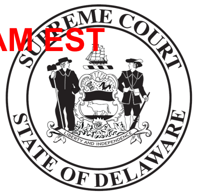
EFiled: Feb 10 2023 11:38AM EST
Filing ID 69125299
Case Number 391,2022



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ENERGY TRANSFER, LP, et al., Defendants and Counterclaim Plaintiffs Below-Appellants, v. THE WILLIAMS COMPANIES, INC., Plaintiff and Counterclaim Defendant Below-Appellee.	No. 391, 2022 Court below: Court of Chancery of the State of Delaware C.A. Nos. 12168-VCG and 12337-VCG PUBLIC VERSION FILED FEB. 10, 2023

APPELLANTS' REPLY BRIEF

OF COUNSEL:

Michael C. Holmes
John C. Wander
Craig E. Zieminski
Andy E. Jackson
VINSON & ELKINS LLP
2001 Ross Avenue
Suite 3900
Dallas, Texas 75201
(214) 220-7700

Paul D. Clement
Matthew D. Rowen
Darina Merriam
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

Rolin P. Bissell (#4478)
James M. Yoch, Jr. (#5251)
Alberto E. Chávez (#6395)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Counsel for Defendants and Counterclaim Plaintiffs Below-Appellants Energy Transfer LP, formerly Energy Transfer Equity, L.P.; Energy Transfer Corp LP; ET Corp GP, LLC; LE GP, LLC; and Energy Transfer Equity GP, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 4

I. Williams Effectuated A Company Adverse Recommendation Change 4

II. Williams Breached The Merger Agreement In Multiple Respects 12

- A. Williams' Actions Breached Williams' Best-Efforts Obligations 12
  - 1. The court applied the wrong legal standard—twice 13
  - 2. The court applied the wrong legal standard in denying ETE an adverse inference 15
  - 3. Spoliation aside, Armstrong's machinations and the board's anti-Merger conduct breached the best-efforts covenants 17
- B. Williams Breached its Financing Commitments 19

III. ETE's Issuance Of Securities Did Not Breach The Merger Agreement 21

IV. The Agreement Does Not Permit Williams To Shift Cravath's Furtive Contingent Fee Award Or Recover Compound Interest 29

CONCLUSION 33

TABLE OF AUTHORITIES

Cases

AB Stable VIII LLC v. Maps Hotels & Resorts One LLC,
2020 WL 7024929 (Del. Ch. Nov. 30, 2020) 14

Akorn, Inc. v. Fresenius Kabi AG,
2018 WL 4719347 (Del. Ch. Oct. 1, 2018) 15

City of Burlington v. Dague,
505 U.S. 557 (1992) 30

Frunzi v. Paoli Servs., Inc.,
2012 WL 2691164 (Del. Super. July 6, 2012) 12

Gerber v. EPE Holdings, LLC,
2013 WL 209658 (Del. Ch. Jan. 18, 2013) 8

Honey v. Bayhealth Med. Ctr., Inc.,
2015 WL 310660 (Del. Super. Jan. 23, 2015) 26

Lorillard Tobacco Co. v. Am. Legacy Found.,
903 A.2d 728 (Del. 2006) 29

Mahini v. Edix Media Grp., Inc.,
935 A.2d 242 (Del. 2007) 29

Micron Tech. v. Rambus Inc.,
917 F.Supp.2d 300 (D. Del. 2013) 15, 16

Murfey v. WHC Ventures, LLC,
236 A.3d 337 (Del. 2020) 29, 32

O'Brien v. Progressive N. Ins. Co.,
785 A.2d 281 (Del. 2001) 27

Shareholder Representatives Services LLC v. Shire US Holdings, Inc.,
2021 WL 1627166 (Del. Ch. Apr. 27, 2021) 30, 31

SIGA Techs., Inc. v. PharmAthene, Inc.,
67 A.3d 330 (Del. 2013) 29

Statutes and Rules

8 *Del. C.* §251 .... 8, 9

Supr. Ct. R. 14(b)(vi)(A)(3) 19

Other Authorities

Black's Law Dictionary (11th ed. 2019) 26

INTRODUCTION

On September 28, 2015, ETE[1] and Williams entered into a multibillion-dollar Merger Agreement to join the two conglomerates. Things did not go as planned. In the critical nine months between signing and closing, the energy market collapsed; Williams' CEO worked behind the scenes "to sabotage the transaction" that would cost him his job; Williams frustrated ETE's efforts to secure financing; and the Williams board green-lighted a salacious lawsuit against ETE's Chairman (the slated leader of the post-merger entity) falsely asserting he had "maliciously" "exploited" his position, while publicly walking back its initial recommendation in favor of the Merger.

The combined pressure of the energy-market collapse and Williams' pervasive efforts to undermine the deal left ETE no choice but to walk away. Given Williams' underhanded tactics—including everything from spoliation to perjury—ETE sought to recoup the breakup fee Williams agreed to pay if it frustrated the deal before closing. Even though ETE detailed the numerous instances of forbidden conduct by Williams and its board, the Court of Chancery dismissed ETE's claim for the breakup fee, concluding that Williams could trigger the breakup fee only if its board formally withdrew non-public board resolutions endorsing the deal. That

[1] Capitalized terms have the same meaning as Appellants' Corrected Opening Brief ("ETE.Br."). Unless noted, all emphases are added.

threshold decision, which skewed the course of litigation, is reviewed de novo and is wholly erroneous.

Under the court's holding, Williams could denounce the Merger publicly as long as its board did not formalize the repudiation in a resolution, and could "cure" any misbehavior simply by showing up on the Closing Date and proclaiming its readiness to close. That is not what the parties agreed to, which explains why Williams struggles so mightily to defend the court's conclusion. The termination fee provision was designed to ensure that Williams and its fractured board would publicly support the deal throughout the critical nine months before closing, not just that Williams would agree to refrain from formally reconsidering its non-public board resolutions or offer a *mea culpa* at the eleventh hour. The court's contrary conclusion reads whole provisions out of the Merger Agreement and frustrates the parties' evident intent.

That error alone justifies reversal. But it is far from alone. The court committed multiple legal errors in awarding Williams, which was in breach of multiple contractual provisions, a separate termination fee that, under the plain terms of the Agreement, it could not recover if it was in material breach. The court further erred in concluding that ETE breached the Agreement by issuing equity securities to ensure the financial health of the post-merger entity. As Williams' half-hearted

defense confirms, the Agreement explicitly and unambiguously permitted ETE to do just that.

This Court should therefore reverse. At the very least, it should vacate the Court of Chancery's unprecedented attorneys' fee award, which has no basis in the parties' contract or Delaware law and would create perverse incentives.

ARGUMENT

I. Williams Effectuated A Company Adverse Recommendation Change.

The parties agreed that any action by the Williams board that walked back its initial recommendation in favor of the Merger triggered an obligation to pay a breakup fee. The Agreement is clear: "Neither the [Williams] Board … nor any committee thereof shall … withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]), or publicly propose to withdraw (***or modify or qualify in a manner adverse to*** [***ETE***]), the Company Board Recommendation."[2] All of those "action[s]"—not just formally "withdraw[ing]" the recommendation, but "modify[ing] or qualify[ing] [it] in a manner adverse to [ETE]," or even just "publicly propos[ing]" to do so—are included in the definition of "Company Adverse Recommendation Change."[3] And "in the event [of] a Company Adverse Recommendation Change," the parties agreed that "[Williams] shall pay [ETE] … an aggregate fee equal to $1.48 billion" if, as happened here, ETE "terminate[d]" the Merger "prior to [closing]."[4] The court legally erred in dismissing ETE's Counterclaim for that fee.

Williams' efforts to evade the plain text of the Agreement fail. Williams first argues that §3.01(d)(i) "defines" "the term 'Company Board Recommendation'" to

---

[2] A0464 (§4.02(d)).

[3] *Id.*

[4] A0474 (§5.06(d)(iii)), A0479-80 (§7.01(e)(i)).

mean only the formal "'resolutions' the Williams Board adopted in favor of the Merger." Appellee's Answering Brief ("Ans.") 29. That cannot be squared with what the provision actually says. Section 3.01(d)(i) enumerates four actions the board needed to take in advance of closing, and defines all four, collectively, as the "Company Board Recommendation."[5] The definition is dozens of words long—but one word that ***never*** appears is "resolutions" (or its cognates). Williams admits this, albeit cagily, noting that the word "resolutions" "appears ***immediately before*** the four clauses" and then "***following*** the definition." Ans.31. The fact that the parties used "resolutions" before and after the definition, but not ***in*** the definition, underscores that the parties knew how to limit a provision to formal resolutions, and did not do so in the definition of Company Board Recommendation.

Williams' reading also makes nonsense of §4.02(f). That provision lists two specific circumstances in which an adverse public statement or action is ***not*** a Company Adverse Recommendation Change.[6] If Williams were right that the only way to effectuate a Company Adverse Recommendation Change is via a formal board resolution, then §4.02(f) would make no sense. In reality, §4.02(f) makes perfect sense. The parties were concerned with substance as well as form, so they

---

[5] A0434 (§3.01(d)).

[6] A0464-65 (§4.02(f)).

prohibited "***any disclosure***" that walks back the Williams board's initial support, not just a formal withdrawal of or modification to a formal resolution.[7]

Williams insists §4.02(f) "is irrelevant here" because the board did not make either type of disclosure §4.02(f) protects and "consistently stated that [it] ***reaffirmed*** its recommendation in favor of the Merger." Ans.35-36. The first argument misses the point, which is that §4.02(f) cannot logically be read to provide a safe harbor for two specific types of public statements if no public statement and only formal non-public resolutions can ever constitute a Company Adverse Recommendation Change. The narrowness of the second argument gives away the game. The following is all undisputed:

- Williams publicly denigrated the would-be leaders of the combined enterprise, including by filing a lawsuit in Texas court.[8]
- Williams publicly stated on May 4, 2016, that it knew its fairness opinions were premised on projected financial information that was no longer valid, but would not seek new ones.[9]
- Williams filed a Form S-4 on May 16, 2016, that not only admitted (contrary to prior statements) that "[c]ertain members of the WMB Board voted on September 28, 2015 against entering into the merger agreement," but underscored that certain board members "continue as of the date of this proxy statement/prospectus to disagree with the recommendation of a majority of the WMB Board."[10]

---

[7] *Id.*

[8] A0989-1038.

[9] A1566-96.

[10] A1172.

While none of those public statements said explicitly that the board was withdrawing its support, all of them sent that message to the public loud and clear—which explains why even the court did not dispute that, if something short of a formal resolution could suffice (which it can), then ETE had met its pleading burden. Adopting Williams' view that none of them counts because none said *in haec verba* that the board had formally resolved to no longer support the deal would not only eviscerate §4.02(f), but also render superfluous §4.02(d)'s two parentheticals stating that a Company Adverse Recommendation Change is not limited to a formal "withdraw[al]," but also encompasses "***any action***" to "***modify or qualify***" its initial recommendations "in a manner adverse to [ETE]."[11]

Williams contends "only ***Board*** actions," i.e., only acts taken ***formally*** by the full board, can constitute a Company Adverse Recommendation Change "because only the Board can adopt (or withdraw) resolutions." Ans.32. The text conclusively rebuts this position. Section 4.02 begins: "Neither the Board of Directors of the Company ***nor any committee thereof*** …."[12] Williams reads the highlighted words right out. In all events, the board did in fact adversely modify its recommendation, and *contra* Ans.33, ETE plainly "plead[ed]" multiple such instances. The S-4, for

[11] A0464 (§4.02(d)).

[12] A0464 (§4.02(d)).

instance, was filed on behalf "***of the WMB Board***,"[13] and the board approved the filing of the lawsuit against ETE's Chairman.[14] That the board publicized these changes to its recommendations via "the Company" does not somehow mean that such changes only qualify as "Company conduct" and are therefore exempted from §4.02(d). "An entity … can only make decisions or take actions through the individuals who govern or manage it."[15] And if the applicability of §4.02(d) somehow turns on parsing out what actions belonged to the Company versus the board, then ETE is certainly entitled to discovery to facilitate that fact-intensive inquiry.

Williams next argues its reading is "consistent with [§3.01(d)'s] purpose" "to confirm compliance with … statutory obligation[s]." Ans.30 (citing 8 *Del. C.* §251). While statutory compliance may have been ***a*** goal, it plainly was not the only one. The nine-month gap between signing and closing meant that ETE, which would need to put up more than $6 billion in cash, bore considerable risk if things changed adversely in the interim. Some changes were out of the parties' control. But one

---

[13] A1172.

[14] B5039 (acknowledging board "voted to approve" the suit against "Warren in his personal capacity in Texas"); *see* ETE.Br.31-32.

[15] *Gerber v. EPE Holdings, LLC*, 2013 WL 209658, at *13 (Del. Ch. Jan. 18, 2013). And *contra* Ans.33, that the Agreement carves out a narrow exception based on the board's fiduciary duties does not mean §4.02(d)'s broader prohibition is somehow confined to formal board action.

thing fully within Williams' control was its continued support for the deal. If Williams publicly signaled its support was wavering, the markets would be spooked and the benefits from the Merger diminished. That explains why §3.01(d) defines the Company Board Recommendation as a set of recommendations that go far beyond statutory requirements.[16]

It also explains why Williams' position that the board had free rein to publicly undermine the deal at any point after it signed the Agreement is so obviously wrong. To be sure, §3.01(d) required the Williams board to adopt certain resolutions and not "rescind[], modif[y] or withdraw[]" them "as of the date of ***this Agreement***," as opposed to the date of Closing.[17] But nothing in §3.01(d) or anywhere else suggests that a ***subsequent*** modification was irrelevant, let alone that it could be accomplished only through formal resolutions. Williams' reading would make nonsense of the text of §4.02(d) and §4.02(f), the structure of the Agreement as a whole, and the parties' evident intent.

As a last-ditch effort, Williams misstates the record. Williams claims ETE "terminated on other grounds" and says it would be illogical to allow ETE to recover based on a Company Adverse Recommendation Change if it did not invoke that

---

[16] *Compare* 8 *Del. C.* §251, *with* A0434 (§3.01(d)).

[17] A0434 (§3.01(d)).

ground in real time. Whether that conclusion follows from the premise is debatable,[18] but the premise is false. ETE cited ***both*** the failure of a condition precedent ***and*** a Company Adverse Recommendation Change as bases for termination.[19]

Finally, nothing about Williams' atextual reading "makes sense." Ans.36. Under Williams' view, Williams was free to publicly denounce the Merger, denigrate the would-be leaders of the new entity, and even encourage stockholders to vote against it, so long as the board did not also pass a formal, non-public resolution. Williams tries to soften its position by arguing that those actions (all of which actually happened) "would presumably violate the best efforts clause." Ans.36. But Williams agreed to something more than best efforts, and the Agreement provided a specific remedy for the kind of public sabotage undertaken here. The parties agreed that, "in the event [of] a Company Adverse Recommendation Change," the remedy would be a specifically enumerated fee:

---

[18] Williams attributes much importance to Williams' stockholders vote in favor of the Merger. But the vote happened ***after*** the court's opinion stopping the Merger in its tracks. *See* AR0001. More fundamentally, the evident intent of the Company Board Recommendation provisions was to impose a continuing duty on Williams to publicly support the deal throughout the critical nine-month period between signing and closing, and that duty is not diminished because of any of the events at closing.

[19] A1537-38.

"[Williams] shall pay [ETE] … an aggregate fee equal to $1.48 billion."[20] The Court of Chancery erred in dismissing ETE's Counterclaim for that fee.

[20] A0474 (§5.06(d)(iii)), A0479-80 (§7.01(e)(i)).

II. Williams Breached The Merger Agreement In Multiple Respects.

Even putting aside its erroneous dismissal of ETE's Counterclaim for the $1.48-billion breakup fee, the Court of Chancery erred in awarding Williams the $410-million WPZ Termination Fee. To be eligible for that fee, Williams needed to show that it complied with its own contractual obligations. It did not come close.[21]

A. Williams' Actions Breached Williams' Best-Efforts Obligations.

The Merger Agreement required each party to "cooperate with [one] other," "use its respective reasonable best efforts to contest and resist" "any … litigation … challenging the Merger," and "carry on its business in the ordinary course."[22] In defiance of those run-of-the-mill obligations, Williams' CEO Alan Armstrong—in the words of a fellow Williams director—"outright attempt[ed] to sabotage the transaction" and "work[ed] exclusively on finding ways to break the deal instead of ways to complete the deal."[23] Armstrong colluded with John Bumgarner, a dissident stockholder and former Williams executive, to kill the deal, ***including via litigation seeking to enjoin the Merger***, and then destroyed the evidence of his malfeasance. The Williams board filed its own lawsuit demonizing the would-be leader of the

---

[21] Williams claims ETE bore the burden of proof on these issues, but it does not deny that it has an independent obligation to demonstrate its own substantial compliance with the contract to recover under it. *See Frunzi v. Paoli Servs., Inc.*, 2012 WL 2691164, at *7 (Del. Super. July 6, 2012).

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

[23] A0847.

combined post-Merger entity. Despite these and other facts, the court found that Williams did not breach its obligations. That conclusion depended on two basic legal errors, which this Court reviews de novo.

1. The court applied the wrong legal standard—twice.

Williams portrays "ETE's appeal" on this issue as "simply a disagreement with how the Court of Chancery weighed the evidence." Ans.40. That is wrong; the facts are not in dispute. The court found that Armstrong discussed with Bumgarner a document that became "[the] federal securities class action complaint" Bumgarner filed and was "responsib[le]" for "Bumgarner obtain[ing] a copy of Armstrong's notes to himself regarding the [Form] S-4," which Bumgarner used to drum up anti-Merger stories in the press.[24] The court's conclusion that these and other undisputed facts did not put Williams in breach of its best-efforts obligations rested on ***legal*** errors.

First, the court's ruling depended on its finding that Armstrong's clandestine actions "were intended to assuage Bumgarner's concerns," "not to thwart the Merger."[25] But even accepting that (highly implausible) interpretation of the record, the court committed legal error in ruling that good intentions could cure actions that,

[24] Op.47-48.

[25] Op.89.

even if not exclusively designed to torpedo the Merger, were indisputably inconsistent with the best efforts the parties agreed to provide. Because "proving a breach of contract … does not require scienter," intent is irrelevant.[26]

Williams does not deny that the court required ETE "to prove" Armstrong's ill intentions; instead, Williams meekly observes that the court did not say it was "impos[ing] 'an intent requirement.'" Ans.42. But there is no denying that that was the effect of the court's decision. Williams' counterargument is makeweight. Even accounting for the standard of review, the most that can be said about the record is that it might not conclusively prove that Armstrong actively encouraged Bumgarner to sue Williams. That is a far cry from a finding that Armstrong gave his best efforts to ensure the Merger would close.

<u>Second</u>, the court wrongly concluded that Williams could cure any best-efforts breaches if it was ready to close as of the Closing Date. Williams concedes, as it must, that "[t]he efforts provisions imposed a continuing obligation from signing to closing." Ans.46. Yet it insists, and the court agreed, that if Williams "strayed from the proper path," it "cured" its breach because it was "ready, willing and able to close" on the Closing Date. Ans.46. That is doubly wrong. Under this (il)logic, a party could engage in all sorts of subversive conduct to undermine the

---

[26] *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at *71 n.248 (Del. Ch. Nov. 30, 2020).

Merger, but then be deemed in compliance with its best-efforts obligations if at the end it claims a willingness to close. That result not only is absurd; it would render §5.03's ongoing best-efforts obligations essentially nugatory, as it would allow Williams to undertake its best efforts to ***undermine*** the deal throughout the critical nine months before closing as long as it said *mea culpa* by the eve of the Closing Date.[27]

2. The court applied the wrong legal standard in denying ETE an adverse inference.

There is no denying that Armstrong intentionally destroyed evidence and lied under oath about doing so,[28] so Williams retreats to the court's finding that ETE "suffered no prejudice from Armstrong's closure of his Gmail account." Ans.48. But even putting aside that Armstrong's actions were not a benign account closing, Williams accepts that "[i]f the spoliation was done in bad faith, the burden shifts to the spoliating party to show lack of prejudice."[29] That admission compels vacatur,

---

[27] Unlike *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *100 (Del. Ch. Oct. 1, 2018), where the party "abandoned its flirtation" with breaching the agreement, Williams blatantly and repeatedly breached the Agreement.

[28] Op.92-94.

[29] *Micron Tech. v. Rambus Inc.*, 917 F.Supp.2d 300, 319 (D. Del. 2013).

as the court placed the burden to prove prejudice ***on ETE***,[30] and Williams has not and cannot come close to meeting its "heavy burden."[31]

Williams claims there was no prejudice because "ETE was able to recover Armstrong's communications with Bumgarner by subpoenaing Bumgarner's emails." Ans.48. But ETE was entitled to—and Armstrong destroyed—more than just direct Armstrong-Bumgarner email exchanges, as Armstrong's emails to others could have further evidenced his campaign to keep his job and sabotage the Merger. While "Armstrong testified that he did not recall any such emails," Ans.49, ETE should not have to take a perjuring spoliator's word for it—and even he conceded that there may be other emails that were destroyed and never recovered.[32] Thus, contrary to Williams' suggestion and unlike the cases it cites, Williams cannot say for sure that information was not "irretrievably lost." Ans.49-50. Because Williams' "destruction of evidence was of the worst type: intentional, widespread, advantage-seeking, and concealed," "the only appropriate sanction" was to find that it was in material breach of the Agreement.[33]

---

[30] Op.92-93.

[31] *See Micron*, 917 F.Supp.2d at 319.

[32] A3875:780:13-22; A3783-84:688:6-689:12.

[33] *Micron*, 917 F.Supp.2d at 327.

3. Spoliation aside, Armstrong's machinations and the board's anti-Merger conduct breached the best-efforts covenants.

Williams does not explain how its board-authorized lawsuit again ETE's CEO could possibly be reconciled with the obligation to use its "reasonable best efforts to contest and resist any [Merger-related] litigation."[34] Instead, Williams tries to justify its actions on the merits. But it does not (and cannot) deny that it green-lighted a lawsuit that warned stockholders that, if they approved the deal, they would be "controlled" by a "malicious" leader who allegedly "exploited" his leadership position at ETE.[35]

Williams feigns confusion about how its posturing for a walkaway payment could possibly breach its best-effort obligations. *See* Ans.44. It is simple: Instead of working with ETE to close the deal, Williams misrepresented its board's position as "unanimously committed," *see* ETE.Br.21-22, "for the benefit of negotiating tactics" in trying extract a walkaway payment.[36] Williams claims that its "financial advisors never analyzed" such a payment, but it does not refute the evidence that, as early as February 2016, the Williams board studied how large a walkaway payment it could extract from ETE, that Williams' bankers presented analyses suggesting a

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

[35] A0989-1038.

[36] A0869.

breakup fee between $6 and $11 billion, and that its directors continued discussing a potential breakup fee until closing.[37]

Williams says ETE "twists the record" when arguing that Williams was collaborating with the press on anti-ETE articles. Ans.45. But Williams does not deny the veracity of an email in the record in which it admitted to "working the press."[38] And that example does not stand alone. As the court found, Armstrong first denied, then "t[ook] responsibility" for, Bumgarner "obtain[ing]"[39] Armstrong's highly critical (and non-public) notes,[40] which Armstrong later relayed to a Wall Street Journal reporter in an effort to stir up anti-Merger press.[41]

Finally, Williams does not deny that Armstrong "work[ed] behind the scenes with [the] dissident directors to fan the deal break flames,"[42] including by trying to bring "swing votes" back to the dissident camp. While Williams meekly responds that there is "no evidence" that the two directors "felt pressured to switch their votes," Ans.44, the relevant fact is not how the directors felt, but what Armstrong did. It is conceded that he "forcefully argued" to the swing votes against "continuing

---

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

[38] *See* Ans.45 (citing A0889-90).

[39] Op.48.

[40] A0493-95.

[41] *Compare* A0493-95, *with* A0530-36.

[42] A0847.

to press forward" with the Merger.[43] Indeed, the court explicitly found that "Armstrong did communicate anti-merger sentiments."[44] That is the opposite of undertaking one's best efforts to get the deal across the finish line.

In sum, even putting aside all the evidence of Armstrong's clandestine activities with Bumgarner—which themselves confirm that Armstrong's best efforts were put to scuttling, not finishing, the deal—the court clearly erred in finding Williams in compliance with its best-efforts obligations.

B. Williams Breached its Financing Commitments.[45]

Section 5.14 required Williams to "provide cooperation reasonably requested by [ETE] that is necessary or reasonably required in connection with … financing … arranged by [ETE]."[46] Williams failed to do so when it refused to instruct its authority to release its financials for an SEC filing, a simple step ETE needed to happen before it could move forward with the proposed offering of CPUs.

---

[43] A0916.

[44] Op.49.

[45] Williams argues ETE failed to "properly raise[]" this issue by not expressly adverting to it in a "question presented or summary of argument." Ans.51. But Williams cites zero support for this theory, for good reason: Issues are properly presented when they are included in the body of an opening brief. *See* Supr. Ct. R. 14(b)(vi)(A)(3). Williams does not dispute that ETE did so here. Nor could it; ETE addressed the issue at length in the Argument section.

[46] A0476.

Like the court, Williams takes the view its noncooperation was not a breach because it had "legitimate business purpose for not agreeing." Ans.51. But Williams' duty to cooperate under §5.14 is not qualified by an any-legitimate-business-purpose out. That matters. Other provisions do qualify Williams' obligations in similar ways. *See* ETE.Br.56-57. And §5.14 itself provides an out if ETE's request was unreasonable. If ETE's cooperation request was reasonable, then ETE had no other out.

In trying to paint ETE's request as unreasonable, Williams observes that "Section 5.14 did not require Williams to cooperate with ETE's breach of its operating covenants," Ans.52, and suggests that the CPU issuance would have violated the Merger Agreement. But §5.14 allowed Williams to resist an unreasonably burdensome request, not to resist ministerial requests because of its view of operating covenants. In all events, Williams is wrong about the issuance, as explained below. Williams therefore breached its financial cooperation obligations.

III. ETE's Issuance Of Securities Did Not Breach The Merger Agreement.

PDL §4.01(b)(v)(1) is clear: "[ETE] may make issuances of equity securities with a value of up to $1.0 billion in the aggregate."[47] It is equally clear that the Issuance complied with that provision. In finding that the Issuance violated the Merger Agreement nonetheless, the court fundamentally misread the contracts. In the court's view, the Equity Issuance Exception modifies only the corresponding sub-subparagraph of the Merger Agreement and has no effect on any other provision that could limit a sub-one-billion equity issuance, including the interim operating covenants ("IOCs") and "ordinary course covenant" ("OCC") in §4.01(b)[48] and the Capital Structure Representation in §3.02(b).[49] It thus held that the safe harbor seemingly provided by PDL §4.01(b)(v)(1) was illusory. That was legal error. This Court should reverse it under the de novo standard that governs contract interpretation, not under the "high bar" of "clear error" Williams erroneously claims applies, *see* Ans.54-55.

The preamble to Merger Agreement §4.01(b), which is repeated twice in §4.01(b), could not be clearer that ***all*** of PDL §4.01(b) applies to ***all*** of Merger Agreement §4.01(b). The preamble states: "***Except as set forth in Section 4.01(b)***

---

[47] A0413 (§4.01(b)(v)(1)).

[48] A0460-61 (§4.01(b)).

[49] A0488 (§8.04(a)); A0390 (Gen. Term #7).

of the Parent Disclosure Letter [or] expressly permitted by this Agreement …."[50] That language is different from—and broader than—other incorporative provisions in the Merger Agreement. To take just one example, Merger Agreement §1.01(b)(i) specifically references PDL §1.01(b)(i).[51] Provisions like that, which limit PDL incorporation to specific subparagraphs, confirm that the preamble means what it says: All of Merger Agreement §4.01(b) is modified by all of PDL §4.01(b). All of PDL §4.01(b) thus cross-applies to all of the IOCs and the OCC in Merger Agreement §4.01(b), not just the ones that correspond to the specific subheadings.

Given the text's clarity, it is perhaps unsurprising that Williams adverts to the language of the preamble only once in its brief, *see* Ans.60, and dismisses it as either surplusage or scrivener's error, Ans.61-62. According to Williams, the parties ultimately did not create any exceptions to the OCC, and the world-class law firms drafting the Agreement (Cravath and Wachtell) simply forgot to delete the vestigial preamble in their clients' $38-billion contract. Ans.61-62. Williams cites no evidence to support this fantasy, which is contradicted by ***Williams' own briefing***. Williams acknowledged below that the preamble points to ***everything*** in PDL §4.01(b), not nothing.[52] And Williams concedes now that "the preambles in the two

---

[50] A0460 (§4.01(b)).

[51] A0420 (§1.01(b)(i)).

[52] *See* A2845 (acknowledging that ETE could "engage in the specific actions set forth in the [PDL] ***even if they were outside the ordinary course***").

sentences of Section 4.01(b) of the Agreement"—one before the IOCs and one before the OCC—"have the same meaning." Ans.62. That concession should end the debate. Because the preamble means that anything in PDL §4.01(b) trumps the OCC, it must also mean that anything in PDL §4.01(b) trumps the IOCs. The court committed legal error in interpreting the preamble otherwise and reading it as a powerless clause that ultimately converts PDL §4.01(b)(v)(1) into a head fake, rather than a safe harbor, as there is simply no exception to the OCCs.

Williams' remaining efforts to justify that erroneous conclusion fare no better. First, Williams argues that because PDL provisions are listed "beneath a reference to [a Merger Agreement] section or subsection" and PDL exceptions topically mirror the Merger Agreement counterpart, the court's conclusion that PDL §4.01(b)(v) "applies only to the operating covenant in the … [§]4.01(b)(v) of the [Merger] Agreement" must be correct. Ans.56-57. But, as ETE explained in its Opening Brief, the parties unambiguously agreed that "headings … are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement."[53] Williams tries to differentiate between "section references" and "headings," arguing that the underlined subheadings in PDL §4.01(b) are actually "section references" with interpretive force. Ans.59-60. This is incorrect. Section

[53] A0488 (§8.04(a)); A0390 (Gen. Term #7).

and subsection numbers proceed in contiguous fashion; for instance, they do not skip from 2.01 to 2.04 or from 2.01(a) to 2.01(c). The underlined subheadings in PDL §4.01(b), by contrast, skip various numbers; thus, they do not constitute subsections even if they contain numbers. What is more, the formatting of the Merger Agreement and PDL further establish that the underlined subheadings in the PDL are ***headings***. In the Merger Agreement, sections appear in all caps, and headings appear in underlined text; for instance, §8.04 begins with "SECTION 8.04. Interpretation." The same formatting is used in the PDL, with the section number in all caps ("SECTION 4.01(b)") and the heading underlined ("Section 4.01(b)(v)").

Second, Williams argues that the PDL "repeats the same exceptions across multiple sections" and "[s]uch repetition would be superfluous if each exception in [PDL] Section 4.01(b) cross-applied to all of the IOCs and the OCC." Ans.58 (alterations omitted). But in a battle of surplusage, Williams clearly loses. Williams concedes that, under its section-by-section interpretation, the preamble to the OCC, which "was included in the very first drafts of the Agreement" and thus reviewed by the drafters countless times, is rank surplusage. Ans.61-62. Against that problem, the alleged surplusage of a single PDL provision (§4.01(b)(x)(1)) that was added ***the day before*** signing would be small beer. But it is not even that; the supposed surplusage Williams cites is illusory, as the repetition of certain exceptions serves the important function of confirming the reach of the reference in question.

Third, Williams' argument that ETE was permitted only to issue units "of the three existing classes of equity," not a new security like the CPUs, Ans.63, is contrary to the PDL's plain language, which could have, but does not, refer to "pre-existing" or "outstanding" classes of equity. That omission was deliberate; other provisions of the Merger Agreement and PDL refer to "issued," "outstanding," and "authorized" securities.[54] That explains why Williams' CFO conceded that "equity securities" (the term in PDL §4.01(b)(v)(1)) includes new securities, like the CPUs.[55]

In all events, even under Williams' incorrect subsection-by-subsection interpretation, the court still erred. Both agreements provide that an exception in the PDL "shall be deemed to apply to and qualify" not just the corresponding "Section or subsection of th[e Merger] Agreement," but ***all provisions of the Merger Agreement*** to which "it is reasonably apparent" that the disclosure "is relevant."[56] So, under Williams' interpretation, Williams must show that there is no reasonably apparent relevance between PDL §4.01(b)(v) ("[ETE] may make issuances of equity securities with a value of up to $1.0 billion") and the allegedly breached provisions of the Merger Agreement. It cannot, because the relevance is obvious.

---

[54] A0423 (§2.01(g)); A0427 (§2.03); A0445-46 (§§3.02(c)(i)-(ii)); A0391 (§1.01(b)(i)).

[55] ETE.Br.55-56.

[56] A0445 (§3.02); A0390 (Gen. Term #4).

Rather than try to contest that conclusion, Williams retreats to the court's conclusion that the "reasonably apparent" standard operates only to "excuse[] actions that would otherwise breach covenants where ***facially necessary*** to permit the activity provided by the [PDL] provision."[57] But that conclusion is plainly wrong. Williams' only support is the self-serving testimony of its deal counsel, who testified that the "reasonably apparent" relevance standard "was intended to address only obvious drafting errors." Ans.14. But extrinsic evidence cannot trump clear contractual text. And the words "obvious," "drafting," and "error" appear nowhere in Merger Agreement §3.02 or PDL General Term #4. The language in the agreements permits cross-application of provisions so long as it is "***reasonably*** apparent" that the two provisions have "relevance" to—*i.e.*, are "[l]ogically connected to"—each other.[58] That low bar[59] is easily cleared here, for the reasons explained in ETE's Opening Brief. The Court of Chancery erred in ruling otherwise.

* * *

---

[57] Op.79.

[58] *Relevant*, Black's Law Dictionary (11th ed. 2019).

[59] "[T]he threshold burden of proving relevancy is low." *Honey v. Bayhealth Med. Ctr., Inc.*, 2015 WL 310660, at *3 (Del. Super. Jan. 23, 2015).

Because the applicable provisions are not susceptible of multiple interpretations, the Court need not consider extrinsic evidence.[60] But the extrinsic evidence would only confirm that the Court of Chancery got it wrong in all events.

First, and *contra* Ans.64, ETE introduced testimony from a senior Wachtell partner who negotiated the transaction for ETE, who testified that "the clear language" of §4.01(b)'s preamble indicates that "***all of*** [***PDL***] ***4.01(b) qualifies each of the 19 provisions***" ***of Merger Agreement §4.01(b)***.[61] Second, while Williams argues that ETE's CFO "testified [he] understood the [PDL §4.01(b)(v)] to apply only to the equity issuance covenant," Ans.64, in reality, he simply testified that PDL §4.01(b)(v) "is an exception to the limitation on issuing equity," which it indisputably is; he was not asked if it ***also*** was an exception to ***other*** IOCs—and, in fact, he testified he never had "any concerns that the proposed offering did not fit within the [M]erger [A]greement."[62] Third, while Williams cites testimony from Cravath's lead deal lawyer claiming he "told Wachtell that … he understood … the disclosure letters to be section-specific," Ans.14, Williams ignores that ETE's interpretation is consistent with this testimony: Applying PDL §4.01(b) to all of Merger Agreement §4.01(b) (but not §4.02, §5.01, etc.) is "***section***-specific."

---

[60] *See O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001).

[61] B7146-48.

[62] A3488:4-23.

Finally, while Williams contends that the parties' post-signing conduct supports its interpretation, it simply misstates what happened. Per Williams, ETE would not have a "consent right" for Williams' own financing efforts if "the equity issuance exception 'cross-applies to all of the IOCs' as ETE now contends." Ans.66. But ETE never took the view that its consent was legally required; its businesspeople simply declined to pursue the transaction when asked, which is not unusual for buyers during the pendency of a merger agreement. Williams does not (and cannot) point to any evidence that ETE relied on any portion of the Merger Agreement or Williams' disclosure letter when discussing Williams' potential transaction.

IV. The Agreement Does Not Permit Williams To Shift Cravath's Furtive Contingent Fee Award Or Recover Compound Interest.

Williams argues that because §5.06(g), the Merger Agreement's fee-shifting provision, does not expressly prohibit a contingency fee arrangement or compound interest, the parties intended it to allow for both.[63] That is wrong. This Court should reverse the court's acceptance of these errors on de novo review.[64]

Section 5.06(g) provides that Williams is entitled to "reasonable attorneys' fees" and unspecified "interest" if it obtains the WPZ Termination Fee.[65] The relevant inquiry is thus "what a reasonable person in the position of the parties would have thought the language of a contract means."[66] Williams does not dispute this. Nor does it deny that, at signing in September 2015, not a single Delaware authority awarded contingency fees pursuant to a contractual fee-shifting provision or that neither ETE nor Williams contemplated such shifting at signing. Instead, Williams relies on Rule of Professional Conduct 1.5(a) to argue that "it was well established

---

[63] *See Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 350 (Del. 2020) (declining to "[i]mpl[y] terms into a written contract" where it was not "more likely than not[] that the parties, had they thought to address the subject, would have agreed" to them).

[64] Williams' argument that abuse-of-discretion review applies, Ans.68, is wrong. Unlike in *Mahini v. Edix Media Grp., Inc.*, 935 A.2d 242 (Del. 2007), the question for this Court is one of contract interpretation. De novo review therefore applies. *See SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

[65] A0474 (§5.06(g)).

[66] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

that there is nothing inherently unreasonable about contingent fees under Rule 1.5(a)." Ans.69. But Rule 1.5(a) governs voluntary fee agreements between attorneys and their own clients, not contractual fee-shifting agreements between the client and the client's contractual counterparty. It says nothing about whether ETE and Williams intended for §5.06(g) to encompass a contingency fee award when no Delaware authority had ever done so and fee-shifting statutes have been interpreted to foreclose the shifting of contingency arrangements for decades.[67]

Williams' reliance on *Shareholder Representatives Services LLC v. Shire US Holdings, Inc.*[68] is misguided. Williams concedes that *Shire* represented a first-of-its-kind ruling, but argues that *Shire*'s outcome "confirmed it is permissible" for contracting parties to expect that a fee-shifting provision could include a contingency fee award. Ans.70. This ignores that the fee-shifting provision in *Shire* covered claims brought by ***a stockholder-plaintiff class***—who are commonly represented on contingency—whereas §5.06(g) was negotiated and executed by two Fortune 500 companies who would be expected to pay litigators based on hourly rates and did so for most of this litigation.

---

[67] *See, e.g.*, *City of Burlington v. Dague*, 505 U.S. 557, 562-56 (1992).

[68] 2021 WL 1627166 (Del. Ch. Apr. 27, 2021), *aff'd*, 267 A.3d 370 (Del. 2021).

Williams next argues that it, like the *Shire* plaintiffs, had "a business reason" for switching mid-litigation to a contingency arrangement, namely to "align Cravath and Williams as partners." Ans.70.[69] That misses the point. Switching to a contingency arrangement always aligns incentives between a party and its lawyers, so that rationale would swallow the general rule. *Shire* involved plaintiffs who (unlike Williams) "struggled to fund [their] litigation" and resorted to a contingency arrangement so that they could "retain skilled and experienced counsel" to pursue meritorious litigation.[70] There was no comparable justification here. Instead, this case illustrates the grave danger of allowing a well-financed company to essentially insure itself against the risk of paying any attorneys' fees at its counterparty's expense. If Williams had agreed to pay Cravath double its ordinary rates if it won, and nothing if it lost, no one would think that ETE would have to pay Cravath double in the event Williams prevailed. The result should be no different here.

Finally, Williams confirms that the court departed from the confines of the Agreement to award compound interest.[71] In fact, Williams defends this award only by arguing that the court properly exercised its discretion to award such interest

---

[69] Of course, both Cravath and Williams testified they were ***not*** misaligned prior to the shift. *See* B8306; B8448.

[70] 2021 WL 1627166, at *1-2.

[71] Williams claims ETE failed to "properly present[] this issue in the question presented." Ans.71. This argument fails for the reasons explained in n.45, *supra*.

pursuant to "equitable principles." Ans.71. But Williams' cited cases are ***statutory*** interest cases that do not involve a contractual interest provision; nor do they hold that courts may disregard a contract's plain language. Ans.70-71. The court was required to enforce the parties' agreement as written, and it erred in rewriting §5.06(g) to add both the terms "compounding" and "quarterly."[72]

[72] *See Murfey*, 236 A.3d at 355.

CONCLUSION

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

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Rolin P. Bissell
Rolin P. Bissell (#4478)
James M. Yoch, Jr. (#5251)
Alberto E. Chávez (#6395)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
(302) 571-6600

Counsel for Defendants and Counterclaim Plaintiffs Below-Appellants Energy Transfer LP, formerly Energy Transfer Equity, L.P.; Energy Transfer Corp LP; ET Corp GP, LLC; LE GP, LLC; and Energy Transfer Equity GP, LLC

OF COUNSEL:

Michael C. Holmes
John C. Wander
Craig E. Zieminski
Andy E. Jackson
VINSON & ELKINS LLP
2001 Ross Avenue, Suite 3900
Dallas, Texas 75201
(214) 220-7700

Paul D. Clement
Matthew D. Rowen
Darina Merriam
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

Dated: February 6, 2023

`CERTIFICATE OF SERVICE

I, Alberto E. Chávez, Esquire, hereby certify that on February 10, 2023, I caused to be served a true and correct copy of the foregoing document upon the following counsel of record in the manner indicated below:

By File & ServeXpress

Kenneth J. Nachbar, Esquire
Matthew R. Clark, Esquire
Morris Nichols Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

/s/ Alberto E. Chávez
Alberto E. Chávez (#6395)