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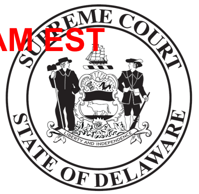

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ENERGY TRANSFER LP, et al.,	)
	)
Defendants and Counterclaim Plaintiffs Below–Appellants,	) No. 391, 2022
	)
v.	) Court below: Court of Chancery of The State of Delaware
	)
THE WILLIAMS COMPANIES, INC.,	) C.A. Nos. 12168-VCG and 12337-VCG
Plaintiff and Counterclaim Defendant Below–Appellee.	) **PUBLIC VERSION** **Efiled February 3, 2023**

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NATURE OF PROCEEDINGS

In September 2015, ETE signed a Merger Agreement to acquire Williams (the "Agreement"). Within weeks, the energy industry hit a downturn and ETE developed buyer's remorse. This case is about ETE's noncompliance with the Agreement once ETE realized it wanted out of the deal. In particular, while ETE worked consistently—and ultimately, successfully—to crater the deal, it also sought to protect its controlling insiders' financial interests in case the merger closed. The cornerstone of this strategy was ETE's March 2016 issuance of preferred securities, which benefited CEO Kelcy Warren and other ETE insiders at the expense of Williams stockholders.

This offering was blatant self-dealing. ETE's own advisors characterized it as a "wealth transfer" to ETE insiders. The Court of Chancery (Glasscock, V.C.) found that ETE's offering violated several interim operating covenants in material respects and rendered its capital structure representation materially inaccurate at closing. The court therefore awarded Williams a $410 million termination fee, plus attorneys' fees and interest. That termination fee was included in the Agreement to reimburse Williams for the fee in the same amount that ETE required Williams to pay to terminate a separate transaction Williams had agreed to before ETE's unsolicited offer to acquire Williams.

On appeal, ETE does its best to avoid discussing the issues that were the subject of a six-day trial below. ETE does not even appeal the trial court's findings that the Preferred Offering violated operating covenants and rendered the capital structure representation false, or the finding that those violations were material. Instead, ETE spends most of its brief pointing the finger at Williams and claiming—counter to all evidence—that it was ***Williams***, rather than ETE, that acted to sink the Merger. It is not until page 59 of its appeal brief that ETE even begins to defend its conduct, and ETE then devotes only eight pages to a scattershot attempt to undermine the decision below.

ETE's defenses based on Williams' conduct defy logic and were soundly rejected by the Court of Chancery. The Williams Board adopted resolutions recommending that stockholders approve the Merger. The Board never withdrew or modified its recommendation; in fact, it repeatedly reaffirmed that recommendation. Consistent with that recommendation, the Williams stockholders voted overwhelmingly to approve the Merger. ETE does not mention that inconvenient fact a single time in its brief.

Williams also rebuffed multiple stockholder lawsuits challenging the Merger. Williams proposed solutions to address the tax issue ETE raised that ultimately cratered the deal, but ETE rejected them. When ETE sought to walk away, Williams even sued ETE to compel it to close. While the trial court ultimately

concluded that ETE was entitled to decline to close and terminate the Agreement, the court also found that ETE "did not act like an enthusiastic partner in pursuit of consummation". This Court affirmed, while noting there was evidence from which the trial court "could have concluded that ETE did breach its covenants".

Ultimately, as ETE conceded, "on June 28, 2016 [the scheduled closing date], Williams was ready, willing and able to close." (Op.91.) It was ETE, not Williams, that refused to close and terminated the Merger. Williams then filed the instant claim to recover the $410 million reimbursement based on ETE's breaches. ETE brought counterclaims and asserted affirmative defenses premised on supposed breaches by Williams. On Williams' motion, the Court of Chancery dismissed ETE's counterclaim that the Williams Board adversely modified its recommendation in support of the Merger because ETE did not allege—and could not allege—that the Williams Board ever withdrew or modified that recommendation.

Before trial, the parties brought cross-motions for summary judgment. The Court of Chancery found that the Preferred Offering did not comport with ETE's operating covenants and that ETE's capital structure representation was false at closing. As noted, ETE does not appeal either ruling. Three issues thus remained for trial: (i) whether ETE's breaches were material, (ii) whether an exception in the Parent Disclosure Letter authorized the Preferred Offering and (iii) ETE's remaining affirmative defenses.

The Court of Chancery held a six-day trial in May 2021. After hearing testimony from both sides, the trial court, which was familiar with the issues from two previous trials resulting in judgments affirmed by this Court, found that Williams complied with its obligations and ETE did not. The trial court found that ETE's breaches in conducting the Preferred Offering were material. The court found, based on substantial extrinsic evidence, that the Parent Disclosure Letter did not permit ETE's violations of the Agreement. And the court found that ETE failed to prove its affirmative defenses. In the trial court's words, "Having called a dirge for the Merger, ETE must pay the piper." (Op.1-2.)

On September 21, 2022, the Court of Chancery entered its Final Order and Judgment, which also granted Williams its reasonable attorneys' fees, expenses and interest. This Court should again affirm and put an end to the saga of this failed merger.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly dismissed ETE's counterclaim that Williams adversely modified the Company Board Recommendation. ETE focuses on Williams' public statements about ETE's efforts to escape the Merger, but the Company Board Recommendation means conduct by the Board—specifically, a set of resolutions recommending the Merger. The Board never withdrew or modified those resolutions. The Agreement specifically describes ***Board*** action, and those ***resolutions*** in particular. That ensures compliance with the Delaware statute requiring that the Board "adopt a resolution approving" the Merger. And the facts of this case demonstrate why ETE's interpretation is nonsensical: the Board repeatedly reaffirmed its recommendation; Williams stockholders voted for the Merger by a wide margin; and ETE walked away for other reasons.

2. Denied. The Court of Chancery properly rejected ETE's affirmative defense that Williams was in prior material breach by supposedly not using reasonable best efforts to consummate the Transactions. ETE focuses on discussions between Williams' CEO, Armstrong, and a former employee, Bumgarner, who brought a lawsuit challenging the accuracy of ETE's synergy projections. After hearing extensively from both witnesses, the court found that Armstrong was attempting to resolve Bumgarner's concerns. That finding was not

clearly erroneous. ETE's prior-material-breach defense also fails for the separate reason that Williams' contractual compliance is measured at the time of ETE's termination of the Agreement, and it is uncontested that Williams was ready, willing and able to close, but ETE refused.

3. Denied. The Court of Chancery properly found that, as a result of the Preferred Offering, ETE violated numerous covenants in material respects and its capital structure representation was materially inaccurate at closing. The court also properly rejected ETE's contention that an exception in the Parent Disclosure Letter permitted its many violations of the Agreement. ETE's contention is wrong because the $1 Billion Equity Issuance Exception in Section 4.01(b)(v) of the Parent Disclosure Letter qualified only the equity issuance covenant in Section 4.01(b)(v) of the Agreement, not all covenants in Section 4.01(b), and certainly not the capital structure representation in Section 3.02(c)(i) of the Agreement. The court's ruling was based on the extensive extrinsic evidence Williams submitted at trial—regarding the parties' intent, contemporaneous negotiations and subsequent conduct—while ETE presented no meaningful evidence.

4. Denied. The Agreement provides that Williams is entitled to reasonable attorneys' fees and expenses, and interest. The Court of Chancery properly exercised its discretion to award Williams attorneys' fees under the terms of its contingent fee arrangement with counsel. The court was well within its

discretion in concluding that a 15% contingent fee, resulting in a 1.7x lodestar multiple, was reasonable. Nor did the court abuse its discretion in awarding Williams compound rather than simple interest.

COUNTERSTATEMENT OF FACTS[1]

I. Williams Negotiated a Merger Agreement That Protected Williams Stockholders.

In May 2015, Williams agreed to acquire the publicly held units in Williams' master limited partnership ("WPZ").[2] When ETE made an unsolicited offer to acquire Williams, ETE required Williams to abandon the WPZ transaction,[3] triggering a $410 million termination fee payment from Williams to WPZ.[4] The Agreement provided that, if the Merger failed and certain conditions were met (here, ETE's violation of covenants and representations), ETE would reimburse Williams for that $410 million payment.[5] The judgment below awarded Williams that reimbursement.

In evaluating ETE's offer to acquire Williams, the Williams Board—with advice from two independent financial advisors, Lazard and Barclays[6]—focused on ensuring Williams stockholders would be treated fairly as compared to

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[1] Unless otherwise indicated, emphases are added and quotations and citations are omitted.

[2] B2928; Op.4-5.

[3] A0444 (§3.01(w)).

[4] B2928; B2445; Op.5.

[5] A0474 (§5.06(f)); Op.23.

[6] B1065-1407; A3243/148:4-19; B2008-2267; Op.27.

ETE unitholders, due to complexities in ETE's proposed "Up-C" merger structure.[7] Instead of ETE units, Williams stockholders would receive shares in a new entity, ETC, which would own ETE Class E units.[8] Thus, "economic equivalence was paramount" to the Williams Board, whose "key concern" was that ETC shares might trade at a discount to ETE common units.[9] The Board was also concerned that ETE's CEO Kelcy Warren, who would control both ETE and ETC, might take actions to benefit ETE (and his own holdings) at ETC's expense.[10]

To address the Williams Board's concerns, through months of negotiations, ETE agreed to concessions to protect economic equivalence, including safeguards around the level of dividends paid to ETC, an equalizing payment after two years, and a $6.05 billion cash payment for ETC shares ("hook stock") to better align interests.[11]

ETE also made a "Capital Structure Representation" in Section 3.02(c)(i): that ETE's capital structure consisted of three classes of equity,

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[7] B0004; B0013, B0016 (§1.1(b)(iii)); Op.6-8.

[8] B0004; B0013, B0016 (§1.1(b)(iii)); Op.8.

[9] A3113-14/18:10-19:4; A3411-12/316:24-317:5; *see also* B0288; Op.6-7.

[10] A3577-78/482:9-483:2; *see* A3700/605:7-22; A3949/854:7-20; B2959; Op.6-7.

[11] A3114-16/19:5-21:7; A3241-42/146:11-147:14; A3298/203:17-23; A3412-13/317:24-318:17; A3513-17/418:19-422:1; A4083-84/988:16-989:3; A4325-26/1230:23-1231:1; *see* B0520; B2389 (LPA §5.15(b)(ii)(B)(ii)); B2397; Op.8-11.

none being a convertible preferred security.[12] This representation, brought down to closing, ensured ETE could not "issue a new class of securities with rights that shifted value" away from Williams stockholders.[13]

Williams and ETE further agreed to interim operating covenants that restricted ETE's conduct, to ensure that "the deal that was struck [wa]s preserved through the closing date".[14] Section 4.01(b) required that ETE "carry on its business in the ordinary course".[15] ETE also agreed to specific covenants, including that it would not take action that would:

- subject ETE to any restriction "with respect to the payment of distributions" (Section 4.01(b)(ii));
- authorize the issuance of securities "in respect of" equity securities (Section 4.01(b)(iii)); or
- "amend" ETE's partnership agreement (Section 4.01(b)(vi)).[16]

ETE and Williams also both covenanted to use "reasonable best efforts to consummate the Merger".[17]

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[12] A0445 (§3.02(c)(i)); Op.9-11.

[13] A3123/28:3-11; *see* A3299-3300/204:19-205:3; A3666-67/571:16-572:5; A0478 (§6.03(a)(i)); Op.10-11.

[14] A3116/21:8-23; A3298/203:8-23; A3665/570:1-7; B8101-02; Op.13.

[15] A0460 (§4.01(b)); Op.11.

[16] A0460-61; Op.11-13.

[17] A0468 (§5.03); *see* A3298-99/203:24-204:6; Op.20.

II. The Parties Intended and Understood That the $1 Billion Equity Issuance Exception Would Apply Only to the Equity Issuance Covenant.

The Agreement was accompanied by disclosure letters, in which ETE and Williams, separately, disclosed to each other certain required information and agreed to carve-outs to specific provisions in the Agreement.[18] Unlike the Agreement, the disclosure letters were not filed publicly, "to maintain confidentiality".[19]

Relevant to this appeal is one carve-out in Section 4.01(b)(v) of the Parent Disclosure Letter, stating that ETE "may make issuances of equity securities with a value of up to $1.0 billion in the aggregate" (the "$1 Billion Equity Issuance Exception").[20] The Court of Chancery directed the parties to present at trial extrinsic evidence regarding the parties' competing interpretations of the $1 Billion Equity Issuance Exception: whether it applies only to the covenant prohibiting equity issuances in Section 4.01(b)(v) of the Agreement (Williams' interpretation); or whether it operates as a safe harbor to immunize ETE from violating any covenant or representation if the violation was related to issuing up to $1 billion in equity (ETE's interpretation).[21]

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[18] A3171/76:3-10; Op.14, 18.

[19] A3121/26:1-6; A3510-11/415:19-416:5; Op.17, 77.

[20] A0413.

[21] SJ.Op.49-50; Op.64, 73.

ETE presented no meaningful extrinsic evidence. The only ETE witness who provided relevant trial testimony, ETE CFO Jamie Welch, was called by Williams and agrees with Williams' interpretation.[22] ETE chose not to call its deal lawyers from Wachtell, who drafted the exception.[23]

In contrast, Williams presented extrinsic evidence concerning the parties' intent, negotiation history and post-signing conduct.[24] Based on that evidence, the Court of Chancery found the parties intended the $1 Billion Equity Issuance Exception to qualify only the Section 4.01(b)(v) covenant—not the host of other covenants and the representation ETE violated with the Preferred Offering.[25]

The drafting history showed that the Agreement had always included a prohibition on issuing equity between signing and closing.[26] After lengthy negotiations, the parties' CFOs agreed to insert the $1 Billion Equity Issuance

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[22] A3504-08/409:2-413:5; Op.16.

[23] ETE submitted deposition testimony from a Wachtell lawyer who "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". (Op.17 n.79 (citing B7138-41/88:21-91:25).)

[24] Op.15.

[25] Op.76.

[26] B0070 (8/5/15 ETE draft, §5.2(b)(xi)); B0243 (8/7/15 WMB draft, §4.01(b)(iv)); Op.15.

Exception directly ***into the text of that covenant*** in the Agreement itself.[27] The day before signing, Williams and ETE each moved a number of exceptions that had been contained within particular covenants in the Agreement—including the $1 Billion Equity Issuance Exception—into their respective disclosure letter.[28] When the exceptions were moved, the parties retained the structure tying each specific exception to its corresponding covenant through the use of section numbers in the disclosure letters.[29]

Both CFOs testified they understood that exception to apply ***only*** to the covenant prohibiting equity issuances in Section 4.01(b)(v) of the Agreement.[30] And both CFOs testified that the parties intended the eve-of-signing move to protect commercially sensitive exceptions and did ***not*** intend to make substantive changes to deal terms.[31]

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[27] A3117/22:8-15, A3119-20/24:2-25:7; A3306-07/211:17-212:19; A3499-507/404:15-412:3; B0459-60 (8/12/15 ETE draft, §4.01(b)(iv)(A)); B1566-57 (§4.01(b)(v)(E)); B1562-63 (same); B2439 (§4.01(b)(v)(1)); Op.15-16.

[28] *Compare* B1491-97, *with* B1597-1600 (movement to Company Disclosure Letter); *compare* B1900-04, *with* B1978-80 (movement to Parent Disclosure Letter); *see also* A3120/25:8-24; A3501-02/406:14-407:4, A3508-11/413:6-416:5; A3307-09/212:20-214:4; Op.16.

[29] *Supra* note 28.

[30] A3121-22/26:19-27:2; A3504-08/409:2-413:5; Op.16.

[31] A3120-21/25:12-26:6; A3510-11/415:19-416:5; Op.17.

Williams' outside counsel, Minh Van Ngo, told Wachtell that Williams agreed to the move "with the understanding that it was nonsubstantive" and that he understood exceptions in the disclosure letters to be section-specific.[32] Van Ngo further testified that a savings clause in the transaction documents—which allows disclosures in one section to apply to other sections only where the relevance to information called for by another section "is reasonably apparent on its face" (A0445 (§3.02); *see also* A0390 (Gen. Term No. 4))—was intended to address only obvious drafting errors.[33] ETE presented no contrary evidence.

Professor John Coates testified that ETE's interpretation is inconsistent with M&A custom and practice and would create a "gotcha" that parties customarily intend to avoid.[34] ETE offered no expert testimony on the issue.

After signing the Agreement, the parties acted consistent with Williams' interpretation. Williams proposed an equity issuance that involved a waiver of certain incentive distribution rights ("IDRs").[35] Although Williams' Company Disclosure Letter also contained an equity issuance exception, Williams

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[32] A3307-10/212:20-215:8; B1667 (§4.01(b)(v)(F)); B2439 (§4.01(b)(v)(1)); Op.17.

[33] A3309-10/214:24-215:8, A3382-83/287:11-288:3; Op.18.

[34] A3670-71/575:3-576:5.

[35] A3124-27/29:13-32:10; A3511-12/416:6-417:18; B2449-50.

asked ETE's permission because a separate covenant prohibited IDR waivers.[36] ETE refused to consent, and Williams abandoned the proposed issuance.[37]

III. After Signing, ETE Sought To Escape the Merger.

On September 25, 2015, a majority of the Williams Board (8-5) voted in favor of the Merger,[38] and "on September 28, 2015, the [Williams] Board (a) approved and declared advisable and resolved to recommend to its stockholders the adoption of the merger agreement, the merger and the other merger transactions and (b) declared that it is in the best interests of the [Williams] stockholders for [Williams] to enter into the merger agreement and consummate the merger and the other merger transactions. Accordingly, the [Williams] Board recommend[ed] a vote 'FOR' the [Merger]."[39]

Shortly thereafter, the energy markets began to "crater".[40] ETE was concerned that if the deal closed, ETE could face a "potential ratings downgrade".[41]

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[36] A3128/33:14-20; A3512/417:2-23; A0457-58 (§4.01(a)(v), §4.01(a)(x)); A0379 (§4.01(a)(v)); Op.18-19.

[37] A3124-28/29:13-33:20; A3511-12/416:6-417:23; Op.19.

[38] B2950-51; A3955-56/860:13-861:16; B5077/305:9-20, B5079-80/307:4-308:7; B4364-65/69:22-70:6, B4473/178:11-22; *see* A3311/216:16-21; Op.20.

[39] B2477; *see* A1566-67¶49.

[40] A3390/295:6-21; Op.23, 41.

[41] A3420-24/325:10-329:2, A3425/330:2-11; Op.23.

By January 2016, Warren no longer wanted to close the Merger as structured.[42] On January 7, 2016, Warren told ETE executives and lawyers that he was "very much opposed to the" Merger and would "walk away" "[i]f he could".[43] The following week, ETE approached Williams to "discuss[] the possibility of terminating the Transaction" and, if Williams refused, threatened "to cut distribution[s] to zero for 2 years".[44] The Williams Board decided to proceed with the Merger.[45]

ETE then did two things. It launched a self-dealing transaction to protect ETE insiders if the deal closed.[46] And ETE looked to find a way to avoid closing, ultimately seizing on a tax "opportunity".[47]

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[42] A3390-91/295:6-296:2, A3403-05/308:16-310:21; A3517-19/422:2-424:3, A3519/424:8-14, A3520/425:6-13; Op.23.

[43] A3518-19/423:14-424:14; Op.24.

[44] B2481; B2483; A0766; A3131-32/36:9-37:18; A3245/150:4-24, A3250-52/155:6-157:3; A3302/207:7-14; A3428-29/333:18-334:17; Op.24-25.

[45] A3246-47/151:1-152:3, A3250-52/155:20-157:3; A3132/37:6-18; A0768.

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

[47] B2742.

A. The Preferred Offering Benefited ETE Insiders at the Expense of Williams Stockholders.

ETE retained Perella Weinberg, which designed a convertible unit offering as a deleveraging measure.[48] But Warren had something more in mind: he personally stood to lose over $200 million per year in cash flow if ETE eliminated distributions.[49] So Warren directed his team to add a preferred payment that would protect his and other insiders' cash flows.[50] Warren insisted on the preferred payment to "support his living", even though then-CFO Jamie Welch told Warren there was no business justification for it.[51] As then-President John McReynolds recognized, the preferred payment meant that the offering would not save cash if ETE cut distributions.[52]

On February 12, ETE told Williams it wished to make a public securities offering with the preferred payment term. Williams refused to consent, on its bankers' advice, because the proposed offering disproportionately benefited

[48] B2484; A3530/435:13-19, A3553-55/458:5-60:20; Op.28.

[49] A3429-30/334:18-335:24; A3483-84/388:6-389:24; Op.30.

[50] B2485; A3559-61/464:24-466:6; A3494-96/399:3-401:24; Op.30.

[51] A3485-88/390:22-393:3, A3493-97/398:21-402:14; A3523-24/428:14-429:19; Op.30-31.

[52] B2688; A3562-64/467:2-469:24; Op.31.

participating ETE unitholders over Williams stockholders.[53] ETE then recast the issuance as a private offering (the "Preferred Offering"), with even more favorable terms for ETE insiders, which ETE completed on March 8, 2016, "without Williams' consent" and without even informing Williams until afterward.[54]

The Preferred Offering created a new class of convertible equity available only to ETE insiders.[55] The transaction was "a hedge meant to protect insiders from the anticipated bad effects of the coming merger".[56] As the Court of Chancery found (Op.41), ETE anticipated potential distribution cuts by January 2016.[57] The Preferred Offering ensured that if ETE cut distributions to common unitholders following the Merger, preferred unitholders would still receive substantial quarterly payouts.[58] Over 85% of the preferred units were issued to Warren, McReynolds and ETE co-founder Ray Davis.[59] The Preferred Offering thus

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[53] A3149/54:9-22; A3257-63/162:22-168:23; Op.34.

[54] A3304/209:2-15; *see* B7114-17/64:4-67:17; B6217-22/191:11-196:3; Op.28, 35.

[55] A3264-67/169:9-172:3, A3267/172:18-22; B2728, B2731; A3585-87/490:20-492:11; Op.36.

[56] *Unitholder Litig.*, 2018 WL 2254706, at *1; Op.35.

[57] A3131/36:9-23, A3132/37:6-18; A3245/150:4-24, A3250-52/155:6-157:3; B2481; B2483; A0766; A3302/207:7-14; A3428-29/333:18-334:7.

[58] *Unitholder Litig.*, 2018 WL 2254706, at *7.

[59] A4843-45/1748:16-1750:18; Op.36-37.

transferred value from Williams stockholders to ETE insiders, undermining Williams' bargained-for economic equivalence. As ETE's advisors at Perella Weinberg concluded, if ETE cut distributions on its common units, the offering would "represent a wealth transfer" to participating unitholders.[60] Even McReynolds conceded that would be "unfair" to Williams' stockholders.[61]

At trial, ETE denied that the Preferred Offering's purpose was to protect insiders and maintained that it did not anticipate distribution cuts until April 2016, but the trial court found ETE's evidence "unconvincing".[62] Tom Long, who succeeded Welch as ETE's CFO, had testified at a previous trial that ETE did not anticipate distribution cuts until it received April 7 projections from Williams showing a "huge" drop in distributable cash flow.[63] ETE did not call Long to testify at this trial, and the trial court found his previous testimony "was incorrect".[64] ETE instead called a more junior employee, Dylan Bramhall, who testified that distribution cuts were "above [his] pay grade" and he "did not know what the

[60] B2698; Op.33.

[61] A3579/484:5-10.

[62] Op.42.

[63] B3882-83/274:16-275:4; Op.42.

[64] B7871-72/164:23-165:12; Op.42.

executive team was discussing."[65] Bramhall did admit that, months earlier, ETE had incorporated projections closely approximating the April 7 projections.[66] The trial court found that "[t]he evidence presented at trial demonstrated that ETE anticipated the potential distribution cuts as early as January 2016", well before ETE launched the Preferred Offering "sweetheart deal" for ETE insiders.[67]

B. ETE Seized a Tax "Opportunity" To Avoid Closing.

Warren continued to discuss concerns about closing with ETE's senior leaders, including Brad Whitehurst, head of tax.[68] Ultimately, ETE avoided closing the Merger based on its tax counsel's professed inability to provide a required tax opinion.[69] ETE communicated the purported tax issue to Williams on April 12, 2016.[70] At the 2016 expedited trial, when Williams sought to compel ETE to close, Whitehurst testified that he had an "epiphany" regarding the transaction structure that led him to discover a tax issue.[71] Following trial in 2021 on a fuller record, the Court of Chancery found that the "record in this trial proved Whitehurst's 2016

[65] A4671-73/1576:4-1578:19; Op.42-43.

[66] A4667/1572:6-20; Op.43.

[67] A3961-62/866:17-867:5; Op.38, 41.

[68] A3415-16/320:23-321:8, A3416-17/321:23-322:8, A3420/325:5-9.

[69] A3471/376:4-11; A3741/646:8-17; Op.52.

[70] B8146¶28.

[71] B3395/150:19-151:23; Op.52.

testimony to be false".[72] In fact, Whitehurst's subordinate first raised the issue as an "Opportunity" to walk away from the Merger.[73] After ETE successfully avoided closing the Merger due to the tax issue, Whitehurst—who had helped design the failed transaction structure—was promoted to CFO[74] and paid a bonus of 125% of his annual base salary.[75]

The Court of Chancery did not reach Williams' tax claims, and thus they are not addressed here, but ETE's conduct in connection with the tax issue also breached the Agreement and would have required the same award.

IV. Williams and the Williams Board Did Everything Necessary To Close, but ETE Walked Away.

In light of the market turmoil and ETE's incendiary actions, the Williams Board continued to discuss the deal's merits internally. The Board never changed its recommendation in favor of the Merger or held a vote to do so.[76] No

[72] Op. 53.

[73] A4177/1082:13-18; B2742.

[74] A4352/1257:16-19.

[75] A4352/1257:5-15.

[76] *See* A3961/866:8-12; A3709-10/614:17-615:10, A3711/616:4-6; B5098/326:4-6; B4479/184:14-20; A3315-16/220:19-221:6; Op.20-22; MTD.Op.18.

director felt pressure to reconsider their support for the Merger.[77] The Board heard from its financial advisors, Lazard and Barclays, that even under new market conditions, the Merger would provide Williams stockholders with billions of dollars in value.[78] In numerous press releases—including on January 15, February 17, April 14, May 13 and May 25, 2016—the Board reaffirmed it was "unanimously committed" to completing the transaction and enforcing Williams' rights under the Agreement.[79] And the Board committee responsible for overseeing the Merger conducted a week-long roadshow to persuade stockholders to vote yes.[80]

Williams also successfully defended stockholder lawsuits challenging the Merger.[81] One plaintiff, John Bumgarner, was retired from Williams after a career overseeing mergers and acquisitions and advising the then-CEO.[82] Bumgarner took issue with a statement in a joint ETE-Williams press release that

[77] A3949/854:7-856:21; A3954/859:17-860:12; B6659/276:9-14; B5086/314:11-18; B4357-58/62:19-63:10; B4057/107:18-24; B5356-58/167:9-169:15; A1475/32:21-23; Op.20-22.

[78] B2492; B2634; A3133/38:3-39:18; A3252/157:6-158:2; A3254/159:1-160:16; Op.27.

[79] A0768; B2714; B3017; A1662; A1665; Op.50-51.

[80] A3156/61:14-23; B5106-07/334:18-335:9; Op.51.

[81] Op.43 & n.260.

[82] A3998/903:6-904:11; A3715/620:6-23; Op.44.

ETE projected commercial synergies of $2 billion in annual EBITDA by 2020.[83] Based on his experience in the pipeline business, Bumgarner believed there was "a lot of BS in those numbers",[84] which he described as "phony".[85] As it turned out, during integration planning (not because of Bumgarner's suit), a joint ETE-Williams taskforce reduced ETE's projection by more than 90%, publicly disclosing a reduction in March 2016 to $170 million annually and again in May 2016 to $126 million annually.[86]

Before suing, Bumgarner brought his concerns directly to Williams' CEO, Alan Armstrong, whom Bumgarner knew from his time at the company.[87] Bumgarner was "detail oriented", "persistent", "aggressive" and "direct".[88] Armstrong attempted to use his relationship with Bumgarner to resolve Bumgarner's issues, telling him the $2 billion figure was ETE's and the Williams Board had not relied upon it.[89] Armstrong informed the Williams Board Chairman of Bumgarner's

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[83] B2442-43; A3719/624:6-24; A4000/905:1-14; Op.44-45.

[84] A4000/905:1-9.

[85] A4002/907:5-10; *see also* B2540 (noting that certain synergies were "not probable or even possible").

[86] A3135/40:17-42:3; B2739-40; B2814; Op.40, 45 n.268.

[87] A3715/620:6-13; A3720-22/625:19-627:2; A4003/908:18-910:10; Op.44-45.

[88] A3715-16/620:24-621:6.

[89] A3719/624:6-24; A4014/919:15-19; Op.45.

litigation threats, but did not bring lawyers into the discussions for fear that would be counterproductive and lead to "a very aggressive fight".[90]

Armstrong and Bumgarner primarily communicated in person or by email.[91] Armstrong used two personal email accounts (Gmail.com and Cox.net) to communicate with Bumgarner.[92] During the pendency of this litigation, Armstrong closed his Gmail account (but not his Cox account).[93] The Court of Chancery found that constituted spoliation, but also found that "ETE was able to recover Armstrong's communications with Bumgarner by subpoenaing Bumgarner's emails."[94] In his communications with Bumgarner, Armstrong attempted to "educate [Bumgarner] on the synergies" by pointing Bumgarner to publicly available information[95] and explaining Bumgarner did not "have a very good case".[96]

Bumgarner sued Williams and ETE on January 14, 2016, seeking correction of the synergy projection before the Williams stockholder vote.[97] On

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[90] A3732/637:12-638:17; Op.45.

[91] A3763/668:5-9; Op.46.

[92] A3763/668:14-17; Op.46.

[93] A3727/632:1-18; Op.46, 92.

[94] B3948; B4295¶2; Op.46, 93.

[95] *See, e.g.*, A0588; A0837.

[96] A4066/971:18-972:3; Op.48.

[97] A0744¶¶1, 16; Op.47.

April 28, 2016, the court granted Williams' motion to dismiss most of Bumgarner's claims.[98] Williams settled Bumgarner's remaining claims on June 16, 2016, before the Closing Date, for a corrective disclosure that simply referenced the previously updated synergy estimates.[99]

On April 6, 2016, Williams brought suit in the Court of Chancery seeking to unwind ETE's Preferred Offering.[100] For personal jurisdiction reasons, Williams filed suit in Texas against ETE's CEO Kelcy Warren, the largest participant in the Preferred Offering.[101] The Texas action alleged Warren tortiously interfered with the Agreement by wrongfully using his control of ETE to cause ETE to undertake the Preferred Offering for his personal benefit.[102] After weeks of stalling, Warren agreed not to contest personal jurisdiction in Delaware, and the Texas action was consensually dismissed.[103]

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[98] *Bumgarner v. Williams Companies, Inc.*, 2016 WL 1717206 (N.D. Okla. Apr. 28, 2016).

[99] B3352; Op.49.

[100] B2743; Op.58.

[101] *See Williams Companies, Inc. v. Warren*, No. DC-16-03941 (Dist. Ct. Dallas Cty.).

[102] A0989; Op.58.

[103] B3014-15/22:6-23:14.

On May 13, 2016, Williams brought a second suit in the Court of Chancery, this time seeking to compel ETE to close despite the purported tax issue.[104] After an expedited trial, the court denied Williams' requests for specific performance and granted ETE a declaration permitting it to terminate the Merger on the basis of the failure of the Tax Opinion.[105] This Court affirmed the judgment, although it disagreed with the trial court's analysis of ETE's tax-related efforts: ETE was obligated "to take all reasonable steps to solve problems and consummate the transaction", and "[t]here was evidence, recognized by the Court of Chancery, from which it could have concluded that ETE did breach its covenants".[106]

On June 27, 2016, Williams' stockholders overwhelmingly approved the Merger, with over 80% of votes cast in support.[107] On June 28, 2016, the agreed-upon Closing Date, Williams' counsel arrived at the offices of ETE's counsel, ready, willing and able to close.[108] ETE informed Williams that ETE would not close based

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[104] B2830; Op.58.

[105] *Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682 (Del. Ch. June 24, 2016).

[106] *Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 272-73 (Del. 2017).

[107] B8147¶33; Op.52.

[108] B8148¶36; Op.57.

on the failure to obtain the required tax opinion, a condition precedent to closing.[109] ETE terminated the Agreement the next day due to passage of the Outside Date.[110]

Throughout, ETE's recitation of facts conflicts with the Court of Chancery's post-trial findings and lacks support in the record. As one example, just as there was no "conceal[ed]" effort with Bumgarner "to derail the Merger", there were no "celebratory drinks" at Williams when ETE refused to close.[111] The celebration happened at ETE. Warren treated his senior management team, including Whitehurst, to a week-long trip to Rome, Italy.[112]

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[109] B8148¶36; Op.57.

[110] B8148-49¶38; Op.58.

[111] *Compare* ETE.Br.18, 20, 34, *with* Op.44 (finding no "clandestine plot to thwart" the Merger); A3771-72/676:22-677:22, A3878-79/783:19-784:6.

[112] A3477-78/382:16-383:7, A3478/383:16-23.

ARGUMENT

I. The Court Correctly Dismissed ETE's Board Recommendation Counterclaim.

A. Question Presented

Did the Court of Chancery correctly dismiss ETE's counterclaim alleging adverse modification to the Company Board Recommendation where it is undisputed the Williams Board never modified (and, in fact, repeatedly reaffirmed) the resolutions in favor of the Merger? Williams preserved this argument at B3504-19; B3562-74; B3597-604.

B. Scope of Review

The Court reviews *de novo* the grant of a motion to dismiss under Court of Chancery Rule 12(b)(6).

C. Merits of Argument

After ETE successfully avoided closing the Merger and itself terminated the Agreement, ETE launched a cynical attempt to capture a $1.48 billion Termination Fee. ETE brought a counterclaim asserting that public statements by Williams *de facto* modified the Williams Board's resolutions recommending that stockholders vote for the Merger. The conduct ETE alleged, however, had nothing to do with the Board's merger recommendation. ETE instead alleged that Williams "modified" the Board recommendation by making public statements "denigrating" ETE executives and "postur[ing] for a walk-away payment" (ETE.Br.39), but ETE

did not and could not plead that the Board withdrew or modified in any way the resolutions containing its recommendation. As the Court of Chancery noted, the Board instead repeatedly reaffirmed the recommendation (including in the very public statements that ETE cites as a basis for this counterclaim); over 80% of Williams' stockholders followed it and voted to approve the Merger; and Williams vigorously litigated (but lost) a claim to compel ETE to close. (B8147¶33; MTD.Op.17.) ETE's theory thus stands the Agreement and the facts on their head.

ETE also ignores that Williams' statements about ETE executives were justified: they responded to ETE's egregious conduct that formed the basis for the trial court's liability finding below. ETE's theory would perversely reward a buyer for engaging in misconduct and then claiming that the target company's public statements protesting the buyer's misconduct constitute a change in board recommendation. The Agreement does not allow ETE such a "windfall". (MTD.Op.17.) The Court of Chancery properly dismissed ETE's counterclaim.

1. The "Company Board Recommendation" Means the Williams Board's Resolutions.

The plain language of the Agreement forecloses ETE's counterclaim. Section 4.02(d) uses the term "Company Board Recommendation", which Section 3.01(d)(i) defines to mean the "resolutions" the Williams Board adopted in favor of the Merger. (A0434, A0464.) As the Court of Chancery held, "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." (MTD.Op.18.) Defining the Company Board Recommendation as Board resolutions is consistent with its purpose, which is to confirm compliance with the Delaware statutory obligation that the Williams Board "***adopt a resolution*** approving an agreement of merger or consolidation and declaring its advisability". 8 *Del. C.* §251; *see In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 491 (Del. Ch. 2013) ("The board's declaration of advisability is typically referred to as the board's merger recommendation."). Thus, the Company Board Recommendation is a set of mandated Board resolutions. Any "withdrawal" (or adverse modification) of the Company Board Recommendation prohibited by Section 4.02(d) must be of those Board resolutions. (MTD.Op.18-19; MTD.Rhg.Op.10-12.)[113]

ETE wrongly argues that the term "resolution" is not included in the definition of "Company Board Recommendation" in Section 3.01(d)(i). (ETE.Br.36.) In fact, "resolution" appears twice in that section, with a grammatical construction that makes ETE's reading impossible. *See ITG Brands, LLC v. Reynolds Am., Inc.*, 2019 WL 4593495, at *4 (Del. Ch. Sept. 23, 2019) ("In discerning the plain meaning of a contract, the court may look to the grammatical

[113] ETE ignores the court's letter opinion denying ETE's motion for reargument (B3933-47) and omits the opinion from its Appendix.

construction of a contractual provision."). The noun "resolutions" appears immediately before the four clauses ETE quotes, which describe the "resolutions":

> "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 ..., (C) directing that the adoption of this Agreement be submitted to a [stockholders'] vote ..., (D) recommending that the stockholders ... adopt this Agreement ((A), (B), (C) and (D) being referred to herein as the 'Company Board Recommendation'), ***which resolutions*** ... have not been rescinded, modified or withdrawn in any way." (A0434 (§3.01(d)(i)).)

Clauses (A) through (D) have no independent meaning, apart from the noun "resolutions". Section 4.02(d), which uses "Company Board Recommendation" as a noun, would make no sense if (as ETE contends) that term were defined as a series of floating adjectival phrases without a noun to anchor them. This reading is confirmed by the fact that, following the definition, Section 3.01(d)(i) refers again to the Company Board Recommendation, in a dependent clause that begins with "which resolutions". This dependent clause expressly refers to the Company Board Recommendation as "resolutions". *See ITG Brands, LLC v. Reynolds Am.*, *Inc.*, 2017 WL 5903355, at *7 (Del. Ch. Nov. 30, 2017) ("The second, dependent clause describes the nature of the 'agreements' to be reached.").

The Company Board Recommendation is defined to mean the Board's "resolutions" in favor of the Merger. ETE did not allege the Board ever withdrew or modified those resolutions. (MTD.Op.18.)

2. Section 4.02(d) Concerns Only Board Actions.

The definition of Company Board Recommendation to mean the Board's merger resolutions is reinforced by Section 4.02(d)'s plain language. ETE's claim is that Williams, the ***Company***, breached Section 4.02(d) by making public statements about ETE's conduct. (ETE.Br.39-40.) But Section 4.02(d) concerns only ***Board*** actions because only the Board can adopt (or withdraw) resolutions. By its plain language, Section 4.02(d) does not apply to action by the Company that takes place without formal Board action.

We know this because the subject of the verbs in the first sentence of Section 4.02(d) is not "the Company"; it is "the Board of Directors of the Company []or any committee thereof". (A0464 (§4.02(d)).) Neighboring provisions, such as Section 4.02(a), have "the Company" as the subject.[114] That distinction is deliberate and meaningful. *See In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 578 n.77 (Del. 2019) (explaining that "[t]he use of different language in the two sections shows the parties knew how" to cover an issue differently when that was their intent).

[114] *See, e.g.*, A0463 (§4.02(a)) ("[T]he *Company* and its Subsidiaries shall not ... solicit ... any Company Takeover Proposal ....").

The use of "the Board" as the subject in Section 4.02(d) is consistent with the definition of Company Board Recommendation in Section 3.01(d)(1) to mean a set of Board resolutions.

We further know Section 4.02(d) is about Board actions from the "fiduciary out" provision in its second sentence. A "fiduciary out" is a required provision that allows ***directors*** to change their recommendation if necessary to fulfill their fiduciary duties. *See Paramount Commc'ns v. QVC Network*, 637 A.2d 34, 51 (Del. 1994) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."). There would be no purpose to, and no need for, a fiduciary out for actions by the Company.

Thus, as the Court of Chancery held, a breach of Section 4.02(d) requires adverse action ***by the Board***. (MTD.Rhg.Op.11.) ETE did not plead any. ETE points to statements by the Company (ETE.Br.39-40), but these are not formal Board action. (*See, e.g.*, A1572-73 (Am.Countercl.) (Williams' purported changes to language in press releases to describe Board's continuing support for Merger); A1575-84 (Williams' litigation against ETE and its CEO); A1584-89 (Williams' disclosure that fairness opinions Board received were no longer valid).) Because ETE did not (and cannot) allege that the Board withdrew, or adversely modified or

qualified, its recommendation in favor of the Merger, ETE failed to plead a breach of Section 4.02(d). (*See* MTD.Op.17.)

3. Section 4.02(f) Is a Safe Harbor And Does Not Independently Prohibit Anything.

Faced with the clear language of Section 3.01(d) defining "Company Board Recommendations" as Board "resolutions" and the clear language of Section 4.02(d) addressing conduct by the Board, ETE relies on a separate provision found in Section 4.02(f). ETE contends that, if only changes "via formal board resolutions" could constitute a breach of Section 4.02(d), Section 4.02(f) would be unnecessary surplusage. (ETE.Br.41.) ETE is wrong. In fact, Section 4.02(f) supports Williams' position.

Section 4.02(f) permits the Company to make disclosures to stockholders in aid of the directors' exercise of their fiduciary duties. (*See* A0464-65 (§4.02(f)).) The first part of Section 4.02(f) is a safe harbor. (*See* A0464 ("Nothing contained in this Section 4.02 or elsewhere in this Agreement shall prohibit ....").) As a safe harbor, Section 4.02(f) does not prohibit anything; the source for a conduct prohibition must be found elsewhere in the Agreement. *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 365-66 (Del. 2013) (conduct outside a contractual safe harbor does not "automatically put [the party] in breach" because the "analysis focuses on the otherwise controlling standard" of conduct).

The safe harbor is much broader than Section 4.02(d), and permits certain conduct that might otherwise be prohibited by any of the covenants in the Agreement.[115]

The proviso at the end of Section 4.02(f) states that certain disclosures to stockholders, including those required by directors' fiduciary duties, "shall be ***deemed*** to be a Company Adverse Recommendation Change unless the [Board] reaffirms its recommendation ...." (A0465.) Contrary to ETE's suggestion (ETE.Br.37), that proviso does not provide that public statements compelled by directors' fiduciary duties meet the definition of Company Adverse Recommendation Change or violate Section 4.02(d). Rather, the proviso provides that such statements "shall be ***deemed***" to be a Company Adverse Recommendation Change, such that Williams would be required to pay the $1.48 billion Termination Fee, unless the Board at the same time reaffirms the Company Board Recommendation. (A0465.) Thus, the Section 4.02(f) proviso does not expand the scope of conduct prohibited by the first sentence of Section 4.02(d), which is the provision at issue on ETE's counterclaim.

The Section 4.02(f) proviso is irrelevant here for two reasons. ***First***, the Board never determined a need for the Company to make disclosures to stockholders in aid of directors' exercise of their fiduciary duties. ETE does not

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[115] *See, e.g.*, A0463 (§4.02(a)); A0466-67 (§5.01(b)).

allege that any of the statements challenged in this case related to the Board's exercise of a fiduciary out. (*See* ETE.Br.39-40 (failing to identify any such action).) ***Second***, in the public statements ETE challenges, Williams consistently stated that the Board ***reaffirmed*** its recommendation in favor of the Merger. (*See* A1041 (cited at ETE.Br.30); A1056 (same); A1131 (same); A1130 (cited at ETE.Br.38); A1172 (cited at ETE.Br.39).)

ETE thus misunderstands the distinction between Sections 4.02(d) and 4.02(f). The former prohibited the Board (subject to a fiduciary out) from withdrawing the merger recommendation, while the latter is a safe harbor that permitted the Company to make certain public statements notwithstanding any other covenants. ETE cannot use Section 4.02(f) to expand Section 4.02(d) beyond its clear text.

4. Williams' Reading of Section 4.02(d) Makes Sense, While ETE's Reading Is Absurd.

Williams' reading of Section 4.02(d) is required by the plain language. It is also consistent with Delaware law on a board's merger recommendations and directors' fiduciary obligations, as shown above. The parade of horribles in ETE's brief (ETE.Br.41-42) fails because, as the trial court observed, "statements by Williams adverse to the Merger would presumably violate the best efforts clause, entitling the counterparty to actual damages, if any". (MTD.Rhg.Op.13.)

In contrast, ETE's interpretation would produce an absurd result. Section 4.02(d) protected ETE if the Williams Board withdrew its recommendation before the stockholder vote. Here, (1) the Williams Board repeatedly reaffirmed the Company Board Recommendation; (2) the Williams stockholders overwhelmingly approved; and (3) ETE terminated on other grounds. ETE does not explain why the parties would have contracted to award a $1.48 billion windfall for a change in Board recommendation to a buyer that itself terminates, at the expense of the very stockholders who approved the merger. The parties could not possibly have intended such a "nonsensical" result. (MTD.Rhg.Op.12.) This Court should affirm.

II. The Court of Chancery Properly Found That Williams Did Not Materially Breach the Merger Agreement.

A. Question Presented

Did the Court of Chancery commit clear error in finding Williams was not in material breach of its efforts obligations under the Agreement? Williams preserved this argument at A4992-99; B8227-39.

B. Scope of Review

This Court reviews for clear error the Court of Chancery's finding that Williams did not materially breach its efforts obligations under the Agreement. *Backer v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94-95 (Del. 2021). Substantial deference is given to factual determinations based on live testimony. *Schock v. Nash*, 732 A.2d 217, 224 (Del. 1999).

C. Merits of Argument

ETE improperly combines three separate issues into its second appeal point. Their only commonality is that they relate to ETE's defenses that Williams was in material breach of contract at the time ETE terminated the Agreement, and that Williams' purported prior material breach excuses ETE's own breaches. Contrary to ETE's assertion (ETE.Br.43), these are affirmative defenses on which ETE bore the burden of proof. (Op.85-86); *see AB Stable VIII LLC v. MAPS Hotel One & Resorts One LLC*, 2020 WL 7024929, at *48-50 (Del. Ch. Nov. 30, 2020),

aff'd, 268 A.3d 198 (Del. 2021). ETE fails to show that the Court of Chancery clearly erred in finding no material breach by Williams.

1. The Court of Chancery Did Not Clearly Err in Finding Williams Did Not Breach Its Efforts Obligations.

The dispositive facts concerning Williams' efforts to consummate the Transaction are undisputed. Williams defeated or settled all stockholder lawsuits (including Bumgarner's), obtained the vote of more than 80% of stockholders and showed up to close at the scheduled closing. (Op.91.)[116] "ETE concedes that on June 28, 2016, Williams was ready, willing and able to close." (Op.91.) As the Court of Chancery found, these facts establish that Williams was not in material breach of its efforts obligations.

ETE's defense that Williams supposedly breached its obligations to use "reasonable best efforts" to consummate the Transactions (A0468 (§5.03(a))) and to "carry on its business in the ordinary course" (A0456 (§4.01(a))) fails for two separate reasons: (1) ETE shows no clear error in the Court of Chancery's findings that Williams ***never*** was in material breach and (2) ETE is wrong as matter of law on Williams' ability to cure any purported breach before closing.

[116] *See* B3352; B8147-48¶¶33-36.

a. <u>Armstrong's communications with Bumgarner did not materially breach Williams' efforts obligations.</u>

ETE focuses on communications between Williams CEO Alan Armstrong and John Bumgarner, a retired Williams executive and stockholder, and friend of Armstrong's, who brought a lawsuit challenging the accuracy of ETE's statements about projected synergies. The Court of Chancery observed over 4½ hours of live testimony from Armstrong and 1½ hours of videotaped testimony from Bumgarner, a non-party witness who lives in Tulsa, Oklahoma.[117] Based on this testimony, the court found that Armstrong's communications with Bumgarner "were intended to assuage Bumgarner's concerns about the synergies estimates, not to thwart the Merger." (Op.89.) ETE does not and cannot show that finding was clear error. Thus, ETE's appeal is simply a disagreement with how the Court of Chancery weighed the evidence and evaluated witnesses' credibility at trial.

ETE's argument that Armstrong "assist[ed] Bumgarner" with a lawsuit to "torpedo the Merger" (ETE.Br.47) mischaracterizes the record. As noted above (pp.22-23, *supra*), Bumgarner took issue with ETE's synergies estimate and sought a corrective disclosure prior to the Williams stockholder vote.[118] It turned out

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[117] *See* A3690-942; A3994-4080.

[118] B2443-44; A4000/905:1-14.

Bumgarner was right, as without any prompting from Bumgarner's lawsuit,[119] Williams and ETE worked together to quantify the synergies and substantially reduced the projection.[120]

ETE ignores the trial testimony from Armstrong and Bumgarner upon which the Court of Chancery relied for its findings. Both testified that Armstrong tried to ***discourage*** Bumgarner from bringing the lawsuit.[121] Bumgarner testified Armstrong "played it straight", behaved like a "Boy Scout" and had nothing to do with Bumgarner's decision to sue.[122] Bumgarner did not use information from Armstrong in his lawsuit.[123] Notwithstanding the Williams directors' differences of opinion about Armstrong, every director who was asked testified that Williams used best efforts to close.[124] ETE presented no evidence to refute this testimony.

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[119] A3137/42:4-13; A4722/1627:18-1628:4.

[120] A3135/40:17-42:3; B2739-40; B2906; A4720/1625:9-1627:3.

[121] *See, e.g.*, A3720/625:19-626:19; A4000/905:1-906:14.

[122] A4005/910:12-22; A4065/970:20-23; A4066/971:15-972:19.

[123] A2207/273:20-23.

[124] B4320/25:7-14, B4413/118:2-5, B4472/177:12-23, B4479/184:9-12; B4954-56/182:25-184:6, B5087-88/315:25-316:23, B5091-92/319:25-320:5, B5105/333:21-24; B4119/169:5-22, B4128/178:2-8, B4232/282:7-20; A3958/863:9-13; B4605-06/88:13-89:3; B5331-33/142:14-144:5, B5351/162:2-25; B6769-70/43:20-44:16, B6803-04/77:24-78:3, B6960-62/234:15-236:18; B6447-48/64:23-65:3, B6651-52/268:16-269:1; B7291-92/71:9-72:11; B5661/95:7-22, B5951/385:6-11.

ETE argues the Court of Chancery imposed "an intent requirement" for breach of contract (ETE.Br.46-47), but it did no such thing. The court required ETE to prove Armstrong's actions were inconsistent with Williams' efforts obligations—which ETE failed to do. The efforts provision obliged Williams "to take all reasonable steps to solve problems and consummate the transaction." *Williams Cos.*, 159 A.3d at 272. Armstrong's attempts to assuage Bumgarner's concerns furthered, and certainly did not materially breach, that obligation. *See eCommerce Indus., Inc. v. MWA Intel., Inc.,* 2013 WL 5621678, at *13 (Del. Ch. Sept. 30, 2013) (defining "material breach" as breach that defeats a contract's "essential purpose").

ETE argues that, because the Court of Chancery did not credit Armstrong's testimony about why he closed his Gmail account, it was error to accept anything Armstrong said about Bumgarner. (ETE.Br.48-49.) But those determinations are the province of the trial court. *See Wood v. State*, 836 A.2d 514, 514 (Del. 2003) (recognizing "the exclusive province of the trial judge, as fact-finder, to determine witness credibility and to resolve any conflicts in the testimony"); *see also Poon v. State*, 880 A.2d 236, 238 (Del. 2005) ("The fact finder is free to reject all or part of any witness's testimony."). Contrary to ETE's suggestion (ETE.Br.48), no "destroyed evidence" was kept from the record: Bumgarner produced all of the emails between him and Armstrong's Gmail account

(*see infra* pp.48-49) and none support ETE's assertion that Armstrong acted to scuttle the Merger.

ETE's other argument is that, because Armstrong acted "clandestinely" at the time—*i.e.*, without publicizing his correspondence with Bumgarner—Armstrong's trial testimony must have been untrue. That does not follow, and it ignores the Court of Chancery's factual finding based on the testimony: Armstrong tried to handle Bumgarner himself because he thought bringing in others "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", until, "when the S-4 was filed, it would 'satisfy [Bumgarner's] concerns.'" (Op.45.) That is what happened: Williams succeeded in getting most of Bumgarner's claims dismissed in April 2016 (Op.49), and settled the remaining claim on June 16, 2016, before the Closing Date, for a corrective disclosure that referred to the updated synergy estimates ETE and Williams had already released.[125] ETE's request to overturn these fully supported findings of fact is improper and should be rejected.

[125] B3352.

b. None of the other alleged actions breached Williams' efforts obligations.

ETE's arguments about other supposed breaches of Williams' efforts obligations (ETE.Br.50) fare no better. "The evidence at trial refuted each of these contentions." (Op.90.)

First, ETE contends that Armstrong encouraged two "swing vote" directors to oppose the Merger. But "Stoney testified that she never felt [such] pressure", and "ETE introduced no evidence that Cleveland or Stoney felt pressured to switch their votes". (Op.90.)

Second, ETE contends Williams "postured" for a walkaway payment. (ETE.Br.39.) ETE does not explain how that behavior, while otherwise complying with contractual obligations, could breach a best efforts covenant. Regardless, Williams never approached ETE for such a payment[126] and Williams' financial advisors never analyzed one.[127] Instead, ETE's CEO testified that any interest on that front came from ETE: Warren believed the Williams Board intended to proceed with the Merger and was frustrated no one at Williams would negotiate with him.[128]

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[126] A3134/39:19-21.

[127] The bankers modeled the deal value following ETE's threats and request to terminate. A3133/38:3-39:12; A3252/157:6-158:2; A3254/159:1-160:16; B2492, B2511; B2634.

[128] B3048/27:5-17, B3049/28:8-20.

Third, ETE contends that Williams was "working the press" to write anti-ETE articles. This twists the record. ETE cites only one email, which truthfully describes ETE's "attempts to back out" of the Transaction and "turning hostile to its own unsolicited deal" when Williams was doing everything it could to close.[129]

Fourth, ETE contends Williams sued ETE's CEO for "publicity", but ETE "introduced no evidence that Williams' Texas lawsuit ... was intended to be a 'publicity stunt'". (Op.90.) Williams sued Warren because his self-interested actions in structuring the Preferred Offering tortiously interfered with the Agreement. (Op.58.) The suit was predicated on "Williams' view that the Preferred Offering breached the Merger Agreement", as confirmed by the liability findings below. (Op.90.) ETE complains the complaint called Warren "malicious" (ETE.Br.51), but legal malice is an element of a tortious interference claim under Texas law, *Powell Indus., Inc. v. Allen*, 985 S.W.2d 455, 456-57 (Tex. 1998), and Williams' allegations about Warren were a truthful and appropriate response to the Preferred Offering. ETE also takes issue with Williams' decision not to refile the Texas action in Delaware after May 24, 2016 (ETE.Br.51), but by then the situation was different: the Preferred Offering had closed (Op.36), ETE was using the Tax

[129] A0889-90.

Opinion to avoid closing the Transaction (Op.55-56), and Williams was focused on its lawsuit seeking to require ETE to close (Op.58).

c. The Court of Chancery correctly concluded that, even if there had been a breach, it was cured by the Closing Date.

In addition to finding that Williams never breached its efforts obligations, the Court of Chancery concluded as an independent basis for rejecting ETE's affirmative defenses that Williams was not in material breach at the time of closing. "The parties agree that Williams was ready, willing, and able to close on June 28, 2016." (Op.57.)

The efforts provisions imposed a continuing obligation from signing to closing, and Williams complied. But even if, between signing and closing, Williams had strayed from the proper path, Williams unquestionably cured any purported breach by the time of closing. *See Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *100 (Del. Ch. Oct. 1, 2018) (party "abandoned its flirtation with" the course of conduct, "thereby curing its breach"), *aff'd*, 198 A.3d 724 (Del. 2018). ETE's claim that Williams breached its efforts obligation is revealed as a pretext because ETE never sought to terminate the Agreement on that basis during the course of performance, even when it was desperately trying to avoid closing. *See Biolife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 281 (Del. Ch. 2003) (recognizing party may refuse performance for counterparty's material breach). Instead, despite Williams' strenuous objections and lawsuit seeking to compel ETE

to close, ETE refused to close for failure of the Tax Opinion closing condition and then terminated due to passage of the Outside Date. (Op.57-58.)

When ETE terminated on June 29, 2016 with operating covenant and capital structure representation violations, ETE became obliged to pay Williams the $410 million reimbursement. (Op.62.) ETE's nonpayment was a breach and would be excused only if Williams were in material breach ***at that time***. *See Akorn*, 2018 WL 4719347, at *100; Restatement (Second) of Contracts § 237 (1981) ("A material failure of performance ... discharges [the other party's] duties if it has not been cured during the time in which performance can occur."). But Williams plainly was not in material breach as of the Closing Date because Williams was ready, willing and able to close, and ETE refused. *See Matthew v. Laudamiel*, 2014 WL 5499989, at *2 (Del. Ch. Oct. 30, 2014). The Court of Chancery was correct to reject ETE's defenses for this independent reason.

2. The Court of Chancery Did Not Abuse Its Discretion by Declining To Make an Adverse Finding That Williams Breached Its Efforts Obligations.

ETE separately argues the Court of Chancery abused its discretion by declining to make an adverse finding that Williams breached its efforts obligations as a sanction for Armstrong's closure of his Gmail account. (ETE.Br.54-56.) That

issue is not part of ETE's question presented or summary of argument, and this Court need not consider it. Del. R. Sup. Ct. 14(b)(iv), (vi)(A)(1).[130]

ETE's argument also fails on the merits. Applying well-established law, after considering (1) the degree of culpability, (2) the degree of prejudice to ETE and (3) the availability of lesser sanctions (Op.92 (citing *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1189 (Del. Ch. 2009), *aff'd sub nom*. *ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749 (Del. 2010))), the Court of Chancery ordered Williams to pay ETE's fees and expenses relating to discovery from Bumgarner and ETE's sanctions motion. ETE argues that the court instead was ***required*** to impose a case-dispositive sanction. That is utterly without merit. Tellingly, ETE does not cite a ***single*** case in which this Court has reversed a trial court for not imposing a more severe sanction than the trial court in its discretion believed was warranted.

The Court of Chancery properly found that ETE suffered no prejudice from Armstrong's closure of his Gmail account. (Op.93.) That is because "ETE was able to recover Armstrong's communications with Bumgarner by subpoenaing Bumgarner's emails". (*Id.*) ETE cites a single statement from Armstrong that he could not be "certain" that he did not exchange additional emails with Bumgarner

[130] ETE sought the adverse finding in a separate sanctions motion below (Op.60) and concedes that it is subject to a more deferential appellate standard of review (ETE.Br.54 n.215).

(ETE.Br.54 (citing A3875/780:13-22)), but Armstrong testified that he did not recall any such emails.[131] Bumgarner signed a declaration, under penalty of perjury, stating that he did not delete or direct anyone to delete any responsive emails from his account.[132] And Bumgarner testified at length, subject to cross-examination, that he retained and produced all of his emails with Armstrong.[133] The trial court in no way abused its discretion in finding there was no prejudice to ETE.[134]

Because ETE was not prejudiced, the Court of Chancery appropriately exercised its discretion in not imposing additional sanctions. *See OptimisCorp v. Waite*, 2015 WL 5147038, at *22 (Del. Ch. Aug. 26, 2015) (rejecting adverse inference absent "evidence that the allegedly destroyed emails are not available"), *aff'd*, 137 A.3d 970 (Del. 2016); *Beard Research*, 981 A.2d at 1193 (declining to draw adverse inference based on deletion of emails); *Perkins v. Towne*

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[131] A3875/780:13-22.

[132] B4295¶2.

[133] A3997/902:7-903:5; A4078/983:22-984:2.

[134] ETE speculates the Gmail account may have contained emails between Armstrong and former Williams CEO Keith Bailey. (ETE.Br.55 n.224.) As the Chancery Court concluded, "an email, almost by definition, has a sender and receiver" and therefore "even if Armstrong had destroyed certain emails to Bailey on his end, the emails would still exist on the other end and could have been produced". (Op.93-94.) ETE never sought discovery from Bailey.

Dollar & Tobacco, LLC, 2014 WL 6671175, at *1-2 (Del. Super. Ct. Nov. 17, 2014) (rejecting adverse inference when copy of deleted video existed).

Contrary to ETE's suggestion, a party like ETE is not caught "between a rock and a hard place" (ETE.Br.56), as parties can and do obtain severe sanctions, including adverse findings, when they prove that evidence that could have affected the outcome of the case is irretrievably lost. *See Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *30 (Del. Ch. July 22, 2015) (awarding adverse inference); *Micron Tech., Inc. v. Rambus Inc.*, 917 F. Supp. 2d 300, 325 (D. Del. 2013) (finding monetary sanctions inadequate due to "irretrievable loss of evidence that may be dispositive" to the case). The trial court appropriately found that this is not such a case.

In addition, potentially case-dispositive sanctions are appropriate only upon a showing that "the evidence would have been helpful in proving [the moving party's] claims or defenses". *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010). Because no set of hypothetical emails from Armstrong could alter the fact that Williams was ready, willing and able to close on the scheduled Closing Date (*see supra* pp.46-47), an adverse finding would not have been justified.

3. The Court of Chancery Did Not Clearly Err in Finding That Williams Did Not Breach the Financing Cooperation Provision.

At the end of Section III, ETE raises a separate affirmative defense alleging material breach of the financing cooperation provision. (ETE.Br.56-58.) That issue appears nowhere in ETE's question presented or summary of argument and thus is not properly raised.

ETE is also wrong on the merits. ETE argues that there was no "reasonableness qualifier" on Williams' obligation (ETE.Br.57-58), but the Agreement provides otherwise: Section 5.14 obliged Williams to "provide cooperation ***reasonably*** requested by [ETE] that is necessary or reasonably required in connection with ... financing ... arranged by [ETE]". (Op.86 (quoting A0476 (§5.14)).) As the Court of Chancery held, "Williams was therefore under no obligation to cooperate with a request by ETE that was unreasonable." (Op.86.) Williams could withhold consent to the Public Offering if doing so was reasonable—that is, if Williams had a "legitimate business purpose". *Union Oil Co. of Cal. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *11 (Del. Ch. Dec. 15, 2006).[135]

Here, ETE's request was unreasonable, and Williams had legitimate business purposes for not agreeing. Williams' financial advisors advised the

[135] The one case ETE cites is irrelevant; it declined to ***imply*** a reasonableness condition, but here, "reasonably" appears in Section 5.14. *Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *1, *6 (Del. Ch. July 23, 2010).

company that "the Proposed Public Offering ... discriminated against Williams stockholders" by precluding their participation. (Op.86-87.)[136] In assessing reasonableness, "an outside financial advisor's opinion on the terms of a transaction" is entitled to great weight. *In re Dairy Mart Convenience Stores, Inc.*, 1999 WL 350473, at *13 (Del. Ch. May 24, 1999). What is more, Williams cooperated with ETE in good faith, offering to discuss "the offering and potential alternatives"[137] and proposing to make the offering available to Williams' stockholders.[138] (Op.87.) ETE turned Williams away.

Finally, ETE ignores the Court of Chancery's finding that "the Proposed Public Offering violated the Merger Agreement". (Op.87.) "An obligation to take reasonable actions ... does not require a party 'to sacrifice its own contractual rights for the benefit of its counterparty.'" *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*, 237 A.3d 817 (Del. 2020). The financing provision in Section 5.14 did not require Williams to cooperate with ETE's breach of its operating covenants.

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[136] *See* A3259/164:2-15; A3260/165:8-168:23; B2710; A0843-44; *see also* A3149/54:9-55:1; B2724.

[137] B2721-22.

[138] A3151-52/56:1-57:14.

III. The Court of Chancery Did Not Clearly Err in Concluding That the $1 Billion Equity Issuance Exception Did Not Permit ETE's Breaches.

A. Question Presented

In findings ETE has not appealed, the Court of Chancery found that ETE's Preferred Offering breached numerous operating covenants in material respects and rendered its Capital Structure Representation materially inaccurate. (SJ.Op.44-47, 50-52; Op.61-72, 82-84.) Did the Court of Chancery clearly err in finding, based on extrinsic evidence at trial, that ETE's violations of the Agreement were not permitted by the $1 Billion Equity Issuance Exception in Section 4.01(b)(v)(1) of the Parent Disclosure Letter? Williams preserved this argument at A2752-59; A2844-57; A2965-72; A4959-75; A5147-58.

B. Scope of Review

The interpretation of unambiguous contract language is reviewed *de novo*. "To the extent the trial court's interpretation of contract language rests on findings concerning extrinsic evidence, however, this Court must accept those findings unless they are unsupported by the record and are not the product of an orderly and logical deductive process." *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992).

C. Merits of Argument

This Court previously affirmed the Court of Chancery's finding that ETE breached its own partnership agreement by making the Preferred Offering,

which was "a gift to the insiders who subscribed to the securities". *Unitholder Litigation*, 2018 WL 2254706, at *25-26, *aff'd*, 223 A.3d 97. Here, the Court of Chancery found that ETE's Preferred Offering created a new class of equity that granted ETE insiders a distribution preference at the expense of Williams stockholders. (Op.66-68, 83-84.) As a result, the Preferred Offering destroyed the economic equivalence between Williams stockholders and ETE unitholders that was "a key point of negotiation" for Williams. (Op.6-7, 13.)

On appeal, ETE does not dispute that its Preferred Offering violated a number of covenants in material respects and rendered its Capital Structure Representation materially inaccurate. Instead, ETE makes a single argument: that language in a disclosure letter accompanying the Agreement supposedly exempted the Preferred Offering from all of the contractual provisions it violated. (ETE.Br.59-60.) ETE's argument fails. The carve-out in the disclosure letter qualified only one covenant, the equity issuance covenant in Section 4.01(b)(v). Williams' interpretation of the contract language is consistent with its plain text and, as the Court of Chancery found after a full trial, the extrinsic evidence overwhelmingly supported Williams' interpretation. (Op.15-19, 76-77.) ETE comes nowhere close to showing clear error.

1. The Meaning of the $1 Billion Equity Issuance Exception Is Not Unambiguous in ETE's Favor.

ETE first ignores the extrinsic evidence, arguing that its interpretation of the Parent Disclosure Letter is unambiguously correct. (A0413 (§4.01(b)(v)(1)).) The Court of Chancery properly rejected that argument. (Op.72-77.)

Williams argued below, and continues to believe, that the language of the Parent Disclosure Letter is unambiguous in Williams' favor. (A2752-64; A4967-71.) ETE took the opposite position. "When the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity, ... [and] the interpreting court must look beyond the language of the contract to ascertain the parties' intentions." *Eagle Indus., Inc. v. DeVilbiss Heath Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). The Court of Chancery found that was the case for the $1 Billion Equity Issuance Exception. (Op.72-77.)

To reverse that finding, ETE faces a high bar: ETE must demonstrate that the Parent Disclosure Letter is susceptible to only one meaning, and no other interpretation could be reasonable. *See Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014) ("Given that some aspects of the Voting Agreement suggest a *per capita* view of Section 1.2(b), and others suggest a *per share* view, we agree with the trial court that Section 1.2(b) is ambiguous."). ETE cannot meet its burden.

ETE's interpretation is that each of the Section 4.01(b) exceptions in the Parent Disclosure Letter applies to ***all*** of the interim operating covenants.

(ETE.Br.61.) Under ETE's interpretation, the $1 Billion Equity Issuance Exception functions as a safe harbor that immunizes ETE from breaching any other covenant, so long as ETE can argue the breach was related to issuing up to $1 billion in equity. Williams' interpretation, and the Court of Chancery's conclusion, is that the $1 Billion Equity Issuance Exception in Section 4.01(b)(v) of the Parent Disclosure Letter applies only to the operating covenant in the ***corresponding*** Section 4.01(b)(v) of the Agreement. (*See* A0413; A0460.) Under Williams' interpretation, each covenant is independent of the others, and the issuance of up to $1 billion in equity may or may not violate other covenants (besides §4.01(b)(v)) depending on the facts of the particular issuance.

Williams' interpretation matches the structure of the Parent Disclosure Letter, which lists the exceptions to a given section or subsection of the Agreement beneath a reference to that section or subsection number. (*See* A0412-14.) For example:

- **<u>Section 4.01(b)(i)</u>** of the Agreement prohibits distributions in respect of ETE's equity securities (A0460). The exceptions listed in Section 4.01(b)(i) of the Parent Disclosure Letter provide the circumstances under which such distributions are permitted (A0412).
- **<u>Section 4.01(b)(ii)</u>** of the Agreement prohibits actions that would restrict ETE with respect to the payment of distributions or dividends

(A0460). The exceptions listed in Section 4.01(b)(ii) of the Parent Disclosure Letter provide particular types of restrictions to which ETE may nonetheless become subject (A0412).

Likewise, the $1 Billion Equity Issuance Exception is listed in Section 4.01(b)(v) in the Parent Disclosure Letter. That corresponds to Section 4.01(b)(v) of the Agreement, which makes sense: it is the operating covenant that precludes equity issuances. (*Compare* A0413 (§4.01(b)(v)), *with* A0460 (§4.01(b)(v)).)

Section 3.02 of the Agreement expressly sets out how to read the two contractual documents together:

> "[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*** ...." (A0445.)

This instruction flatly contradicts ETE's contention 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". (ETE.Br.61.)

The use of section numbers as references for correspondence between the Parent Disclosure Letter and the Agreement is further confirmed by the non-sequential numbering in the Parent Disclosure Letter. For example, it skips from 4.01(b)(ii) to (v), and from (v) to (vii) (A0412-13)—which would make no sense unless the enumerated sections in the Parent Disclosure Letter match the corresponding sections in the Agreement. Moreover, on several occasions the Parent

Disclosure Letter repeats the same exceptions across multiple sections. (*See, e.g.*, A0413-14 (Sections 4.01(b)(v)(4), (x)(1) and (xi)(4)).) Such repetition would be superfluous if each exception in Section 4.01(b) "cross-applie[d] to all of the IOCs and the OCC", as ETE suggests. (ETE.Br.61.) That result would run afoul of interpretative canons. *See Estate of Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (Delaware courts "read a contract as a whole" and "give each provision and term effect, so as not to render any part of the contract mere surplusage").

The Agreement includes a savings clause to resolve any inconsistencies between the two documents. Section 3.02 provides that information in the Parent Disclosure Letter also applies to "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". (A0445; *see also* A0390 (Gen. Term No. 4).) ETE relied below on this savings clause as its argument for how the $1 Billion Equity Issuance Exception could justify ETE's violation of the Capital Structure Representation. (Op.84.)[139]

[139] ETE argues, for the first time on appeal, that it could prevail on its defense to Williams' Capital Structure Representation claim based on the preamble to Section 3.02. (ETE.Br.61.) That is wrong: This preamble refers the reader to Sections 3.02(b) to 3.02(n)(ii)(h) of the Parent Disclosure Letter (A0392-411), which provide exceptions to ETE's representations. There are two exceptions to the Capital Structure Representation (A0394), neither of which (as ETE concedes) authorized the Preferred Offering. Regardless, ETE conceded below that it needed

But the relevance of the $1 Billion Equity Issuance Exception to the Capital Structure Representation, as well as covenants other than Section 4.01(b)(v), is not "reasonably apparent on its face", as ETE could have issued equity up to $1 billion—structured differently from the Preferred Offering, without creating a new class of equity with features discriminating in favor of ETE insiders—in a way that complied with all covenants and representations. (Op.78-79.)

ETE's arguments to the contrary are unpersuasive. ETE first argues that the section references in the Parent Disclosure Letter are irrelevant because "***headings*** are for reference purposes only and should not affect ***in any way the meaning or interpretation*** of the PDL". (ETE.Br.60 (citing A0488 (§8.04(a)); A0390 (Gen. Term No. 7)).) But the Agreement treats section references differently from "headings":

> "When a reference is made in this Agreement to an Article, a ***Section*** or Exhibit, such reference shall be to an Article or a ***Section of***, or an Exhibit to, this Agreement unless otherwise indicated. The table of contents and ***headings*** contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement." (A0488 (§8.04(a)).)

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the savings clause to defeat the Capital Structure Representation claim (A5075) and so has waived this new argument. *See State Farm Mut. Auto. Ins. Co. v. Spine Care Del.*, 238 A.3d 850, 859 (Del. 2020).

Thus, the rule for textual "headings" does not apply to references to section numbers.[140]

ETE next addresses the preambles to the interim operating covenants (both the ordinary course covenant in the first sentence of Section 4.01(b) and the specific covenants in the second sentence), which state: "Except as set forth in Section 4.01(b) of the Parent Disclosure Letter ...." (A0460.) ETE wrongly asserts that this reference to Section 4.01(b), rather than specific subsections, means every exception listed in Section 4.01(b) of the Parent Disclosure Letter "cross-applies to all of the IOCs and the OCC, not just the ones that correspond to the specific subheadings". (ETE.Br.61.) ETE's reading is implausible.

The purpose of referencing Section 4.01(b) of the Parent Disclosure Letter is to establish that the nineteen covenants in Section 4.01(b) of the Agreement are potentially subject to carve-outs set forth in Section 4.01(b) of the Parent Disclosure Letter. The Parent Disclosure Letter itself establishes which exceptions apply to each covenant in the Agreement, using section number references. The reason the Agreement specifically identifies Section 1.01(b)(i) of the Parent

[140] The same principle applies in statutory construction. *See* 1 *Del. C.* §306 ("[T]he descriptive headings or catchlines immediately preceding or within the texts of the individual sections of this Code, ***except the section numbers included in the headings*** or catchlines immediately preceding the text of such sections, do not constitute part of the law.").

Disclosure Letter—to address ETE's counterexample (ETE.Br.62)—is because (unlike the interim operating covenants) that provision in the Agreement has no free-standing meaning, and the drafters therefore knew that specific corresponding information from the Parent Disclosure Letter was necessary.

Next, ETE claims that, under Williams' interpretation, the preamble language before the ordinary course covenant would be surplusage because that covenant does not have a corresponding provision in the Parent Disclosure Letter. (ETE.Br.62-63.) ETE ignores how merger agreements are drafted in practice. Parties customarily agree first on framework language for the merger agreement's representations and covenants that includes cross-references to sections and subsections of disclosure letters that have not yet been completed.[141] In this transaction, the preamble was included in the very first drafts of the Agreement, long before the parties had begun drafting the disclosure letters.[142] Accordingly, a cross-reference included in the original framework language may point to a section or

[141] Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* §13.03 n.4 (1992) (discussing a "[s]eller, who has not yet signed the acquisition agreement and who is adding exceptions to a disclosure schedule still being drafted").

[142] B0070 (§5.2(b)(xi)) (8/5/15 draft); B0242 (§4.01(b)) (8/7/15 draft).

subsection of a disclosure letter that ultimately contains no content.[143] Thus, contrary to ETE's argument (ETE.Br.63), the preambles in the two sentences of Section 4.01(b) of the Agreement have the same meaning: the reader should consult Section 4.01(b) of the Parent Disclosure Letter to see whether there are applicable exceptions.

ETE also relies, wrongly, on the savings clause (A0445 (§3.02)), asserting that it is "reasonably apparent on its face" that the $1 Billion Equity Issuance Exception relates to the various operating covenants and the representation that ETE violated. (ETE.Br.63-64.) Indeed, as the Court of Chancery recognized, the savings clause is "the only way that the $1 Billion Equity Issuance Exception could apply to the Capital Structure Representation". (Op.84.) But the court properly rejected ETE's reading as inconsistent with the language of the savings clause. For an exception's relevance to another section or subsection of the Agreement to be "reasonably apparent on its face" means that its application to that section or subsection must be ***apparent*** to the reasonable reader ***on the face*** of the disclosure letter exception. (Op.79-80.) Nothing on the face of the $1 Billion Equity Issuance Exception made reasonably apparent, for example, that ETE was

[143] *See* Royce de R. Barondes, *Side Letters, Incorporation by Reference and Construction of Contractual Relationships Memorialized in Multiple Writings*, 64 Baylor L. Rev. 651, 704 (2012).

authorized to breach its partnership agreement (A0457 (§4.01(b)(vi))), as ETE could have issued new equity without such a breach. (Op.82.)

Nor was it reasonably apparent on its face that the exception permitted ETE to violate its Capital Structure Representation (A0445 (§3.02(c)(i))), as ETE could have issued new equity without creating a new class of equity. (Op.84-85.) This is alone sufficient to affirm the judgment below based on ETE's materially false representation. Indeed, the bring-down provision of Section 6.03(a) carefully harmonized the Capital Structure Representation with the $1 Billion Equity Issuance Exception by bringing down to closing ***only*** the representation of the three existing classes of equity, but ***not*** the representation of the number of outstanding units in each class. (A0478 (§6.03(a)(i)).) This demonstrates the specific contractual intent to prevent ETE from issuing new ***classes*** of equity.

Finally, ETE argues that the Court of Chancery's interpretation "limits the Equity Issuance Exception to common units". (ETE.Br.65.) That is wrong. The word "equity" in the $1 Billion Equity Issuance Exception deliberately mirrors Section 4.01(b)(v)'s prohibition on issuing "equity". ETE was permitted to issue units within any of the three existing classes of equity, as identified in Section 3.02(c)(i) of the Agreement (A0445), not just common units.[144]

[144] ETE asserts in a footnote, without support, that it "could not issue additional units of these classes for reasons unrelated to the Merger Agreement". (ETE.Br.65 n.262.) But ETE did not argue this point below, and on appeal fails to

2. The Court of Chancery Did Not Clearly Err in Its Findings Based on Extrinsic Evidence.

ETE also challenges the findings the Court of Chancery made based on extrinsic evidence. (ETE.Br.66-67.) But, as noted above (*supra* pp.12-15), ETE introduced ***no*** meaningful extrinsic evidence at trial. The record includes testimony and documents from those involved on both sides of the negotiations. And everyone who testified supported ***Williams'*** interpretation. Based on this evidence, the trial court concluded 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." (Op.77; *see* Op.15-18.) The record amply supports this finding.

The parties' principal negotiators, CFOs Welch and Chappel, both testified that they understood the exception to apply only to the equity issuance covenant.[145] The drafting history shows that the exception was originally contained within the Section 4.01(b)(v) covenant in the Agreement, not the Parent Disclosure Letter.[146] On the eve of signing, that $1 Billion Equity Issuance Exception was

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show Williams was aware of those limitations (if there were any) at the time of contracting.

[145] A3117/22:8-15, A3121-22/26:19-27:2; A3504-08/409:2-413:5; B1562-63 (§4.01(b)(v)(E)).

[146] A3119-10/24:2-25:7; A3504-07/409:2-412:3; A3306-07/211:17-212:19; B1566-67 (§4.01(b)(v)(E)); B1562-63 (same); B2439 (§4.01(b)(v)(1)).

moved, at ETE's request, to the Parent Disclosure Letter.[147] Williams' deal counsel testified, without contradiction, that he told ETE's counsel at Wachtell that Williams agreed to the movement on the understanding that it was non-substantive.[148] This procedure aligns with M&A agreement drafting practice.[149]

The uncontradicted testimony from both parties' principals is that the parties made this last-minute move to protect confidentiality, and did not thereby intend to affect the parties' rights.[150] This is confirmed by the fact that around two dozen exceptions were all moved to the disclosure letters at the same time as the $1 Billion Equity Issuance Exception.[151] ETE adduced no parol evidence that the parties intended a substantive change by any of these last-minute moves after negotiating the exceptions on a covenant-by-covenant basis for weeks. The ***only*** evidence was that the move was intended to be non-substantive.

The trial testimony also confirmed that the "reasonably apparent on its face" savings clause did not alter the section-specific nature of the disclosure

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[147] A3307-09/212:20-214:4; B1667 (§4.01(b)(v)(F)); B2439 (§4.01(b)(v)(1)).

[148] A3307-09/212:20-214:4.

[149] *See* Paul K. Hilger & William J. Gole, *Due Diligence: An M&A Value Creation Approach* 213 (2009) ("Items included in the disclosure schedules are keyed to the appropriate contract section.").

[150] A3121/26:1-6; A3510-11/415:19-416:5.

[151] *Compare* B1491-97, *with* B1597-1600 (movement to Company Disclosure Letter); *compare* B1900-04, *with* B1978-80 (movement to Parent Disclosure Letter).

letters.[152] Rather, as Williams' deal counsel testified, without contradiction, that provision was intended to address only obvious drafting errors.[153] Likewise, Professor Coates testified that construing the $1 Billion Equity Issuance Exception (as ETE does) to negate a wide range of covenants and representations in the Agreement would be inconsistent with M&A custom and practice.[154]

The parties' conduct after signing further confirms Williams' interpretation. (Op.18-19, 77.) As explained above (pp.14-15), prior to the Preferred Offering, Williams requested ETE's consent, under Williams' analogous disclosure letter exception, for an equity issuance that would have violated a separate covenant. But ETE refused, and Williams did not proceed.[155] If the equity issuance exception "cross-applies to all of the IOCs" as ETE now contends, ETE would have had no consent right and the parties' conduct would have made no sense.

ETE ignores this evidence and does not challenge any of the Court of Chancery's findings. (Op.15-19.) Instead, ETE cites three items that purportedly undermine the court's conclusion. (ETE.Br.66-67.)

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[152] A3309-10/214:24-215:8.

[153] A3309-10/214:24-215:8; A3382-83/287:11-288:3; *see* B2306.

[154] A3670-71/575:3-576:5.

[155] See notes 35-37 above.

First, ETE argues that a change from "at-the-market" to "equity" in the Equity Issuance Exception proves the parties intended to permit ETE to issue new classes of equity. (ETE.Br.66.) That is wrong. The revision permitted ETE to issue any common units—whether priced "at-the-market" or not—in addition to units of its other two existing equity classes.

Second, ETE points to Chappel's testimony that the Equity Issuance Exception was meant to give "some flexibility" between signing and closing. (ETE.Br.67.) It did that—by permitting ETE to issue up to $1 billion in equity.

Third, ETE argues that Chappel's testimony about "the interplay between the disclosure letters and Merger Agreement" proves Williams' interpretation cannot be correct. (ETE.Br.67.) In fact, that testimony simply illustrates when the "reasonably apparent on its face" savings clause comes into play. For example, CDL §4.01(a)(ix) permits Williams to "abandon" an asset worth up to $100 million; it is reasonably apparent on its face that the exception overrides the covenant against non-ordinary-course conduct for such an abandonment. (A0380; A0456.)[156]

[156] The savings clause likewise governs the interplay of CDL §4.01(a)(v) and the §4.01(a)(iv) IOC and of CDL §4.01(a)(ix) and the §4.01(a)(vi) IOC. (A0379-80; A0457.)

IV. The Court of Chancery Did Not Abuse Its Discretion in Finding That Williams' Attorneys' Fees Were Reasonable.

A. Question Presented

Did the Court of Chancery abuse its discretion in finding that Williams' attorneys' fees under a contingent fee arrangement were reasonable? Williams preserved this argument at B8252-58; B8508-11.

B. Scope of Review

A court's determination of the reasonableness of attorneys' fees pursuant to a contractual fee-shifting provision is reviewed for abuse of discretion. *See Mahani v. Edix Media Grp., Inc.,* 935 A.2d 242, 245 (Del. 2007). ETE identifies no ambiguity in the parties' Agreement, and the case ETE cites in arguing for *de novo* review (ETE.Br.68) has nothing to do with attorneys' fees. *See Osborn*, 991 A.2d at 1155 (interpreting a real-property sales contract).

C. Merits of Argument

Section 5.06 requires ETE to pay Williams' "reasonable attorneys' fees and expenses". (Op.94-95; A0474.) ETE argues the Court of Chancery erred in finding that the 15% contingent fee by which Williams will compensate Cravath was reasonable. (ETE.Br.68.) ETE shows no abuse of discretion.

ETE focuses on the fact that, when the parties signed the Agreement, no Delaware case had addressed whether a contingent fee was reasonable for purposes of a contractual fee-shifting provision. But Delaware cases predating the

Agreement made clear that the standard for "reasonableness" for contractual fee-shifting is found in Rule of Professional Conduct 1.5(a). *See, e.g.*, *Mahani*, 935 A.2d at 245-46; *Glob. Link Logistics, Inc. v. Olympus Growth Fund III, L.P.*, 2010 WL 692752, at *1 (Del. Ch. Feb. 24, 2010). By 2015 it was "well established that there is nothing inherently unreasonable about contingent fees under Rule 1.5(a)", and "the eighth factor of Rule 1.5(a) explicitly contemplates contingent fees". (Fee.Op.7.) A reasonable contracting party would have expected that "reasonable attorneys' fees" (A0474 (§5.06(g)) could include a contingency arrangement. The Court of Chancery therefore properly concluded that, by placing no other limitation on fee-shifting, the parties "manifested an intent to shift to the losing party ***all attorneys' fees and expenses that are 'reasonable,'*** as determined by [the] Court." (Fee.Op.6.)

The ruling below followed the holding in *Shareholder Representative Services LLC v. Shire US Holdings, Inc.*, 2021 WL 1627166 (Del. Ch. Apr. 27, 2021), *aff'd*, 267 A.3d 370 (Del. 2021). There, then-Vice Chancellor McCormick held that "there is nothing inherently unreasonable in enforcing a contractual fee-shifting arrangement to cover a contingent fee award". *Id.* at *2. Here, the Court of Chancery did not abuse its discretion in finding the fee reasonable when (i) the 15% fee "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"

(Fee.Op.8 & n.29) and (ii) the contingent fee in this long-running litigation resulted in a 1.7x lodestar multiplier (Fee.Op.10-11).

ETE argues that *Shire* was decided after the Agreement was signed, but if that mattered, *Shire* could not have come out the way it did. By ETE's argument, at the time of contracting in *Shire*, no Delaware case "expressly permit[ed]" shifting contingent fees, either. *Shire* confirmed it is permissible.

ETE also argues that the *Shire* plaintiffs could not otherwise fund their litigation, and thus had a business reason for a contingency arrangement. (ETE.Br.71.) But Williams had a business reason, too: "to align Cravath and Williams as partners in this litigation". (Fee.Op.9.) Regardless, attorneys' fees are reasonable if they are consistent with Rule 1.5(a), *see Mahani*, 935 A.2d at 247, and the client's financial resources are not one of the factors listed in Rule 1.5. Thus, "there is nothing inherently unreasonable in enforcing a contractual fee-shifting arrangement to cover a contingent fee award". *Shire*, 2021 WL 1627166, at *2. Reasonableness does not turn on whether the arrangement was the only way the party could have proceeded.

ETE makes policy arguments, but these were rejected in *Shire*, rejected below and should be rejected again here. ETE takes issue with Williams' decision to "switch[] to a contingency arrangement mid-stream". (ETE.Br.72.) But ETE cites no authority for the proposition that a party may not enter into a contingency

arrangement partway through litigation. Moreover, ETE obtained discovery into the fee arrangement (*see* Fee.Op.5), and on that record the Court of Chancery credited testimony that the reason for the change was to "align Williams and Cravath" and found that to be reasonable (Fee.Op.10).[157] Those findings were well within its discretion.

Separately, ETE challenges the award of compound rather than simple interest. (ETE.Br.73.) As a threshold matter, ETE has not properly presented this issue in the question presented. (ETE.Br.68.)

On the merits, ETE does not demonstrate that the Court of Chancery abused its discretion in "find[ing] that compound interest is appropriate here because it more accurately reflects the economic realities of the parties". (Fee.Op.14-15.) ETE's only case, *Rexnord Indus., LLC v. RHI Hldgs., Inc.*, 2009 WL 377180, at *9-10 (Del. Super. Ct. Feb. 13, 2009), is from the Superior Court, which has no equitable discretion, and itself explained that the Court of Chancery is different because it ***may*** "award compound interest in order to serve equitable principles". *Id.* at *10. ETE fails to address the numerous cases holding that the Court of Chancery has discretion to award compound interest. *See, e.g.*, *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002) ("[T]he rule or

[157] B8418-19/43:23-44:18; B8326/67:2-20.

practice of awarding simple interest, in this day and age, has nothing to commend it ....”); *Brandin v. Gottlieb*, 2000 WL 1005954, at *29 (Del. Ch. July 13, 2000) (“[F]airness dictates that the pre-judgment interest awarded to [plaintiffs] be compounded.”).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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CERTIFICATE OF SERVICE

I certify that on February 3, 2023, the foregoing ***Public Version of Appellee's Answering Brief*** was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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