. May 3, 2019).

[66] *See Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209, 211 (Del. 1978) ("[W]here there has been an inordinate delay the Court may take into consideration all of the actions of the parties and apportion fault for any delay, thereby reducing the interest due in accordance with the degree of the plaintiff's or his attorney's responsibility for the delay."); *See Wacht v. Cont'l Hosts, Ltd.*, 1994 WL 728836, at *2 (Del. Ch. Dec. 23, 1994) (reducing interest because plaintiff waited "nearly a decade to bring" "garden variety" case to trial, which was preceded "by long periods of inactivity, with only fitful legal skirmishes occasioned mainly by motions . . . filed by defendants").

[67] Ryan Decl. ¶¶ 20–21, 23.

[68] *See Buckeye Partners, L.P. v. GT USA Wilmington, LLC*, 2020 WL 2551916, at *10 (Del. Ch. May 20, 2020).

To the extent the foregoing requires an Order to take effect, IT IS SO ORDERED.

EXHIBIT F

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., and LE GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12168-VCG
THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant, v. ENERGY TRANSFER LP, formerly known as ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER CORP LP, ETE CORP GP, LLC, LE GP, LLC and ENERGY TRANSFER EQUITY GP, LLC, Defendants and Counterclaim Plaintiffs.	C.A. No. 12337-VCG

FINAL ORDER AND JUDGMENT

WHEREAS, on May 10-17, 2021, the Court held trial in the above-captioned actions;

WHEREAS, on December 29, 2021, the Court issued a post-trial memorandum opinion finding that (i) Williams[1] is entitled to recover the $410 million WPZ Termination Fee Reimbursement, plus interest, reasonable attorneys' fees and expenses, and (ii) Energy Transfer is entitled to recover its fees and costs in connection with subpoenaing Bumgarner's email and for bringing its motion for sanctions (the "Post-Trial Opinion"; Dkt. No. 654);

WHEREAS, on August 25, 2022, the Court found that Williams' submitted attorneys' fees and expenses were reasonable and that interest on the WPZ Termination Fee Reimbursement should accrue at the contractual rate of 3.5% per year, compounded quarterly, from June 29, 2016 (the "Fee Award"; Dkt. No. 677);

WHEREAS, Energy Transfer has indicated that it intends to appeal the Post-Trial Opinion and the Fee Award to the Delaware Supreme Court and that it seeks a stay pending appeal pursuant to Court of Chancery Rule 62;

AND WHEREAS, the parties have agreed on a proposed form of order and final judgment implementing the Court's Post-Trial Opinion and Fee Award and staying the action pending appeal;

IT IS HEREBY ORDERED, ADJUDGED, and DECREED this ____ day of ___________________, 2022 that:

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1 Undefined capitalized terms have the meanings ascribed to them in the Post-Trial Opinion.

ENTRY OF JUDGMENT

1. Williams is awarded $601,538,223.79, which comprises and incorporates:

A. $410,000,000 for the WPZ Termination Fee Reimbursement;

B. $99,143,160.17 in prejudgment interest at a 3.5% rate per year, compounded quarterly;[2]

C. $85,440,716.36 in reasonable attorneys' fees; and

D. $7,713,361.36 in reasonable expenses; less

E. $759,014.10 awarded to Energy Transfer for its fees and expenses in connection with subpoenaing Bumgarner's email and for bringing its motion for sanctions.

2. Final Judgment is entered as of this date and shall be in the amount of $601,538,223.79 plus additional interest of $48,062.82 per day beginning on September 17, 2022 and ending on the date of the entry of this Final Order and Judgment.

3. Williams is awarded post-judgment interest at a 3.5% rate per year, compounded quarterly, until the date of payment.

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2 The pre-judgment interest calculation is as of September 16, 2022, and increases by $48,062.82 per day until September 29, 2022. Because the interest compounds quarterly, this daily rate applies until September 29, 2022.

STAY PENDING APPEAL AND SECURITY

4. This Final Order and Judgment is hereby stayed pending the outcome of any appeal to the Supreme Court of the State of Delaware.

5. Upon consideration of Del. Const. Art. IV, Section 24, Supreme Court Rule 32, Court of Chancery Rule 62, and the factors set forth in *Kirpat, Inc. v. Del. Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 357 (Del. 1998), a stay is appropriate because (1) it will not result in substantial harm to Williams, (2) if the judgment is distributed to Williams and its counsel, and Energy Transfer subsequently prevails on appeal, it may be difficult to recover all the distributed funds, and (3) the public will not be harmed if the stay is granted.

6. Within fourteen (14) business days of the entry of this Final Order and Judgment, Energy Transfer shall lodge with the Register in Chancery a supersedeas bond in the amount of $617,450,000.00, which approximates the amount of the Final Judgment plus nine months of post-judgment interest.

7. The stay pending appeal granted in this order is conditioned on Energy Transfer's timely posting of a bond as described above.

SO ORDERED:

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Vice Chancellor Sam Glasscock III

Court:	DE Court of Chancery Civil Action
Judge:	Multi-Case
File & Serve Transaction ID:	68120984
Current Date:	Sep 21, 2022
Case Number:	Multi-Case

/s/ Judge Sam Glasscock

Multi-Case Filing Detail: The document above has been filed and/or served into multiple cases, see the details below including the case number and name.

Transaction Details

Court: DE Court of Chancery Civil Action

Document Type: Order

Transaction ID: 68137302

Document Title: Granted ([Proposed] Final Order and Judgment)

Submitted Date & Time: Sep 21 2022 10:34AM

Case Details

Case Number	Case Name
12168-VCG	CONF ORDER The Williams Companies, Inc. v. Energy Transfer Equity, L.P., and LE GP, LLC
12337-VCG	CONF ORDER The Williams Companies, Inc. v. Energy Transfer Equity, L.P., Energy Transfer Corp LP, ETE Corp GP, LLC, LE GP, LLC and Energy Transfer Equity GP, LLC

CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, hereby certify that on January 17, 2023, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

By File & ServeXpress

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