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Case No. 11130-CB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ADRIAN DIECKMAN, on behalf of himself and all others similarly situated, Plaintiff, v. REGENCY GP LP and REGENCY GP LLC, Defendants.	)	Civil Action No. 11130-CB

DEFENDANTS' POST-TRIAL BRIEF

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Dated: February 10, 2020

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I. PRELIMINARY STATEMENT

Regency's limited partnership agreement ("LPA") requires Plaintiff to prove that Defendants did not *subjectively believe* that the merger between Regency and ETP (the "Merger") was in Regency's best interests. Recognizing he cannot meet this standard, Plaintiff contends, contrary to Supreme Court precedent, that the Merger must be "fair and reasonable" to Regency. The Merger *was* fair and reasonable to Regency, as evidenced by the fact that the only damages model Plaintiff presented at trial depends on an illogical and rejected apples-to-oranges comparison. This was no accident. As trial established, there can be no serious dispute that Regency's directors who approved the Merger—and particularly the committee directors—thoroughly understood the transaction, actively negotiated, and believed the Merger was in Regency's best interests.

In late 2014, the energy industry experienced a dramatic downturn that was expected to (and did) persist for years. As Plaintiff's expert, James Canessa, conceded, commodities prices went "in the toilet" in the months preceding the January 2015 Merger.[1] Gathering and processing ("G&P")—which accounted for most of Regency's revenue—was the industry segment most exposed to this decline. Even among its G&P-focused peers, Regency was poorly positioned for the

[1] TT(Canessa)289:24-290:4.

downturn due to its above-average debt, capital needs, and commodities exposure. The market recognized this, and Regency's unit price fell 26% in Q4 2014.

This downturn squeezed Regency from two sides: its current operations and future projects became less profitable and simultaneously more expensive to fund. Moreover, Regency's stretched balance sheet and non-investment grade status limited its ability to incur new debt, leaving it reliant on more expensive equity for its $2.6 billion project backlog.

Regency's above-average commodity exposure showed in its post-downturn results, which Canessa admitted were "horrible." In the two quarters following the downturn, Regency missed internal budgets and analyst expectations by ~20%. In Q1 2015, Regency was foundering under key MLP financial metrics: evaporating liquidity, a 0.77x coverage ratio (meaning Regency must borrow $0.23 of every dollar distributed, or cut distributions), and a 5.26x leverage ratio (putting it at risk of credit rating downgrades). Regency's struggles showed no signs of dissipating as of the April 2015 closing. Post-closing, its assets continued to significantly underperform, and its G&P peers struggled, with many peers holding distributions flat to this day. Gas futures prices never returned to January 2015 levels—let alone pre-downturn levels. In short, without the Merger, Regency and its unitholders ("Unitholders") would have suffered.

The Merger alleviated these challenges and provided Unitholders with ETP units at an attractive 15% premium. Unlike Regency, ETP was largely insulated from the downturn. ETP had diversified businesses with minimal commodities exposure. Post-downturn, it exceeded internal budgets and analyst expectations, and its costs of capital did not change materially. ETP also had an investment-grade credit rating, lower leverage, and much greater borrowing capacity, allowing it to execute Regency's growth projects with 4.00% debt rather than Regency's 9.27% equity yield rate. Unsurprisingly, the market, analysts, and proxy advisory services all reacted positively to the Merger—despite their awareness of Plaintiff's principal critiques concerning the Merger's terms.

Beyond occasionally referencing Regency's "challenges" or "disappointing results," Plaintiff's Opening Post-Trial Brief ("Plaintiff's Brief" or "PB") is deafeningly silent on the points above. Rather than engage with concrete facts or actual results, Plaintiff primarily references optimistic projections and puffery: "Regency…affirmed confidence"; "Bradley 'remained very excited'"; and so on. After insisting throughout this litigation that Regency was "solid, stable, and growing" at the time of the Merger, Plaintiff abandons this mantra and now contends only that Regency did not face a "dire" or "existential threat." But whether Regency could have *survived* without the Merger is not the relevant question. Regency's board of directors (the "Board") reasonably concluded that Regency would struggle

without the Merger, and that ETP provided a stronger platform. Plaintiff scarcely contends otherwise. Regency's Board also reasonably concluded that Regency's conflicts committee (the "Committee") had negotiated attractive terms, including an exchange ratio on the favorable end of nearly all of the relative valuation analyses conducted by JPMorgan. Plaintiff's Brief does not even attempt to impugn JPMorgan's analyses or independence.

Each of Plaintiff's challenges to the Merger's terms fail. Plaintiff's criticism that the Merger was projected to be dilutive to Unitholders' distributions ignores that, when accounting for risk, ETP's distributions were *more valuable* than Regency's standalone distributions. Moreover, Plaintiff's myopic focus on accretion/dilution ignores the Merger's many other benefits—including a $3.14/unit premium that dwarfs Plaintiff's alleged dilution of $1.05/unit—and is based on overly-optimistic projections. Rather than show harm to Regency (or Unitholders), Plaintiff contends that ETE disproportionately benefited relative to Unitholders. Delaware law forecloses such comparative allegations under the LPA. That the Merger *also* benefited ETE does not negate its many benefits for Regency and Unitholders. Like third-party analysts and proxy advisors, the Board considered ETE's accretion but concluded that the Merger was nevertheless favorable to Unitholders.

Unable to persuasively attack the Merger's substance, Plaintiff focuses on its process. His contention that the two Committee members, Dick Brannon and Jim Bryant, were "beholden" to ETE and Kelcy Warren (ETE's chairman and ETP's CEO) is based on personal and professional histories that were fifteen years stale by 2015. When negotiating the Merger, Brannon and Bryant were highly experienced and independently successful businessmen with no material business dealings with Warren or ETE. While the handling of Brannon's resignation from another board preclude application of two LPA optional safe harbors, both Brannon and Bryant satisfied all other independence requirements under the LPA, and there is no evidence that the Committee acted in bad faith or had a disabling self-interest. The other Regency directors who approved the Merger—Michael Bradley (Regency's CEO) and Rodney Gray—also had significant experience, no non-Regency interactions with ETE or Warren, and a track record of independence.

The Committee efficiently worked long days to move expeditiously, which benefited Regency due to its deteriorating condition. ETP and ETE were both pushed to their reservation prices. While Plaintiff portrays the process as rushed, he never contends that the Committee or Board omitted or misevaluated anything. Rather, subsequent events overwhelmingly confirmed the Board's assessments.

Even if Plaintiff could establish liability, there are no damages. Canessa conceded there are damages *only if* the Court compares the *dividend discount model*

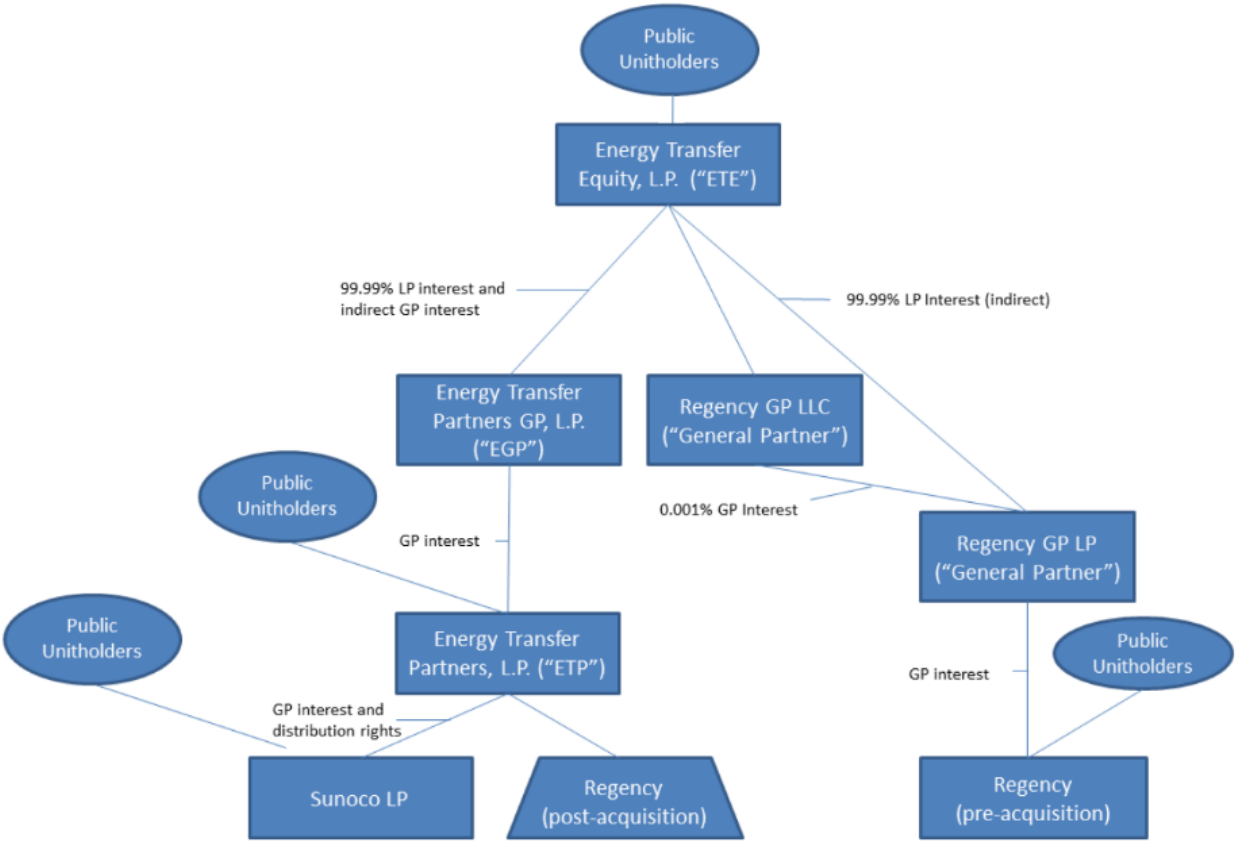
("DDM") *value* of Regency (akin to a discounted cash flow) to the *market price* of the ETP units received. Courts have repeatedly rejected such apples-to-oranges damages methodologies. Further, Canessa's reasons for disregarding Regency's unit price also apply to ETP's unit price, and his reasons for eschewing an ETP DDM also apply to Regency's DDM. And Canessa uses Regency projections from January 2015 to value Regency as of the April 30, 2015 closing—despite Q1 2015 results confirming that these projections were ~20% too high *during the very quarter in which they were made*. The Court should categorically reject Canessa's apples-to-oranges framework, but even if it does not, there are no damages if appropriate projections are used.

Conceding that the only damages model he proffered is unreliable, Plaintiff attempts a Hail Mary, suggesting for the first time in post-trial briefing that the Court should award damages using an accretion/dilution analysis conducted by Plaintiff's industry expert, Matthew O'Loughlin, who testified he was not opining on damages. It is too late for Plaintiff to switch damages models, and regardless, his new damages theory is equally flawed by focusing solely on the difference in Regency's and *pro forma* ETP's projected distributions (discounted to present value for the first time in Plaintiff's Brief), which fails to consider the Merger's other benefits and the different risk profile of these projected distributions. Correcting either of these errors eliminate damages.

II. BACKGROUND

A. Regency Expanded in a Strong Commodities Environment.

Regency was a non-investment grade MLP concentrated in the midstream industry's G&P segment.[2] ETP was a larger, diversified, investment-grade MLP.[3] ETE owned both MLPs' general partners:[4]



[2] Pretrial Order ("PTO") ¶¶36, 41, 173-78. "Midstream" connects producers ("upstream") to end-users ("downstream") of hydrocarbons.

[3] PTO ¶¶42-47; TT(Canessa)387:5-8.

[4] PTO ¶51.

In 2013 and 2014, Regency doubled in size through $9 billion in G&P-focused acquisitions, often with ETE's support, during a period of high commodities prices.[5] Additionally, Regency committed to $2.6 billion in predominantly G&P growth projects.[6]

B. Industry Conditions Deteriorated in Late 2014, Leaving Regency Particularly Exposed.

1. Commodities Prices Declined Dramatically.

In late 2014, the industry experienced "one of the largest oil-price shocks in modern history."[7] From June 2014 through January 2015, spot prices for oil declined 55%, natural gas liquids by 50%, and natural gas by 35%.[8] The decline accelerated after OPEC announced on November 27, 2014 that it would not stabilize oil prices ("OPEC's Announcement").[9] Analysts viewed this "declare[d] price war on U.S. shale oil" as a "watershed" moment and a "brave new world,"[10] not a standard cyclical fluctuation. OPEC's Announcement began a "violent and challenging

[5] PTO ¶¶211-15; JX838 ¶16; TT(Canessa)419:20-422:8; TT(Warren)1274:5-1275:21.

[6] JX839:79 fig.41; TT(Bradley)485:14-486:10.

[7] JX787:3.

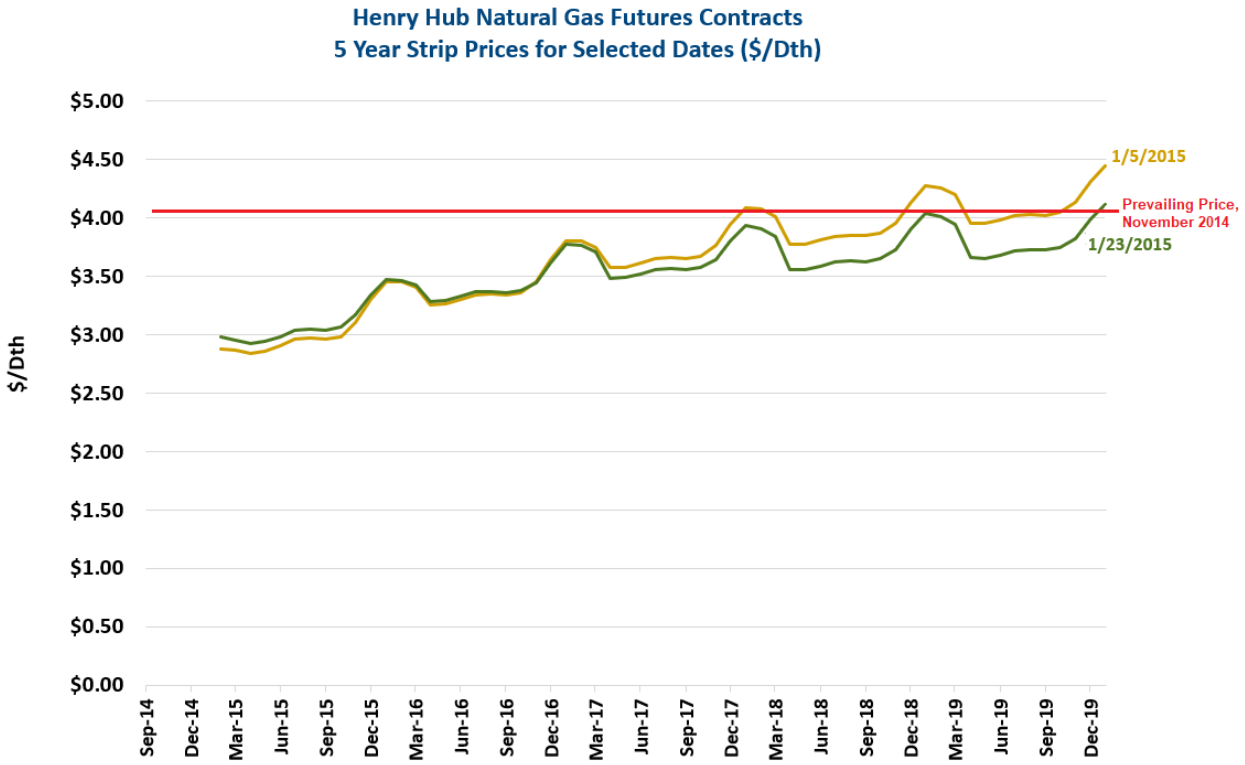
[8] JX854:1-2; JX919:1; JX855:1.

[9] TT(Bradley)493:10-494:2; TT(Bryant)952:2-12; TT(O'Loughlin)55:5-15.

[10] JX255:2; JX210:1.

operating environment"[11] wherein OPEC was "bracing for lower prices longer term."[12]

The market—and Board—expected this downturn to persist for years.[13] In January 2015, the market believed gas prices would take 5+ years to return to late-2014 levels—let alone mid-2014 levels.[14]



[11] JX354:45.

[12] JX255:1-3; TT(Bradley)493:10-494:20; TT(Brannon)893:9-24; TT(Bryant)952:2-12; TT(Welch)1408:20-1410:17.

[13] TT(Brannon)762:12-18; TT(Bryant)954:22-955:8; TT(Bradley)497:2-15; TT(Gray)1365:6-9.

[14] JX839:52-53 fig.23; TT(O'Loughlin)168:17-20, 173:3-178:20, 179:24-180:21.

2. G&P Was the Most Exposed Midstream Segment.

G&P is the most commodity-sensitive of any midstream segment.[15] Fees tied to commodities prices are more prevalent in G&P than other segments, such as interstate/intrastate pipelines.[16] And G&P "fixed-fee" contracts are generally shorter and have lower volume commitments (or none at all), leaving G&P operators with greater volume exposure if producers reduce drilling.[17] Consequently, G&P companies' equity values fell precipitously in the downturn.[18]

3. Regency Was Particularly Exposed and Struggled After the Downturn.

Even compared to its G&P peers, Regency was poorly positioned to face the downturn, with the highest leverage ratio and lowest distribution coverage ratio—both key metrics of an MLP's financial stability—and above-average commodity exposure.[19] Its non-investment grade rating also became a greater vulnerability in a

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[15] TT(Bradley)487:23-488:10, 497:16-498:1, 568:8-16; TT(Bramhall)1128:13-23; TT(Brannon)790:23-791:10, 811:22-812:8; TT(Castaldo)716:11-717:15; TT(Bryant)952:13-953:7; TT(O'Loughlin)152:4-153:4.

[16] JX79:28, 112, 117, 137; TT(Bradley)487:23-488:10; TT(Bryant)952:13-953:7.

[17] TT(Bradley)488:24-489:11, 498:2-14, 501:15-502:20; TT(O'Loughlin)152:4-12; TT(Brannon)794:12-795:3.

[18] JX540:7; TT(Welch)1443:18-24.

[19] JX540:13; TT(Castaldo)723:9-724:8; TT(Dages)1486:14-1488:16; TT(Long)1029:21-1030:17; JX457:8; TT(O'Loughlin)116:14-117:17, 119:21-120:12; JX309:18; TT(Bradley)499:3-21, 567:21-568:16.

downturn.[20] Regency's efforts to insulate itself from a downturn provided limited protection and were insufficient to prevent consistently poor results following OPEC's Announcement.[21] Some of these measures would provide even less protection if the downturn lingered. For instance, Regency had no 2016 natural gas hedges, and could not economically obtain them post-downturn.[22] And slowdowns in production would lag price declines, with detrimental effects on producers increasing as the downturn continued.[23]

Accordingly, Regency's unit price declined 18.3% in the first nine trading days following OPEC's Announcement.[24] Analysts identified Regency as among the "MLPs with the most commodity price exposure."[25]

Bradley recognized these challenges and commissioned a report on Regency's condition,[26] which confirmed the downturn was squeezing Regency from two sides:

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[20] JX79:35; TT(Castaldo)682:9-19.

[21] TT(Bradley)499:22-502:20, 571:19-572:16, 569:14-570:15; TT(Canessa)310:8-12; TT(Gray)1367:6-14.

[22] JX611:3; TT(O'Loughlin)70:3-15, 71:5-13; TT(Bradley)501:4-12; TT(Long)1032:7-14; TT(Brannon)831:1-832:1.

[23] TT(O'Loughlin)187:16-188:20; TT(Brannon)761:2-22, 838:13-22.

[24] JX842:18-19 table 1.

[25] JX256:1; JX201:2.

[26] TT(Bradley)515:7-14; JX590.

its operations and growth projects suffered from reduced revenue expectations and simultaneously became increasingly expensive to fund.[27]

From a revenue perspective, Regency faced price and volume exposure.[28] In the Permian Basin—where volumes were expected to remain strong—standard contract terms resulted in a 20% internal rate of return ("IRR") at pre-downturn commodities prices but a -31% IRR at January 2015 commodities prices.[29] In basins where Regency had more fixed-fee contracts, volume growth was coming under pressure.[30] Producers only drill when they expect a healthy return,[31] and even assuming $70/barrel oil prices—well above January 2015 prices (~$50/barrel)[32]—producers' IRRs were halved, or worse, from mid-2014 levels.[33] Regency's key customers in several basins curtailed drilling.[34]

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[27] TT(Bramhall)1119:9-21.

[28] TT(Bradley)495:9-19.

[29] JX590:35; TT(Bramhall)1125:11-1127:3; TT(Bradley)487:23-488:23.

[30] JX448:3; JX590:63, 68, 75; TT(Bradley)489:22-490:22, 495:11-19.

[31] TT(Welch)1411:7-12.

[32] JX854:1-2.

[33] JX309:34; TT(O'Loughlin)112:24-114:1, 131:9-19.

[34] JX590:63, 68, 75; TT(Bradley)519:18-521:12, 526:24-527:22, 530:23-531:20; TT(Warren)1360:17-1361:12.

Meanwhile, Regency's costs of debt and equity were increasing, and "the capital markets [were] almost closed for anyone below [investment grade]," like Regency.[35] This occurred when Regency needed affordable capital to fund $2.6 billion in growth projects, which Regency could not cancel due to contractual commitments.[36] Regency's revolving credit facility was for working capital and not a viable option for funding long-term projects.[37] Moreover, Regency's high leverage ratio limited its capacity for new debt,[38] leaving Regency heavily reliant on more-expensive equity funding.[39] Regency's "at-the-market" program ("ATM") resulted in equity issuances at *then-prevailing* market prices and, thus, was no panacea.[40]

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[35] JX568:2; PTO ¶¶173-178; JX842:85-86; JX590:37; TT(Long)1025:4-11, 1027:6-8; TT(Welch)1441:9-12; TT(Bradley)508:8-509:11; TT(Bramhall)1123:5-16; TT(Gray)1374:2-16. While Regency redeemed $600 million in senior notes in December 2014, the notice of redemption was sent in October 2014 before Regency's access to, and cost of, capital had deteriorated. JX667:97; JX226:23.

[36] TT(Bramhall)1118:22-1119:8.

[37] TT(Bradley)506:23-507:12.

[38] JX839:104-06 fig.57; JX464:14; TT(Castaldo)720:11-23, 722:24-723:17; TT(Bradley)540:3-541:1; JX135:1; JX667:176.

[39] TT(Brannon)802:21-803:19; TT(Bramhall)1122:8-1123:16; TT(O'Loughlin)141:10-142:5; TT(Welch)1437:15-1438:7.

[40] TT(Brannon)803:20-805:8; TT(Bradley)512:17-513:10; TT(Long)1031:6-22.

Higher costs of capital required higher IRRs.[41] By January 2015, a 17.2% IRR delivered the same return as a 12% IRR with pre-downturn costs of capital, a "significant" increase.[42] At this new IRR hurdle rate, four of Regency's growth projects were now unprofitable, even based on mid-2014 IRR calculations that did not account for lower revenue expectations.[43]

Regency's Q4 2014 results confirmed these challenges: distributable cash flow missed budget by 25% and December G&P EBITDA missed by 29%, "primarily due to [the] lower price environment and negative volume variance."[44]

4. ETP Was Better Shielded from the Downturn.

ETP, by contrast, was largely insulated from the downturn. ETP was a "larger, more stable, better capitalized entity"[45] with "more diversified asset[s]."[46] ETP had far less G&P exposure,[47] its three largest segments were less vulnerable

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[41] JX590:37.

[42] JX590:37; TT(Bramhall)1123:24-1125:4.

[43] TT(O'Loughlin)137:10-138:12; JX839:82, fig.43.

[44] JX258:4, 9; TT(O'Loughlin)99:15-100:3; JX481:3-4; TT(Bradley)560:19-562:20.

[45] TT(Castaldo)724:3-8.

[46] TT(Wolf)1200:12-16; TT(Canessa)386:17-389:6; TT(Welch)1441:18-1443:17.

[47] JX605:7.

than G&P to commodity prices,[48] and its retail gasoline business was countercyclical to commodity prices.[49] ETP's performance exceeded its budget and analyst expectations, even after the downturn. *Infra* §II.I. With ample liquidity and an investment-grade credit rating,[50] ETP could fund growth with less expensive debt, compared to Regency's expensive equity.[51] In January 2015, ETP had a 3.9x leverage ratio compared to Regency's 4.5x,[52] interest rates 2-3% lower than Regency's,[53] and $1.81 billion available on its revolver compared to Regency's $473 million.[54] The market recognized that ETP was less vulnerable:[55]

[48] JX79:28, 112, 117, 137; JX605:7; TT(Brannon)796:18-797:7, 788:21-789:10.

[49] TT(O'Loughlin)157:1-14.

[50] TT(Canessa)387:5-8.

[51] TT(Welch)1440:2-1441:17.

[52] JX657:5; JX839:106 fig.57.

[53] JX357:8; JX416:3; JX842:200; JX590:37.

[54] JX671:209; JX667:175.

[55] JX540:7; JX842:17-19 table 1.

C. ETP Offered to Merge with Regency.

Warren and Bradley met in early January 2015 regarding Regency and discussed merging Regency and ETP.[56] On January 16, ETP's board approved proposing to acquire Regency for 0.4044 ETP units and a cash make-whole payment

[56] TT(Warren)1265:2-1268:1, 1269:3-1270:11, 1360:13-1361:20; TT(Bradley)545:16-546:3.

of $0.36 per Regency unit,[57] with ETE "giving back" $60 million/year in incentive distribution right ("IDR") payments for five years post-closing.[58]

Regency's Board and management met to discuss ETP's offer, their concurring views that the downturn would be prolonged, and Regency's cost of capital to fund its projects.[59] Bradley "advised that all necessary parties would congregate at an off-site location to further evaluate the proposal"[60] to avoid deal leaks and enhance efficiency.[61]

The Board delegated authority to negotiate and evaluate the proposed transaction to the Committee.[62] Regency CFO Tom Long contacted JPMorgan to begin analyzing the transaction, should the Committee retain them.[63]

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[57] This was reduced to $0.32 when Regency lowered projected distributions. JX514:1.

[58] PTO ¶¶99-100; TT(Grimm)1158:24-1159:16.

[59] JX364:1; TT(Bradley)497:2-15, 549:2-550:7; TT(Brannon)762:12-18; TT(Bryant)955:1-8; TT(Long)1032:15-1033:9.

[60] JX364:1.

[61] TT(Castaldo)705:19-707:8.

[62] JX364:1; JX486; TT(Bradley)550:3-7.

[63] PTO ¶102; TT(Long)1033:10-1035:6; TT(Brannon)783:16-784:3, 902:5-10.

D. Brannon and Bryant Form the Committee.

Also on January 16, Brannon joined the Board.[64] Brannon had over 35 years of industry experience, including as president of two energy companies.[65] Brannon's candidacy was first considered in December 2015, after Gray became CFO of a Regency customer, threatening Gray's independent status under NYSE rules.[66] Before his appointment, Brannon met Regency management to discuss Regency's business.[67]

Regency's attorneys vetted Brannon's independence.[68] Brannon disclosed that he owned 17,200 ETE units (from a 1996 ~$40,000 investment) and had served on Sunoco's board since September 2014.[69] Brannon co-invested with Warren in multiple businesses in the 1990s, the last of which was sold in 2001.[70] Brannon began "substantive work on the merger"[71] after submitting his resignation from

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[64] PTO ¶60.

[65] JX301:47.

[66] JX815-Gray 16:21-17:4, 93:16-22; TT(Brannon)752:2-14; TT(Bradley)552:1-13; JX275.

[67] TT(Brannon)755:16-756:24; TT(Bradley)552:14-553:5.

[68] JX280; JX302; TT(Gray)1377:20-1378:3.

[69] JX301:15; TT(Brannon)753:18-754:15.

[70] TT(Brannon)768:15-770:10, 786:1-11.

[71] TT(Brannon)766:17-767:19, 873:11-17, 875:21-876:14.

Sunoco's board on January 20 to Tom Mason, the general counsel of ETP, which indirectly owned Sunoco's general partner.[72]

The Committee consisted of Brannon and Bryant.[73] Bryant, a director since 2010, founded Regency's predecessor in 2004.[74] He has 64 years' experience at energy companies.[75] Bryant also co-invested with Warren in multiple businesses in the 1990s, including ETE; since 2000, Warren at most "may have had a small investment" in one of Bryant's partnerships.[76] In 2015, Bryant was CEO of a midstream partnership unassociated with Warren or ETE.[77]

On January 20, the Committee met with its counsel, Akin Gump, and decided to retain JPMorgan.[78]

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[72] JX600.

[73] PTO ¶95.

[74] TT(Bryant)948:20-950:18.

[75] JX51:52; TT(Bryant)937:22-938:12, 938:18-942:7, 942:24-943:11, 951:7-21.

[76] JX828-Bryant 42:3-44:2, 41:9-13.

[77] TT(Bryant)937:7-18; JX828-Bryant 9:12-25.

[78] PTO ¶¶106-08; TT(Brannon)901:18-902:10; TT(Long)1033:19-1034:19.

E. The Committee Negotiated and Evaluated the Merger.

The Committee formally met eleven times,[79] continued to work "[b]efore, between, and after" Committee meetings,[80] and exchanged four counterproposals with ETP's conflicts committee ("ETP's Committee").[81]

1. The Committee Understood the Transaction.

The Committee was deeply familiar with Regency, ETP, and the industry.[82] Beginning on January 16, JP Morgan enlisted 11 bankers—knowledgeable about the industry and both companies—to "work basically around the clock" on diligence and analysis.[83] The Committee and JP Morgan had two formal diligence sessions[84] and numerous diligence communications with Regency and ETP management.[85] Because "everybody [was] in one place," there were "a lot of continuous

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[79] PTO ¶¶106-07, 109, 112-13, 119, 126, 133, 136, 141, 144.

[80] TT(Brannon)814:10-12, 773:15-18.

[81] PTO ¶¶127, 130, 133, 137.

[82] TT(Brannon)809:9-810:12, 787:15-788:6, 910:12-16; TT(Bryant)948:20-951:6, 983:6-14.

[83] TT(Castaldo)700:12-702:1, 703:3-705:14, 719:23-720:6, 718:13-719:8, 714:9-17.

[84] JX406:5-6; JX428:3-4; TT(Castaldo)706:17-707:8, 712:10-713:8, 714:6-716:10, 717:16-718:2; JX426; JX1302.

[85]TT(Castaldo)712:10-16, 714:6-20; TT(Brannon)773:8-14; TT(Bradley)553:14-554:5.

meetings,"[86] leading to an "incredibly efficient" process because the Committee had "unfettered access" to management and advisors.[87]

On January 22, JPMorgan presented its preliminary analysis, which the Committee reviewed "line by line and page by page."[88] As is customary in stock-for-stock mergers, JPMorgan (like Barclays, ETP's financial advisor) performed a "relative value analysis" of both Regency and ETP across the same metrics.[89] ETP's offer was on the favorable end of most valuation metrics and near the middle of the others, indicating it was "reasonable or fair."[90] The Committee determined that, based on this analysis, the proposed transaction appeared "fair to [Unitholders], especially when considering…the current commodity price environment, [Regency's] high leverage and high cost of capital…and the expected decline in its distribution coverage ratio."[91] The Committee deemed ETP's offer "a great start"

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[86] TT(Brannon)772:24-773:7.

[87] TT(Castaldo)706:17-707:8, 744:5-745:4; TT(Brannon)780:21-781:7; TT(Bradley)564:9-23.

[88] JX454:3-4; JX464; TT(Brannon)815:17-22, 851:15-852:1; TT(Castaldo)720:7-729:15.

[89] TT(Castaldo)677:1-678:7, 700:12-702:1, 703:3-705:14, 714:9-20, 718:13-720:6; TT(Wolf)1196:8-1197:18, 1200:17-1201:17.

[90] TT(Castaldo)718:12-719:22, 727:18-729:15; JX454:3; JX464:21; TT(Brannon)820:1-821:6; TT(Welch)1454:3-1455:3.

[91] JX454:3-4; TT(Brannon)824:13-825:2; TT(Bryant)956:9-958:12.

and dedicated its "efforts…to improv[ing] on that proposal,"[92] countering with a 0.425 exchange ratio and two-year cash make-whole payment.[93]

2. The Committee Negotiated For As Much Consideration As It Could.

ETP's Committee responded with a choice between ETP's original offer, or a 0.399 exchange ratio and a two-year make-whole payment.[94] It also pressed ETE to increase the IDR giveback to avoid diluting ETP's unitholders under its counterproposal.[95] Jamie Welch (Energy Transfer's Group CFO) confirmed ETE's agreement, increasing the first-year giveback to $80 million.[96]

Because ETP "didn't move off [its] initial position," the Committee utilized "a negotiating tactic," insisting on January 23 that ETP provide a 15% premium, which the Committee asserted was a 0.4088 exchange ratio and one-year make-whole payment.[97] Although the Committee recognized the deal would be accretive to ETE,[98] it focused on maximizing the exchange ratio and make-whole payment

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[92] TT(Brannon)914:20-915:1; TT(Bryant)1001:5-11, 1003:17-19.

[93] JX682:64-65; JX495; TT(Brannon)825:5-20.

[94] JX472:2; TT(Grimm)1164:17-1165:4.

[95] JX472:4; TT(Grimm)1163:5-8.

[96] JX473:2-3; JX474:2.

[97] PTO ¶133; JX479:1-2; TT(Brannon)840:15-842:9, 920:12-16, 923:14-18.

[98] TT(Brannon)822:18-824:11; TT(Bryant)1009:8-12.

because 100% of that consideration would go to Unitholders as compared to one-third of any IDR giveback.[99]

That afternoon, Bradley and Long received Regency's preliminary results for Q4 2014, which were "not pretty."[100] December distributable cash flow fell 54% below budget, resulting in a 25% quarterly shortfall and 0.80x coverage ratio.[101] These preliminary results were shared with the Committee but not ETP.[102] Brannon lamented that Regency "was deteriorating…much faster…than we anticipated."[103] By contrast, ETP's preliminary Q4 2014 EBITDA *exceeded* budget by 9%.[104]

Later that afternoon, Long authorized JPMorgan to utilize 2015-19 projections for Regency (the "January Projections") and ETP (the "ETP Projections") based on managements' respective 2015-16 projections and modified Wells Fargo 2017-19 forecasts.[105] These projections resulted from both companies'

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[99] TT(Brannon)931:22-932:13; TT(Bryant)1011:15-1012:7.

[100] JX481:1.

[101] JX258:4; JX481:5.

[102] TT(Brannon)832:19-834:13; TT(Long)1042:21-1043:9; TT(Welch)1416:21-1417:4.

[103] TT(Brannon)833:13-834:13, 839:20-840:14.

[104] JX492:3.

[105] JX477:1; TT(Long)1043:10-1045:8; JX540:11.

efforts in early January to update their forecasts due to lower commodities prices.[106] However, Long explained to JPMorgan, "[a]s discussed, forecasting is difficult due to the dramatically changing price environment,"[107] and the updates lowered only prices—not volumes—from the pre-downturn budgets.[108] This disproportionately benefited Regency,[109] but any optimism in the January Projections made the Merger appear *less* fair to Regency (by over-valuing standalone Regency).[110] By contrast, Barclays modeled a downside scenario wherein Regency distributions (but not ETP distributions) remained flat through 2019.[111]

Later that day, the parties and their advisors debated what exchange ratio would provide a 15% premium.[112] Welch asked Warren to increase ETE's first-year IDR giveback from $80 million to $85 million, but Warren refused.[113] Following Barclays' analysis that a 0.4066 exchange ratio and one-year make-whole payment

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[106] TT(Bramhall)1127:10-1128:8; JX312:1; JX324:1-2; JX326:1-2.

[107] JX477:1; TT(Long)1045:13-1046:23, 1108:11-23; TT(Bradley)614:2-6.

[108] TT(Bramhall)1128:9-23; JX324:1; JX388:1.

[109] TT(Bramhall)1128:9-23.

[110] TT(Castaldo)733:7-19.

[111] TT(Wolf)1197:19-1199:10; JX507:30.

[112] TT(Brannon)842:14-844:22; TT(Welch)1456:1-22; JX494:1-2; JX499:1-2; JX682:66.

[113] JX467:1; TT(Warren)1278:16-1279:12; TT(Welch)1458:6-1459:2.

would yield a 15% premium based on Regency's three-day VWAP, ETP's Committee authorized that counterproposal.[114] Mike Grimm, a member of ETP's Committee, testified that (1) this was ETP's "reserve price," (2) ETP was not "willing to go any higher [than] this proposal" regardless of the size of ETE's IDR givebacks, (3) ETP had "maxed out ETE's willingness to further contribute" IDR givebacks, and (4) he instructed Welch to tell Brannon this was a "[t]ake it or leave it" offer.[115]

Welch then conveyed ETP's counteroffer to Brannon, and following multiple communications, which got "heated," Welch snapped that Regency should "just go it alone and see how you like that in six months."[116] Brannon did not relent until the bankers concurred that the counteroffer represented a 15% premium.[117]

The Committee met to discuss.[118] Brannon—who has negotiated 15+ energy transactions over $100 million—believed the Committee had pushed "as far as we

[114] JX474:2; JX499:1-2; JX500:1; JX682:66.

[115] TT(Grimm)1166:4-18, 1169:21-23, 1171:24-1172:6, 1172:16-22; JX920-Grimm 254:6-10.

[116] TT(Brannon)844:4-22; TT(Welch)1455:13-1456:22, 1455:4-1456:22.

[117] JX682:66; TT(Brannon)846:6-17.

[118] JX514:1; TT(Brannon)851:4-10; JX533.

were going to get them."[119] JP Morgan concurred.[120] The Committee accepted in principle, subject to additional financial analysis: a 0.4066 exchange ratio, a one-year $0.32/unit make-whole payment, and $320 million in total IDR givebacks.[121]

F. JPMorgan Provided Its Fairness Opinion, and the Committee and Board Approved the Merger.

1. The Committee Recommended the Merger.

On January 25, JPMorgan presented its final analysis and fairness opinion,[122] which reflected, among other things:

- A 15.2% premium from Regency's three-day VWAP;[123]
- The premium ($3.14/unit using market prices) was in line with precedent transactions;[124]
- The "crux" of JPMorgan's analysis—the "football field" below—demonstrated the "transaction was fair" when comparing what Unitholders "were giving versus what [they] were getting" because the exchange ratio "was comfortably to the right of just about all of those bars."[125]

[119] TT(Brannon)749:6-750:6, 826:22-827:9, 854:22-855:1.

[120] TT(Castaldo)742:20-743:7.

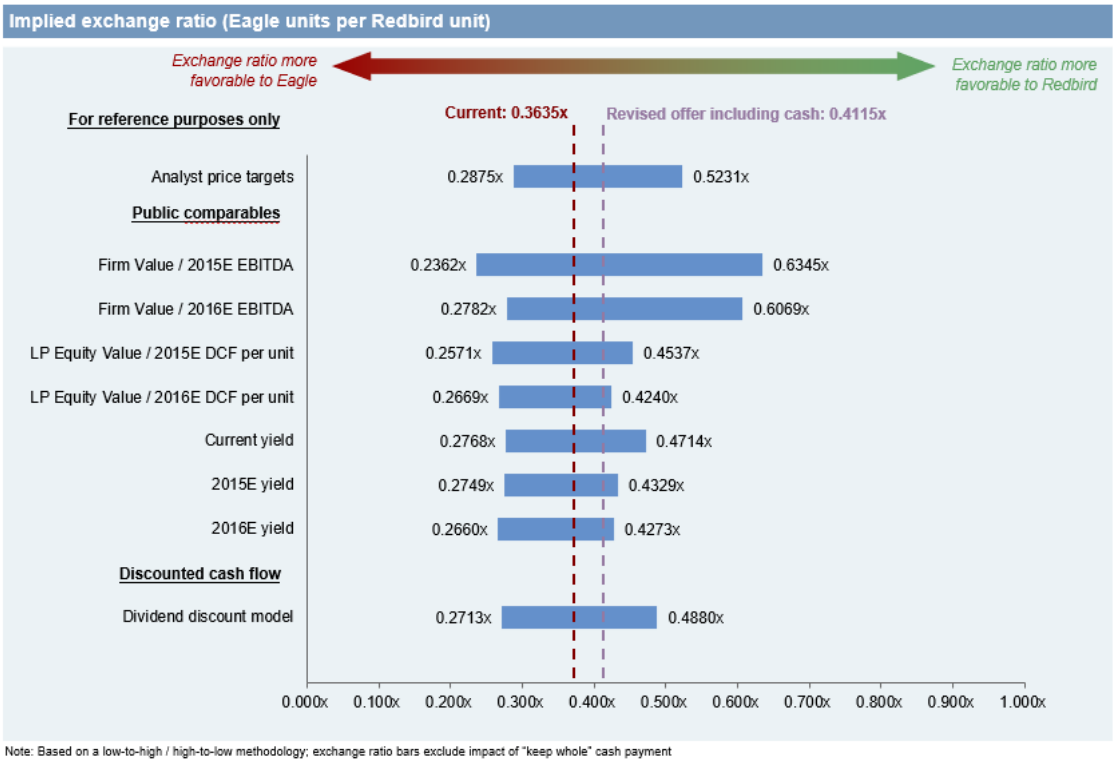
[121] PTO ¶¶137-38; JX534; TT(Brannon)845:1-10.

[122] JX540; JX551:1-2; TT(Brannon)851:20-852:1, 855:11-13.

[123] JX540:5.

[124] JX540:14.

[125] JX540:20; TT(Castaldo)737:10-739:4; TT(Brannon)820:1-821:6.



JPMorgan's distribution "accretion/dilution" analysis projected that the Merger would be breakeven to Unitholders' distributions in 2015 (with the keep-whole payment) and dilutive by $0.26 in 2016; essentially breakeven to ETP unitholders' distributions; and highly accretive to ETE.[126] The Committee analyzed this information[127] and other factors weighing against the Merger.[128] But the Committee also considered:

- Its expectation that the downturn would be prolonged, Regency's unit price would continue struggling, and its cost of capital would remain

[126] JX517:21; TT(Castaldo)689:18-24.

[127] TT(Brannon)822:18-824:11, 848:7-851:3; TT(Bryant)1009:8-1010:1.

[128] JX682:72-73.

high.[129] In contrast, ETP was a larger and diversified investment-grade entity, was well-positioned to weather the downturn, and was potentially undervalued by the market.[130]

- Its belief that Regency "would have a hard time meeting [management's] projections" and maintaining its distribution absent a commodities recovery.[131] By comparison, ETP's distributions were far less risky, as ETP's lower yield rate and higher growth rate reflected.[132]

- Regency's growth projects could be executed more profitably with ETP's 4.00% debt rather than Regency's 9.27% equity yield rate.[133]

- Unitholders would receive equity in an entity with far less exposure to G&P (called "midstream" at ETP) and a greater percentage of fee-based revenue:[134]

[129] TT(Brannon)829:24-830:17, 837:10-839:4, 933:24-934:17; TT(Bryant)954:22-955:8, 956:12-22; TT(Castaldo)738:1-739:4; JX479:1; JX514:1.

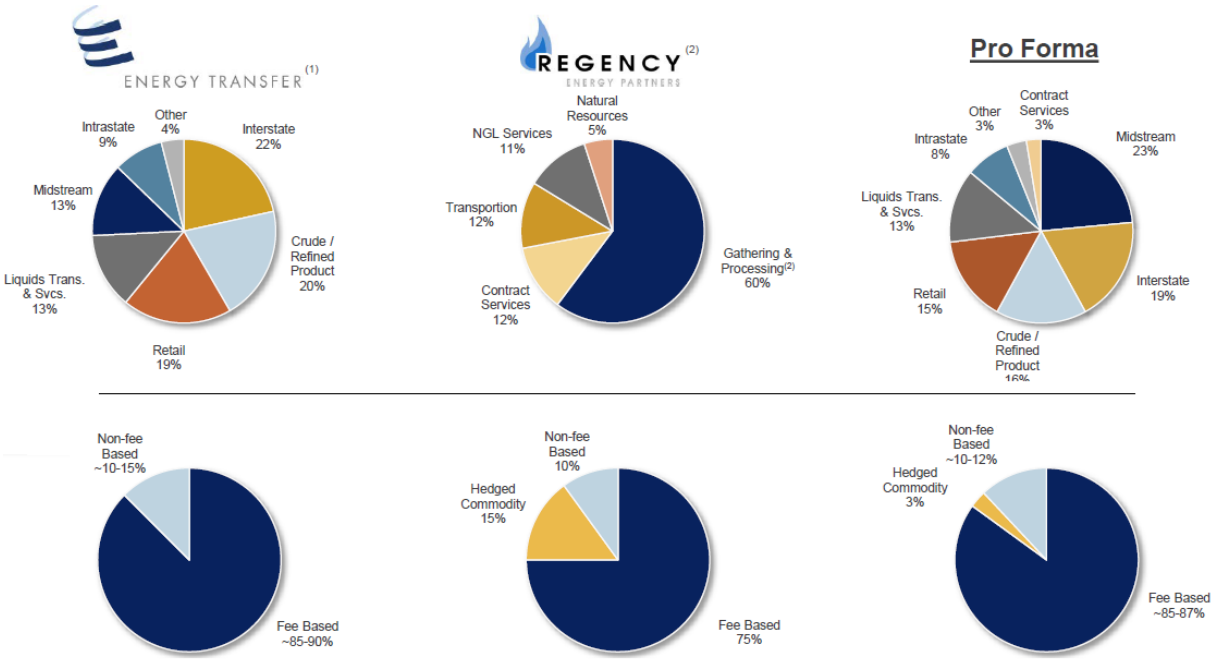
[130] TT(Brannon)818:14-819:17, 852:16-854:2, 860:6-8; TT(Bryant)954:22-957:11; TT(Castaldo)722:24-724:8 (discussing JX464:14); TT(Canessa)345:19-23, 388:18-23.

[131] TT(Brannon)832:2-18, 837:10-839:4, 933:24-934:17; TT(Bryant)954:22-955:8, 1009:13-1010:1, 1010:17-23; TT(Castaldo)721:7-18; JX454:3-4.

[132] TT(Brannon)789:17-21; TT(Bryant)958:2-12; TT(Castaldo)720:11-722:22; JX540:13, 18 (ETP's projected distribution growth 5.2%, Regency's 3.9%).

[133] JX416:3; TT(Brannon)800:7-804:24; TT(Bryant)956:12-22.

[134] JX608:13; TT(Brannon)790:14-798:17; TT(Bryant)994:20-995:16, 996:18-23.



After discussing every factor, there was "[n]o doubt" the Merger was "fair and reasonable and in the best interests of [Regency] and [its] Unitholders," and the Committee unanimously recommended the Merger.[135]

2. The Board Approved the Merger.

Later on January 25, the Board met to consider the Committee's recommendation.[136] The Committee "walked [the Board] through the entire negotiations," and JPMorgan discussed its analysis.[137] The Board unanimously

[135] JX551:3-4; TT(Brannon)855:2-10; TT(Bryant)956:6-8.

[136] PTO ¶146.

[137] TT(Brannon)856:6-21; JX537:1-2.

approved the Merger,[138] with directors John McReynolds and Matt Ramsey abstaining due to their roles at ETE.[139] Thus, Regency's remaining directors—Brannon, Bryant, Bradley, and Gray—approved the Merger.

Bradley and Gray had worked at energy companies for decades.[140] They had served on the Board since General Electric owned Regency's general partner and had no prior relationship with Warren or ETE.[141]

Like the Committee, Bradley and Gray believed the Merger "was the best deal available" for Regency and its Unitholders.[142] Both expected Regency would be "very challenged" in a prolonged downturn.[143] They were concerned that Regency's high cost of capital threatened its competitiveness,[144] whereas ETP provided a "[s]trong balance sheet" and "[g]ood access to capital."[145] The projected distribution

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[138] TT(Brannon)856:17-24; JX537:2-3.

[139] JX682:67.

[140] PTO ¶¶58, 69; JX833-Bradley 24:20-33:17; JX100:44.

[141] PTO ¶¶58, 69; JX833-Bradley 25:22-33:17; JX815-Gray 32:19-24; 58:11-18; 59:3-7.

[142] TT(Bradley)545:16-546:3, 549:2-550:2, 557:6-558:2, 565:3-15, 566:6-23, 598:12-15, 659:5-16; TT(Gray)1365:3-19, 1373:18-1377:1.

[143] TT(Bradley)497:2-15, 545:16-546:3, 574:19-575:1; TT(Gray)1365:3-1367:14.

[144] TT(Gray)1365:3-19, 1374:2-1375:2; TT(Bradley)508:13-509:11, 512:9-14, 513:14-15, 557:6-16, 566:6-23, 659:5-16; JX428:4.

[145] TT(Bradley)535:6-9, 549:2-550:2, 557:6-16; TT(Gray)1372:8-1373:9.

dilution was offset by "a good premium" and a more "certain" distribution.[146] They recognized ETE's accretion but saw no leverage to obtain better terms and had to decide "what was better for [Unitholders], do the deal or don't do the deal."[147] Saying "no" was an option, but "[t]ime was of the essence" because Regency was "deteriorating."[148]

G. The Market's Reaction.

On January 26, the Merger was announced (the "Merger Announcement"), Regency announced a flat distribution,[149] and ETP announced a $0.02 distribution increase.[150]

Regency's unit price (which had already jumped 7% the day of ETP's initial offer) increased 4.97% that day.[151] Analysts unanimously concluded the Merger was positive for Regency, echoing the Board's reasoning:[152]

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[146] TT(Bradley)566:1-23; TT(Gray)1376:6-1377:1.

[147] TT(Gray)1370:2-1371:14, 1375:9-1376:5, 1378:4-18; TT(Bradley)566:24-567:11.

[148] TT(Gray)1375:21-1376:5; TT(Bradley)567:12-568:16.

[149] JX570:1; TT(Welch)1418:15-1419:13.

[150] JX580:1.

[151] JX842:152.

[152] JX851-Canessa 66:20-67:4 (unaware of any contrary reports); TT(O'Loughlin)160:17-162:8 (same); TT(Dages)1517:3-1518:1.

- UBS: Titled, "ETP Providing Shelter from the Storm": Merger was positive given the "premium paid," synergies, and the fact that "capital markets are almost closed for anyone below [investment grade]."[153]

- Credit Suisse: Asking, "Why Prolong the Pain?": Regency would be "moving to a more financially stable ETP platform," "help[ing] to alleviate…concerns about [Regency] having to use a weakened currency and stretched balance sheet to continue to fund a large capex budget."[154]

- Morgan Stanley: "Given [Regency's] current cost of capital, the current circumstances dictated the timing as projects were no longer accretive," and ETP provided "an attractive platform to help subsidize weakness likely to persist at Regency, absent a material rally in oil and/or natural gas [prices]."[155]

- Wells Fargo: Merger was "positive[]" because Regency's "prospects [were] more challenging given lower commodity prices (and potentially volumes)" and Regency "would have been challenged to finance an estimated $1.5B 2015 capital program on its own."[156]

The market reacted positively despite immediately recognizing the Merger was projected to be dilutive to Unitholders' distributions and accretive to ETE.[157]

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[153] JX568:1-2.

[154] JX570:1.

[155] JX587:2.

[156] JX614:4.

[157] JX569:1; JX570:1; JX614:2; TT(O'Loughlin)211:11-21; TT(Canessa)261:4-18, 268:3-6; Am. Compl. ¶113.

ETP's unit price fell 6.44% that day.[158] As Canessa acknowledged, the "market perceived [the Merger] as a bad thing for ETP."[159] In a report titled "Regency Rescue Not the Ideal Deal for ETP," BofA Merrill Lynch commented that Regency was "beset by several investor concerns," including "heightened commodity exposure," leaving the analyst "somewhat surprised ETP did not drive a harder bargain."[160]

Proxy advisory services also uniformly concluded the Merger was positive for Regency—despite awareness of Plaintiff's principal criticisms of the Merger terms.[161] For example, ISS noted that Regency's price had declined relative to ETP and that the Merger was dilutive for Unitholders and accretive for ETE.[162] Nevertheless, ISS recommended the Merger for its "strong" business rationale, lowered borrowing costs, and "all-equity" consideration allowing Unitholders "to capture upside exposure in a natural gas rebound."[163]

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[158] JX842:163.

[159] TT(Canessa)459:4-11.

[160] JX554:1.

[161] JX693:1, 4-5.

[162] JX691:9.

[163] JX691:2, 9.

H. The Amendment.

On February 18, the Committee and its advisors met to consider ETP's proposal to amend the merger agreement to (1) be a "reverse triangular merger" instead of a direct merger, and (2) replace the $0.32 cash payment with $0.32 in ETP units (the "Amendment").[164] JPMorgan informed the Committee that it need not update its fairness opinion because changing the form of ~1% of the consideration was immaterial.[165] The Committee determined that the Amendment would benefit Unitholders by eliminating the ETP unitholder vote requirement—providing greater deal certainty—and by deferring taxes on the make-whole payment.[166] Nonetheless, it sought additional concessions, and ETP agreed to convert the make-whole payment to ETP units based on a methodology more favorable to Unitholders.[167] The Committee recommended the Amendment,[168] and the Board approved it.[169]

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[164] PTO ¶¶151-52.

[165] JX635:2; TT(Castaldo)695:18-696:17, 741:7-13.

[166] JX635:5-6; TT(Brannon)857:11-24, 859:12-860:8.

[167] JX635:1-2; TT(Brannon)858:1-859:11.

[168] JX635:6.

[169] PTO ¶¶155, 158.

I. Regency's Post-Signing Performance Confirmed the Merger's Rationale, Undermined the January Projections, and Weighed Down ETP's Unit Price.

In Q4 2014 and Q1 2015, ETP's distributable cash flows exceeded median analyst estimates by ~5%, whereas Regency's fell ~18% below analyst estimates.[170] Canessa described Regency's results as "horrible."[171] Between signing and closing, gas prices fell another 13%.[172] In Q1 2015, Regency's G&P EBITDA fell 22% below budget due to "lower natural gas & [c]ondensate prices" and "lower volumes in all regions:"[173]

($000s)	Apr-14	May-14	Jun-14	Jul-14	Aug-14	Sep-14	Oct-14	Nov-14	Dec-14	Jan-15	Feb-15	Mar-15
Adjusted EBITDA												
Gathering & Processing	$ 63,171	$ 63,876	$ 61,411	$ 74,470	$ 67,502	$ 74,157	$ 61,571	$ 72,906	$ 59,424	$ 50,673	$ 49,602	$ 49,535

Regency's coverage ratio declined to 0.77x, its leverage ratio climbed to 5.26x (risking a credit downgrade[174]), and its liquidity fell to $299 million.[175] Its

[170] JX842:176-77; TT(Canessa)443:22-444:1; JX547:5; JX1300:5.

[171] TT(Canessa)310:8-12, 444:2-11.

[172] JX838:64.

[173] JX669:5-6.

[174] JX135:1; JX839:107; TT(Long)1029:11-1030:10.

[175] JX883.

distributable cash flow fell 17% below the January Projections, with no signs of abating,[176] while ETP exceeded the ETP Projections by 7.6%.[177]

On April 30—the closing date—Regency finished its "3+9 forecast" for 2015 that incorporated Q1 actual results and re-forecasted Q2-Q4, with no changes beyond 2015 (the "April Projections").[178] The April Projections projected 2015 distributable cash flow 33% below the January Projections.[179] Moreover, Regency's projected leverage ratio would rise to 5.98x (which would violate debt covenants[180]), it would have no liquidity for Q2-Q4, and it would have to issue higher-cost equity for all capital needs.[181]

Despite ETP's strong performance, ETP's unit price fell 11.6% between signing and closing,[182] which analysts attributed to ETP being "penalized" for taking

[176] *Compare* JX450, *with* JX883; JX842:180.

[177] JX842:60-61, 177.

[178] JX883; TT(Bramhall)1133:6-1137:8.

[179] *Compare* JX883, *with* JX540:11.

[180] JX590:38.

[181] JX883.

[182] JX842:152, 154.

on "additional exposure from [Regency]" that could be "a material drag on [ETP]'s 2015 outlook."[183]

99% of unaffiliated common units present at a Regency special meeting (and 60% of those outstanding) voted for the Merger.[184] It closed on April 30, with each Regency unit exchanged for 0.4124 ETP units.[185]

J. Post-Closing Events Further Confirmed Regency's Rationale for the Merger.

Based on puffery in ETP earnings calls, Plaintiff asserts that "[a]fter the Merger closed, Regency's legacy assets continued to perform well."[186] But Regency's assets—and the entire G&P subsector industry-wide—continued to struggle throughout 2015 and beyond.

ETP's business segment housing Regency's G&P assets *shrank* by a combined 15% (despite substantial revenues from new assets and increased

[183] JX656:1-2; JX713:3; JX727:1.

[184] JX700:3; MTD Br. (Aug. 14, 2015) at 10 n.4.

[185] PTO ¶¶162-63.

[186] PB:12. Alleging "continued" success is peculiar given Canessa's admission that Regency performed "horribl[y]" in Q4 2014 and Q1 2015. TT(Canessa)443:16-444:11.

volumes) in 2015 and 2016, when the January Projections predicted 28% *growth*.[187] Regency's contract services business also missed the January Projections by 20% in 2015.[188] And Regency's G&P assets in the Mid-Continent Basin—its second largest basin[189]—have had "over the last several years…zero to negative cash flow."[190]

Meanwhile, many of Regency's G&P peers have declared bankruptcy, reduced distributions, or held distributions flat since Q4 2014.[191] Peer G&P equity prices continued declining, indicating Regency standalone would have traded at ~$16/unit by December 2015:[192]

[187] TT(Bramhall)1138:18-1143:5 (*comparing* JX1306:233, *with* JX394); JX755:59 (showing segment's EBITDA decline in 2015, $288 million of which was "due to lower NGL and gas prices," despite $220 million increase from new assets).

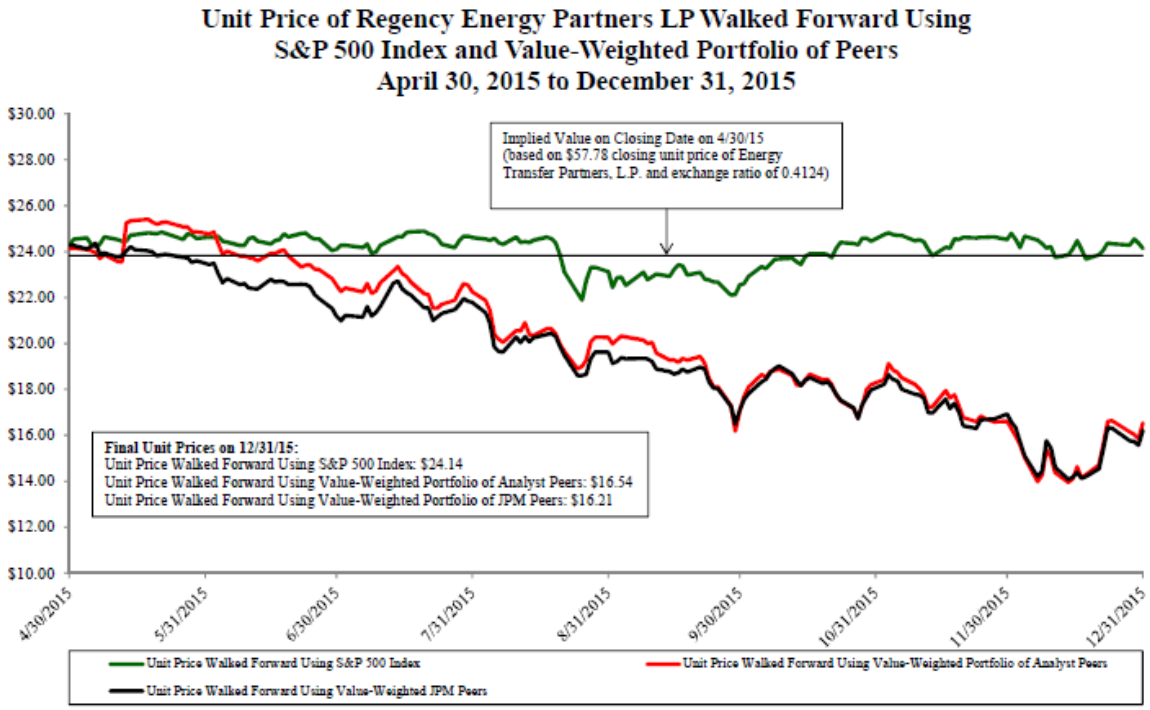
[188] TT(Bramhall)1140:2-17 (*comparing* JX755:8, *with* JX394).

[189] JX839:63 fig. 30.

[190] TT(Bramhall)1143:6-18; TT(Bradley)495:9-19.

[191] TT(Castaldo)724:9-726:6.

[192] JX842:178.

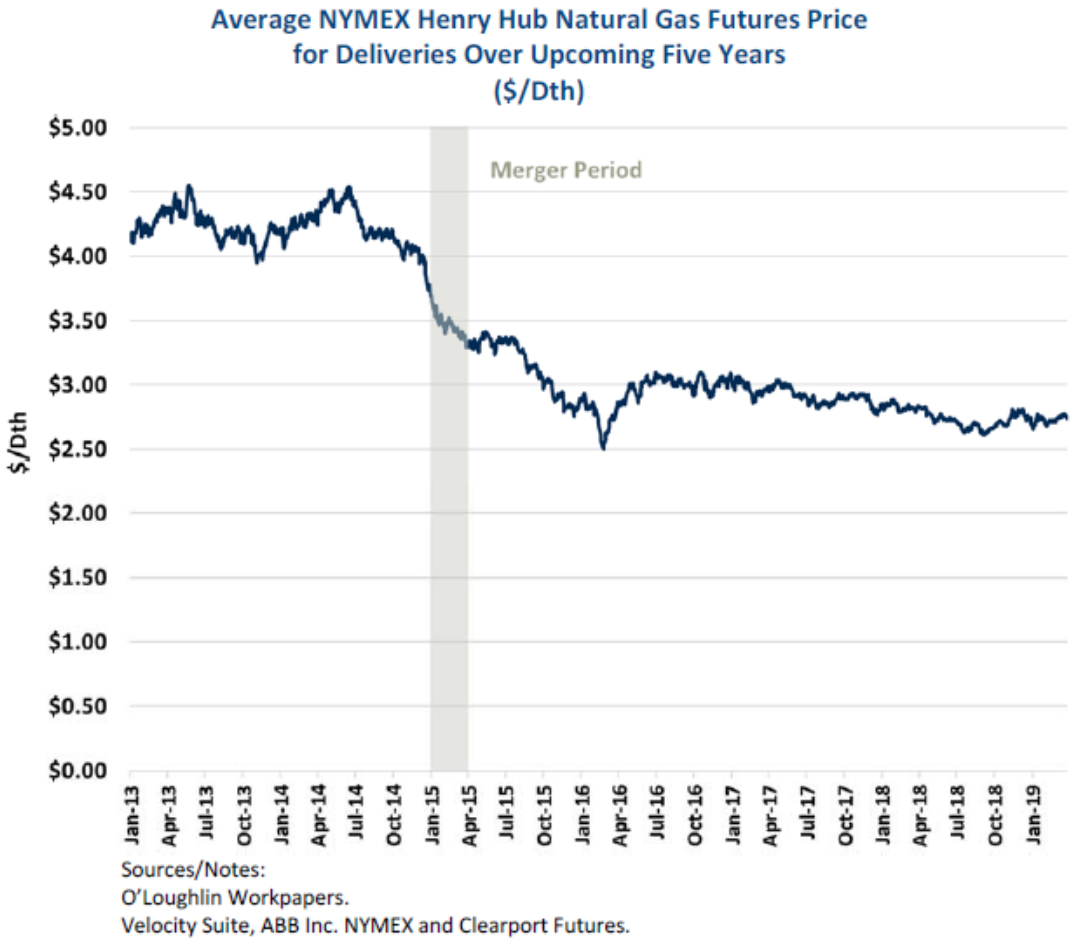


As expected, the commodities downturn persisted. By early 2016, nearly two-thirds of U.S. oil and gas rigs had stopped drilling,[193] and oil and gas prices reached 12- and 17-year lows, respectively.[194] Gas futures prices have never recovered to January 2015 levels—let alone pre-downturn levels:[195]

[193] JX918:1-2.

[194] JX854:1; JX855:1.

[195] TT(Brannon)762:19-22, 840:12-14; JX855:1; TT(O'Loughlin)168:17-171:2.



By contrast, ETP's *pro forma* 2015 EBITDA exceeded Merger projections (despite disappointing legacy Regency results), and distributions met Wall Street expectations.[196] As analysts foresaw, ETP had provided Regency "shelter from the storm."[197]

[196] TT(Canessa)332:10-333:20; JX827-Dieckman 109:25-110:20.

[197] JX568:1-2.

III. ARGUMENT

A. Plaintiff Must Prove Defendants Approved the Merger in Bad Faith.

1. Section 7.9(b).

This lawsuit is governed by §7.9(b), which requires the general partner to act in "good faith," defined as a "belie[f] that the determination or other action is in the best interests of the Partnership."[198] "[O]nly the subjective intent" of the directors "matters when determining whether they acted in good faith." *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *12 (Del. Ch. Oct. 28, 2010). A transaction "could have suffered from many flaws as long as the Committee members reached a rational decision for comprehensible reasons," and arguments "that the Committee should have proceeded differently" are insufficient. *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2015 WL 1815846, at *16 (Del. Ch. Apr. 20, 2015), *rev'd*, 152 A.3d 1248 (Del. 2016).

Unable to prevail under this standard, Plaintiff contends the Merger must satisfy §7.9(a). But under well-settled authority, §7.9(a) provides optional safe harbors, not a governing standard. *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 254 n.37 (Del. 2017); *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 102 & n.28 (Del. 2013); *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 364-65 (Del. 2013); *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 WL 4975270 (Del.

[198] JX25:70.

Ch. Aug. 20, 2015), *aff'd sub nom. Haynes Family Tr. v. Kinder Morgan G.P.*, 135 A.3d 76 (Del. 2016); *Morris v. Spectra Energy Partners (DE) GP, LP*, 2017 WL 2774559, at *10 (Del. Ch. June 27, 2017). Indeed, Plaintiff alleged in his Amended Complaint and elsewhere that "***[w]ithout safe harbor*** or financial advisor protection, Defendants are *liable for breach of contract* ***if*** they failed to act in good faith in approving the Merger" under §7.9(b).[199]

Plaintiff reversed course at summary judgment and now argues §7.9(b) is irrelevant because §7.9(b) says "unless another express standard is provided for in this Agreement," purportedly referring to §7.9(a).[200] But this language was found in Encore's partnership agreement, and the Supreme Court nonetheless applied §7.9(b)'s good-faith standard. JX29:70-71; *Encore*, 72 A.3d 93. Moreover, Plaintiff conflates the good-faith *standard* prescribed by §7.9(b), and a good-faith *presumption* allowable under §7.9(a); these provisions are compatible because they address distinct issues.[201] Finally, Plaintiff relies solely on opinions from one Vice Chancellor who simply disagrees with Supreme Court precedent but has

[199] Am. Compl. ¶111 (citing §7.9(b)); *id*. ¶¶49-50, 149, 153; Pl.'s MTD Opp. (Aug. 3, 2017) at 16, 22, 28.

[200] PB:53-54.

[201] Defs.' Answering Br. in Opp'n to Pl.'s Mot for Partial Summ. J. ("Defs.' Opp.") 25-27.

acknowledged that, under that precedent, a general partner has a "choice" whether to utilize §7.9(a). *Kinder Morgan*, 2015 WL 4975270, at *6.[202]

2. Section 7.8(a).

Under §7.8(a), Plaintiff can recover damages only if Defendants "acted in bad faith or engaged in fraud [or] willful misconduct."[203] Plaintiff mistakenly contends that §7.8(a) is an affirmative defense that Defendants waived.[204] First, §7.8(a) is not an affirmative defense. As Plaintiff admitted, §7.8(a) is part of the agreement that Plaintiff alleges has been breached and, thus, is part of Plaintiff's cause of action. Pretrial Conference Tr. 30 (conceding Plaintiff has "the burden…under LPA Section 7.8"); *Enbridge*, 159 A.3d at 260 (under similar provision, "*[plaintiff] must plead facts*" showing bad faith); *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2012 WL 1142351, at *6 (Del. Ch. Apr. 4, 2012) (same). Plaintiff cites no case stating a similar contract provision is an affirmative defense, instead relying on two inapplicable cases examining *statutory* defenses.[205]

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[202] *Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097 (Del. Ch. 2014); *El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 WL 2768782 (Del. Ch. June 12, 2014); *Bandera Master Fund LP v. Boardwalk*, 2019 WL 4927053 (Del. Ch. Oct. 7, 2019). In *Bandera*, the Court was able to avoid the authorities cited above because the permissive nature of §7.9(a)'s safe harbors was not at issue.

[203] JX25:69; MSJ Tr. 115:12-21.

[204] PB:43-44.

[205] PB:70 (citing *In re Nantucket Island Assocs. P'ship Unitholders Litig.*, 2002 WL 31926614, at *2 (Del. Ch. Dec. 16, 2002); *Malpiede v. Townson*, 780 A.2d

Second, Plaintiff has not even attempted to prove prejudice, as he must.[206] Plaintiff has always known bad faith was at issue. Defendants' motion-to-dismiss briefing mentioned the terms "good faith" and "bad faith" *eighty-five* times.[207] Additionally, Defendants filed their answer in response to Plaintiff's Amended Complaint, which *conceded* that §7.9(b)'s good faith standard applied and that §7.9(a) was optional. *Supra* §III.A.1; Am. Compl. ¶¶111, 149-53. Defendants invoked §7.8(a) only after Plaintiff reversed course at summary judgment. If Plaintiff's strict approach to pleading is adopted, then *Plaintiff* has waived his argument that §7.9(a) is mandatory.

Thus, under either §7.9(b) or §7.8(a), the applicable standard is whether Defendants approved the Merger in good faith. *Brinckerhoff v. Enbridge Energy Co*, 2011 WL 4599654, at *8-9 (Del. Ch. Sept. 30, 2011) (interpreting similar

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1075, 1095 (Del. 2001)). Even if these cases applied, they pre-date *In re Cornerstone Therapeutics Inc. Stockholder Litig*., 115 A.3d 1173 (Del. 2015), which changed these statutory exculpatory provisions to "an immunity…rather than…an affirmative defense." *In re Ezcorp Consulting Agreement Deriv. Litig.*, 130 A.3d 934, 939-40 (Del. Ch. 2016).

[206] *Nantucket*, 2002 WL 31926614, at *3-4 (finding defense waived because plaintiffs were otherwise "vulnerable to severe prejudice, as…the factual record was shaped without an appreciation that the statutory defense was even in the case").

[207] Defs.' MTD (June 22, 2017) (*passim*); Defs.' MTD Reply (Aug. 31, 2017) (*passim*).

provision to §7.8(a) as "an 'Indemnitee' will not be liable…for any actions taken in good faith"), *aff'd*, 67 A.3d 369 (Del. 2013).

3. Section 7.10(b).

§7.10(b) provides a conclusive presumption of good faith for decisions made in reliance on a financial advisor.[208] Plaintiff's argument that §7.9(a) precludes application of §7.10(b) is illogical and contrary to Supreme Court precedent, which applied §7.10(b) to conflicts transactions. *Norton*, 67 A.3d at 367-68; *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 419-20 (Del. 2013).

Plaintiff's reliance on *Spectra* is misguided, as Spectra's partnership agreement provided the general partner with a *rebuttable* presumption of good faith for receiving Special Approval, and the court found it unlikely the drafters intended for fairness opinions to provide a higher *irrebuttable* presumption. 2017 WL 2774559 at *7, *13.[209] Here, no such tension exists because §7.9(a) does not provide a rebuttable presumption for Special Approval.

[208] JX25:71.

[209] Plaintiff also relies on *Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 7141 (Del. Ch. Oct. 26, 2012) (TRANSCRIPT), which predates *Norton* and *Gerber*.

4. Section 7.9(a).

Even if the Merger must be "fair and reasonable" under §7.9(a)(iv),[210] Defendants prevail. The "test of entire fairness" is whether stockholders "receive the substantial equivalent in value of what [they] had before." *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *29 (Del. Ch. July 21, 2017), (transaction with "flaws…was entirely fair"), *aff'd*, 184 A.3d 1291 (Del. 2018). "[T]he absence of certain elements of fair dealing does not mandate a decision that the transaction was not entirely fair." *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 83 (Del. 1995); *Emerald Partners v. Berlin*, 2003 WL 23019210, at *1 (Del. 2003) (same).

Plaintiff mistakenly contends that Defendants bear the burden of *disproving* Plaintiff's *breach of contract allegations* under §7.9(a). *Zimmerman v. Crothall*, 62 A.3d 676, 703-04 (Del. Ch. 2013) (plaintiff had burden to prove breach of contractual "entire fairness" provision); *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at *36 (Del. Ch. Mar. 30, 2017) (plaintiff "bears the burden of proving every element of its breach of contract claim"). Plaintiff's reliance on *ETE* and *Auriga Capital* is misguided because the provisions at issue were prohibitory (*i.e.*, 'thou shall not…unless…'), whereas §7.9(a) is not. *Auriga Capital Corp. v. Gatz Props.*, 40 A.3d 389, 857 (Del. Ch. 2018); *In re Energy*

[210] PB:43.

Transfer Equity, L.P. Unitholder Litig. ("ETE"), 2018 WL 2254706 at *18 (Del. Ch. May 17, 2018). Courts have relied on this distinction in determining which party bears the burden. *Zimmerman*, 62 A.3d at 706; *ETE*, 2018 WL 2254706 at *19 n.307.

5. Each Standard Focuses on the Partnership as a Whole.

§7.9(b) and §7.9(a)(iv) focus on "the *Partnership*," which refers to "the entity, not just…the limited partners." *Enbridge*, 159 A.3d at 259 n.59; *El Paso*, 2015 WL 1815846, at *17 (directors should focus on the "MLP as an entity," not just what was "good for the holders of common units"). Directors have "discretion to consider the full range of entity constituencies, including…employees, creditors, suppliers, customers, the general partner, the IDR holders…, and of course the limited partners." *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 181 (Del. 2014).

B. The Merger Was Approved in Good Faith and Was Fair and Reasonable.

Regardless of which standard applies and who bears the burden, Defendants prevail. The evidence at trial established the Merger was approved in good faith ***and*** fair and reasonable to Regency:

- Even compared to its G&P peers, Regency was particularly exposed to the downturn, which was expected to (and did) persist for years. *Supra* §II.B.3. By contrast, ETP had a healthier balance sheet, diversified business lines, and less G&P exposure. *Supra* §II.B.4.
- Regency was caught amidst an aggressive capital expansion when its cost of capital increased and expected revenues from such projects dwindled. *Supra*

§II.B.3. ETP's access to inexpensive debt allowed Regency to more profitably execute on these projects. *Supra* §II.F.

- The companies' performance in the months preceding the Merger revealed Regency's exposure to and ETP's insulation from the downturn. *Supra* §§II.B.3-4.

- The Committee negotiated forcefully and obtained as much consideration as it could. *Supra* §II.E. The exchange ratio was on the high end of most valuation analyses, within the fairness range of *all* analyses, and in line with the premia in precedent transactions. *Supra* §II.F.

- While projected distributions were ~$0.25/year lower post-Merger, the Merger provided a $3.14/unit premium with safer distributions. The Committee evaluated the declining market conditions and suspected Regency "would have a hard time meeting [management's] projections" and maintaining its distribution. *Supra* §§II.E-F.

In sum, the Board thoughtfully analyzed market conditions, evaluated the pros/cons of the Merger, and correctly determined that Regency and Unitholders would be better served joining a stronger and more diverse entity.

1. Plaintiff's Challenges to the Merger's Economics Fail.

The Court should reject Plaintiff's efforts to impugn the Merger's merits.

a. Regency's "Need" for the Merger.

After maintaining throughout this litigation that Regency was "solid, stable, and growing" in January 2015,[211] Plaintiff drops this mantra post-trial and asserts only that "Regency did not *need* to merge" because it did not face a "dire" or

[211] JX839:10, 59; Pl.'s Pretrial Br. ("PPB") 39-40; TT(O'Loughlin)93:17-20.

"existential threat."[212] Whether standalone Regency could have *survived* does not answer whether Regency was *better off* with the Merger.[213] Unlike *El Paso*—the only case ever to find breach of a similar good faith provision—Plaintiff points to *no* evidence that the Board believed the Merger was against Regency's best interests. *Cf. El Paso*, 2015 WL 1815846, at *9, *11-12, *16-17 (directors could not explain their rationale at trial, and their emails showed "significant doubts" and "objections").

Plaintiff scarcely attempts to refute the Board's conclusion that Regency would struggle in the downturn and that the Merger alleviated Regency's challenges.[214] Like O'Loughlin, Plaintiff's 72-page brief does not address:

- the severity and expected longevity of the industry decline;[215]
- the G&P segment's unique exposure to that decline;[216]
- Regency's high exposure even relative to G&P peers;[217]

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[212] PB:8-9, 14; TT(Brannon)923:2-11 ("dire" means "going out of business").

[213] TT(Bryant)956:9-958:12; TT(Brannon)855:2-10; TT(Gray)1365:3-19, 1371:15-1373:9; TT(Bradley)564:24-566:24.

[214] PB:9.

[215] TT(O'Loughlin)166:1-11, 173:3-178:20, 179:24-180:21.

[216] TT(O'Loughlin)163:5-8, 191:24-192:23, 193:18-194:1.

[217] TT(O'Loughlin)114:20-117:17, 118:15-120:12, 144:5-15.

- why Regency's unit price declined more than its peers;[218]
- Regency's rising cost of capital;[219]
- stagnating volume growth in several of Regency's key regions;[220]
- the deteriorating economics of Regency's operations;[221]
- Regency's post-downturn performance;[222]
- why Regency's efforts to insulate itself were insufficient to prevent poor results;[223]
- ETP's advantages as a larger, less commodity-sensitive business with better access to low-cost capital;[224] or
- why analysts unanimously supported the Merger.

Supra §§II.B, I. Plaintiff's assertion that O'Loughlin's opinions are "unrebutted" ignores overwhelming contrary evidence elicited from O'Loughlin's cross-examination and every fact witness. Far from being unrebutted, O'Loughlin's

[218] TT(O'Loughlin)93:21-24, 94:13-20.

[219] TT(O'Loughlin)130:13-131:8.

[220] TT(O'Loughlin)183:7-186:1.

[221] TT(O'Loughlin)129:24-131:19, 133:16-22.

[222] TT(O'Loughlin)97:2-99:6.

[223] TT(O'Loughlin)120:24-121:18, 123:7-24, 127:24-128:16, 148:2-15, 151:6-15.

[224] TT(O'Loughlin)140:8-141:7, 152:23-153:4, 155:4-16, 156:19-157:14, 216:4-13, 218:7-18.

primary opinion—that Regency was "solid, stable, and growing" in January 2015—has been disproven and *abandoned*.[225]

Plaintiff's Brief and his experts' reports are also silent on Regency's *actual* financial results and condition following the downturn, including that:

- Regency's unit price declined from $32 to $24 in Q4 2014;[226]
- Regency's costs of debt and equity rose significantly;
- Regency fell ~20% below analyst expectations and its internal budgets in Q4 2014 and Q1 2015 (while ETP continued to exceed its budget and analyst expectations), with Regency's EBITDA and distributable cash flow decreasing despite robust projected growth;[227]
- Regency's coverage ratio fell to 0.80x in Q4 2014 and 0.77x in Q1 2015;
- in Q1 2015, Regency's leverage ratio rose to 5.26x—even without any new debt to fund its $2.6 billion in growth projects; and
- the industry conditions causing these results were expected to—and did—persist for years.

Supra §§II.B, I, J. Plaintiff instead makes his case primarily with unshakeable faith in the January Projections and quotes to executives' statements of optimism (*e.g.*, "Bradley 'remained very excited'")[228], including numerous statements made *after*

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[225] *Compare* JX839:10, 59, and PPB:39-40, *with* PB:36 (omitting this opinion from list of O'Loughlin conclusions).

[226] TT(O'Loughlin)90:8-91:21, 93:5-20.

[227] TT(O'Loughlin)98:17-101:3, 102:10-103:11, 104:5-8.

[228] PB:9.

the Merger Announcement. Without the Merger, it "would have [been] a different discussion."[229] Regardless, relying on such puffery[230] rather than key objective metrics would not have been a reasonable method for the Board to evaluate the Merger and is no basis for awarding $2 billion in damages.

b. Accretion/Dilution.

Plaintiff's criticism that the Merger was dilutive to Unitholders' cash distributions is misguided. First, accretion/dilution "is a separate inquiry from whether a transaction is in the best interests of [the] MLP." *El Paso*, 2015 WL 1815846, at *1, *19 ("Focusing on accretion did not tell the [c]ommittee anything about the deal's long-term potential to add value….").

Second, Plaintiff's dilution analysis simply compares Regency's and ETP's raw projected distributions without accounting for their different risks. ETP's distributions were less risky, as reflected in ETP's significantly lower distribution yield (6% vs. Regency's 8.5%)[231] and the Board's analyses.[232] Accretion/dilution

[229] TT(Bradley)573:15-575:1, 651:24-652:10; TT(Grimm)1192:22-1193:6.

[230] Plaintiff makes much of the fact that Regency's executives didn't tell investors that Regency was foundering, which is ironic given that Plaintiff ascribes bad-faith price manipulation to Welch's accurate comments to analysts. PB15-16; *infra* §III.B.1.c.

[231] JX540:9; JX522:2; JX842:98-99; TT(Canessa)387:19-388:17.

[232] TT(Gray)1376:15-18; TT(Brannon)789:17-21, 836:3-7; TT(Bradley)566:1-567:11; TT(Bryant)1009:13-1010:1.

did not "underpin [JPMorgan's] fairness determination" because "the quality of distributions" from ETP "is materially different from" Regency.[233]

Third, Plaintiff's myopic focus on distributions ignores the Merger's other benefits—including a $3.14/unit premium based on the companies' last unaffected unit prices.[234] *Supra* §II.F.1.

c. Relative Trading Prices.

Plaintiff emphasizes that in Q4 2014 "Regency's unit price declined faster than ETP's, making it cheaper…to buy Regency with ETP units."[235] This decline undisputedly occurred because Regency was more exposed to the industry downturn than ETP. *Supra* §§II.B.3-4. Regency *traded* for less post-downturn because it was *worth* less. Regency's Board—like the market—correctly expected the downturn to persist (*supra* §§II.B, E, F); thus, the Board did not believe it was selling at the bottom.[236] The industry's further deterioration and Regency's weighing down ETP's unit price post-signing confirms the reasonableness of that expectation. *Supra* §§II.I,J.

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[233] TT(Castaldo)735:5-24.

[234] TT(Warren)1279:13-1280:12.

[235] PB:15, 22.

[236] TT(Gray)1365:3-19; TT(Bryant)954:17-955:8; TT(Bradley)567:12-568:16; TT(Brannon)852:16-853:2, 933:6-23.

Plaintiff next asserts that Regency's unit price was "talked down" by Welch's comments at an industry event, published on December 11, 2014.[237] Regency's unit price declined 2.39% that day.[238] But in the nine trading days after OPEC's Announcement but *before* these comments, Regency's unit price declined 18.37%, or ***2.04% per day***.[239] Plaintiff bemoans the absence of a "corrective disclosure,"[240] but never contends that Welch's statements were inaccurate. And Plaintiff's insinuation that Welch's comments were a conspiracy to devalue Regency is contradicted by evidence that these comments displeased ETE executives.[241]

Plaintiff's only other criticism of the premium—that ETP's unit price declined between signing and closing—is not probative of the Board's belief when it approved the Merger.[242] Further, ETP's post-signing decline was due to the Merger and Regency's struggles. *Supra* §II.I. Notably, Plaintiff's Brief dropped his

[237] PB:15-17, 23.

[238] PB:16.

[239] JX842:19.

[240] PB:17.

[241] JX290; JX287; TT(Warren)1313:8-18; TT(Bradley)660:23-661:5.

[242] PB:33.

argument that the Board should have negotiated a collar after trial established that collars are nearly unheard-of in energy company stock-for-stock mergers.[243]

d. Benefits to ETE/Warren.

Having conceded that the Merger benefited Regency,[244] Plaintiff primarily criticizes the Merger for benefiting ETE/Warren. The LPA's focus on "the Partnership" forecloses arguments that a transaction "did not benefit the limited partners enough relative to what the General Partner received." *Allen*, 113 A.3d at 178; *Kinder Morgan*, 2015 WL 4975270, at *4, *8 (dismissing claim that the committee should have "extracted greater consideration relative to" general partner).[245]

That the Merger *also* benefited ETE does not negate its substantial benefits for Regency. Indeed, analysts and proxy advisors observed that the Merger benefited ETE, yet unanimously supported it from Regency's perspective. *Supra* §II.G. Similarly, the Board was aware of ETE's accretion and correctly concluded that the Merger was nevertheless fair and reasonable to (and in the best interests of)

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[243] TT(Castaldo)733:24-734:9; TT(Brannon)853:8-854:2; TT(Wolf)1201:18-1203:2, 1245:20-1246:9; TT(Dages)1530:7-1531:9.

[244] TT(O'Loughlin)140:8-141:7; TT(Canessa)386:17-389:6.

[245] Plaintiff's citation to *Bandera* (PB:54-55) is inapposite because there the general partner allegedly harmed the common unitholders to its own benefit "without any apparent benefit to other constituencies or…the entity as a whole." 2019 WL 4927053, at *16.

Regency. *Supra* §§II.E-F. The record lacks any suggestion that Regency's directors approved the Merger to enrich ETE. Rather, both ETE and ETP were pushed to their reservation prices.[246] *Encore*, 72 A.3d at 109 (rejecting allegations committee acted in bad faith where it "only [obtained] a meager increase in the exchange ratio" and "had limited negotiating leverage vis-à-vis [controller]"). The Board reasonably decided *not to*, as Welch put it, "see how [Regency] like[d] it in six months."[247]

In a diversionary attempt, Plaintiff's Brief spends more time discussing Warren's ETE purchases than Regency's actual results or the Merger's merits.[248] This is not a *Brophy* or internal controls case. Further, Plaintiff's allegations that Warren purchased ETE units in January 2015 to profit from the Merger fail. The alleged $4 million unrealized gain constitutes ~0.1% of Warren's net worth.[249] Warren testified that he "routinely" buys (and never sells) ETE units.[250]

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[246] TT(Brannon)854:12-855:1; TT(Grimm)1166:16-18, 1172:2-1173:3; TT(Warren)1279:4-12, 1328:16-1329:1.

[247] TT(Brannon)844:20-22; TT(Bryant)942:9-23.

[248] PB:17-18.

[249] PB:6.

[250] TT(Warren)1357:10-1358:6, 1359:20-1360:12.

2. Plaintiff's Process Challenges Do Not Undermine Defendants' Good Faith or the Fairness and Reasonableness of the Merger.

Unable to challenge the Merger's economics, Plaintiff criticizes its process. These criticisms floundered at trial and, regardless, do not undermine the transaction's economic merits.

a. The Process Was Not Rushed.

Plaintiff mistakenly criticizes the Merger negotiations as rushed and without sufficient diligence.[251] Similar challenges frequently fail under common law standards[252] and the LPA.[253] While the timeline was condensed, the Committee formally met eleven times and worked efficiently "before, between, and after" meetings alongside an army of capable advisors.[254] The Board, management, and JPMorgan had deep knowledge of Regency, ETP, and the industry, enabling more expediency and less diligence than in a third-party transaction.[255] Neither JPMorgan,

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[251] PB:27-30.

[252] *E.g.*, *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 241 (Del. 2009); *In re Cox Radio, Inc. S'holders Litig*., 2010 WL 1806616, at *14 (Del. Ch. May 6, 2010), *aff'd*, 9 A.3d 475 (Del. 2010).

[253] *Encore*, 72 A.3d at 109; *Allen*, 113 A.3d at 182; *Brinckerhoff*, 2011 WL 4599654, at *10.

[254] *Supra* §II.E; TT(Brannon)814:10-12, 771:12-22, 772:24-773:7.

[255] TT(Bradley)563:12-564:23; TT(Castaldo)704:14-705:14; TT(Brannon)782:3-23, 787:15-788:6, 809:9-810:12, 910:12-16.

the Committee, nor the Board believed they needed more time or information.[256] Plaintiff does not allege that the Committee and its advisors failed to discover something in diligence. Nor does Plaintiff make any substantive challenge to their analyses; indeed, subsequent events confirmed their assessments. *Supra* §§II.I-J.

Plaintiff repeatedly notes that the parties aimed to negotiate the Merger "quickly and quietly" as if it were some damning admission, rather than standard operating procedure in public-company mergers.[257] Confidentiality concerns were justified, as Regency had recently lost a merger due to leaks, and Regency's unit price jumped 7% the date of ETP's proposal.[258]

Plaintiff also ignores that moving expeditiously benefited Regency. Negotiations concluded before Regency's "horrible" Q4 2014 results were shared with ETP and the public. *Supra* §II.E. The Committee correctly recognized a "need to do something fairly quickly" rather than hold out for the possibility of a better

[256] TT(Castaldo)744:5-745:4, 714:21-715:9, 717:16-718:2, 741:20-742:11; TT(Brannon)780:22-781:7, 932:14-933:1; TT(Gray)1368:18-1369:6.

[257] TT(Bryant)955:21-956:5; TT(Castaldo)678:21-679:6; TT(Brannon)780:22-781:7.

[258] JX842:152; JX361; TT(Castaldo)705:19-706:4.

deal,[259] believing the Merger would insulate Regency from further downside.[260] *Supra* §II.F.2.

b. The Alleged Conflicts Are Overstated and Insufficient to Taint the Process, Let Alone the Merger's Merits.

(i) The Board Was Not Beholden to Warren.

Plaintiff incorrectly contends that the Board was "beholden" to Warren.[261]

Brannon and Bryant: Plaintiff challenges Brannon and Bryant's independence based primarily on their relationships with Warren.[262] These relationships are *distant* history. After exiting a co-investment in 2001, Brannon did not do business or socialize with Warren until mid-2014.[263] Similarly, Bryant and Warren are "not close now" and "don't spend a whole lot of time together;" Bryant could not recall a business venture with Warren post-2000.[264] These prior business dealings are too stale to impugn their independence, particularly because in early 2015 both men were individually wealthy and executives of companies with no material ties to

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[259] TT(Bryant)977:20-978:1.

[260] JX479:1; TT(Gray)1375:21-1376:5; TT(Bradley)564:24-565:13.

[261] *Supra* §II.F.2. Plaintiff attacks McReynolds' and Ramsey's independence (PB:19), but ignores they recused themselves from the vote. JX682:67.

[262] PB:19-22, 52.

[263] TT(Brannon)769:11-770:3.

[264] JX828-Bryant 42:3-44:2; TT(Bryant)961:1-8.

Warren or ETE.[265] *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004); *In re MFW S'holders Litig.*, 67 A.3d 496, 514 (Del. Ch. 2013) (director's prior co-investment with controller bolstered independence because his "current relationship with [the controller] would likely be economically inconsequential to him"), *aff'd sub nom. Kahn v. M&F Worldwide Corp.* 88 A.3d 635 (Del. 2014); *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980-81 (Del. Ch. 2000). Furthermore, Plaintiff failed to establish, as he must, that Brannon's and Bryant's ETE units or Board seats were material to them.[266] *Solomon v. Armstrong*, 747 A.2d 1098, 1118 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2010); *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617-18 (Del. Ch. 1999).

Plaintiff asserts that Warren "saved Bryant's career" by "allowing [him] to keep a…valuable consulting contract" at Endevco, a company Bryant founded, when several investors (including Warren) purchased 50% of Endevco through a prepackaged bankruptcy in 1993.[267] But Bryant retained 50% of his equity in

[265] JX301:9-11 (noting no material relationships with ETE); TT(Brannon)754:16-755:1.

[266] TT(Brannon)753:18-755:1; TT(Bryant)964:10-20.

[267] PB:19-20; TT(Bryant)939:22-941:14.

Endevco (making the consulting contract only one source of his wealth),[268] Warren sold his Endevco stake in 1996, and the consulting agreement ended in 1999.[269] Regardless, there is no evidence that Bryant could not have found alternative employment[270] or viewed the Merger as a *quid pro quo* 25 years in the making.

Bradley: Plaintiff's allegation that Bradley's "financial well-being [was] dependent on Warren's continued favor" is insufficient.[271] *E.g.*, *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260, at *11 & n.52 (Del. Ch. 2009), *aff'd*, 996 A.2d 795 (Del. 2000). Bradley *lost* his position as CEO of a publicly traded entity by approving the Merger and had other employment options.[272] There is no evidence that Warren influenced Bradley; rather, Bradley showed no hesitancy to disagree with ETE executives and veto unfavorable transactions.[273]

Gray: Like Bradley, Gray served on the Board *prior* to ETE's purchase of Regency's general partner.[274] Gray did not know Warren previously, only interacted

[268] TT(Bryant)940:23-941:3; JX828-Bryant 22:4-9.

[269] TT(Bryant)941:15-942:7; JX828-Bryant 28:23-29:3.

[270] TT(Bryant)939:9-943:11: JX103:37.

[271] PB:20.

[272] TT(Bradley)580:7-16; 582:4-12.

[273] JX193; TT(Bradley)542:11-544:1, 546:19-548:7; JX286:1-2.

[274] JX62:109-10; TT(Bradley)576:6-9.

with Warren "at board meetings," and never had another role with Energy Transfer.[275] Gray's role at a Regency customer did not render him beholden to Warren; it simply prohibited him from Committee service per NYSE guidelines.[276] He also has a history of integrity, even at the cost of his primary employment.[277]

(ii) Warren Did Not Influence Merger Negotiations.

Plaintiff fails to establish that Warren "corrupted" negotiations.[278] Warren's only communication with any Regency director/officer about the Merger occurred on January 16 when he delivered ETP's offer to Bradley and Long.[279]

Plaintiff also fails to establish that the Committee pulled punches to appease Warren.[280] The Committee pushed ETP/ETE to its reservation price in "heated" negotiations. *Supra* §II.E.2. Plaintiff mischaracterizes Bryant's testimony that it was the Committee's "intent" to avoid ETP dilution.[281] Bryant's comment, and

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[275] JX815-Gray 32:19-24, 58:11-18, 59:3-10.

[276] PB:20.

[277] JX815-Gray 39:17-40:6.

[278] PB:1.

[279] JX364; TT(Warren)1278:5-8. Plaintiff proves nothing by arguing that Bradley and Warren had different recollections at their 2019 depositions about who initially raised the prospect of a Merger during an *early January 2015* conversation that preceded this offer. PB:24-25.

[280] PB:49.

[281] PB:27.

Warren's agreement to provide IDR subsidies to avoid ETP dilution, merely reflect that ETP was unwilling to suffer dilution *and* pay Regency a 15% premium while taking on additional commodities exposure. Plaintiff's allegation that "Warren's directives protected ETP"[282] over Regency is contradicted by Canessa's assertion that ETE took advantage of ETP in the Merger, Regency's/ETP's unit price reactions upon Merger Announcement, and analysts' and proxy advisors' reactions to the Merger.[283] *Supra* §II.G.

Nor did Plaintiff establish that Warren manipulated the process by making Long the CFO of the combined entity.[284] There is no indication that Long influenced the process to favor a Merger. To the contrary, Long approved JPMorgan's use of the January Projections, which (if anything) made a fairness opinion *harder* to deliver by overstating Regency's standalone value.[285]

(iii) The Committee's Composition Does Not Evidence Bad Faith.

Plaintiff mistakenly contends that Brannon's overlapping service on the Committee and Sunoco's board not only precludes Special Approval but also

[282] PB:50.

[283] TT(Canessa)436:5-11.

[284] PB:2.

[285] TT(Castaldo)733:10-19; TT(Brannon)934:3-17.

establishes Defendants' bad faith.[286] But Brannon submitted his resignation from Sunoco's board on January 20, before which he did not conduct "any substantive work on the merger proposal"[287] or "view [himself as] on the conflicts committee."[288] He "didn't think [he] needed to do anything more" to resign.[289] Even if the Court had found (which it has not) that the January 20 resignation was ineffective, it is not *bad faith* for the Board to have believed this was sufficient, particularly given its delegation of legal issues to counsel.[290] Nor do Brannon and Bryant's history with Warren evidence bad faith. *Gerber v. EPE Holdings, LLC*, 2013 WL 209658, at *5 (Del. Ch. Jan. 18, 2013) (dismissing allegations that committee members lacked independence where they were appointed to board by controller, owned units in controller's other partnerships, and "had common ties" with controller); *Allen v. El Paso Pipeline GP Co.*, No. 7520-CS, at 42 (Del. Ch. Nov. 5, 2012) (TRANSCRIPT) (same; director was former chairman of partnership's parent).

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[286] PB:43-45.

[287] TT(Brannon)766:17-767:19.

[288] TT(Brannon)875:21-876:14.

[289] TT(Brannon)766:6-12, 767:20-768:14.

[290] Defs.' Opp. 45; TT(Brannon)764:14-765:22, 767:20-768:10, 882:3-16.

Despite claiming that precluding these safe harbors at summary judgment would streamline trial,[291] Plaintiff tellingly spends more time on Brannon's resignation than the Merger's benefits or Regency's actual condition. Proving that Brannon's resignation was mishandled does not demonstrate Defendants' bad faith or entitle Plaintiff to $2 billion.[292] *See Norton,* 67 A.3d at 366 (dismissing for no allegations of bad faith, without reaching allegation that conflicts invalidated special approval); *Atlas*, 2010 WL 4273122, at *14-15 (same).

c. The Proxy Did Not Misrepresent the Merger's Economics.

While the Court found that the Proxy inaccurately described the Committee as "independent" based on Brannon's Sunoco position, Plaintiff makes no persuasive argument that Unitholders were misled about the Merger's economics.[293]

The Proxy did not "omit[] the fact that the Merger was immediately dilutive to Regency unitholders."[294] The ***very first factor*** in the Proxy's discussion of "negative or unfavorable factors" is: "Regency unitholders will receive ETP common units that, at least through 2016, are expected to pay a lower distribution as

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[291] MSJ Tr. 23.

[292] The Proxy disclosures do not compel a different result, as they were only found inaccurate with respect to Brannon's resignation from Sunoco. Mem. Op. (Oct. 29, 2019) 30-33.

[293] Defs.' Opp. 51-52.

[294] PB:2, 34.

compared to the expected distribution on Regency common units during that period."[295]

Plaintiff also asserts without basis that the Merger was amended to conceal JPMorgan's accretion/dilution analysis. Obviating a Form 13e-3 was a tertiary consideration, and there is no evidence linking this consideration to avoiding disclosure of JPMorgan's accretion/dilution analysis. Further, this information was *already disclosed*. Within days of the Merger Announcement—and well before the Amendment—numerous analyst reports calculated ETE's and Regency's projected accretion/dilution from the Merger. *Supra* §II.G. Canessa testified that "as soon as there's a shift in the IDR splits, the market knows what's happening."[296] *See In re MONY Grp., Inc. S'holder Litig.*, 853 A.2d 661, 683 (Del. Ch. 2004), as revised (Apr. 14, 2004) (no omission where particular investors' profit was a "fact that was readily available to the stockholders"); *R.S.M. Inc. v. All. Capital Mgmt. Hldgs. LP*, 790 A.2d 478, 502-03 (Del. Ch. 2001) (same).[297]

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[295] JX682.72.

[296] TT(Canessa)266:1-4.

[297] Plaintiff also mistakenly suggests that a breach of the implied covenant under §7.9(a) establishes liability. PB:44-48. But failure to satisfy the implied covenant under one (or two) of four ***disjunctive*** safe harbors "does not end the analysis," because the Court must then determine whether Defendants "independently satisfied" another safe harbor or standard. *Gerber*, 67 A.3d at 423. Thus, even if §7.9(a) were mandatory (which it is not), a "breach" of one prong (whether express or implied) forecloses that safe harbor but does not establish liability.

3. Defendants' Good Faith Is Conclusively Presumed Under §7.10(b).

Because Defendants relied on JPMorgan's fairness opinion, their good faith is conclusively presumed. *Supra* §III.A.3. Plaintiff no longer challenges JPMorgan's independence after trial established JPMorgan was diligent, unbiased, and has earned only ~$5 million in fees from Energy Transfer since the Merger.[298] Plaintiff's remaining arguments distort the record and misunderstand fairness opinions.

First, that the Committee reached preliminary conclusions or an agreement-in-principle before receiving the opinion does not preclude reliance. *E.g.*, *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1015 (Del. Ch. 2010) (applying presumption where fairness opinion delivered after agreement-in-principle); *In re Encore Energy Partners LP Unitholder Litig.*, 2012 WL 3792997, at *5 (Del. Ch. Aug. 31, 2012) (same). To hold otherwise would eviscerate §7.10(b), as reliance on financial advisors involves an iterative process, and banks do not deliver fairness opinions until a deal is reached in principle.[299] The Committee did not—and would not—approve or recommend the Merger until after receiving a fairness opinion.[300]

[298] TT(Castaldo)743:11-15.

[299] TT(Castaldo)732:9-21.

[300] TT(Bryant)1001:15-21; TT(Brannon)855:14-21, 922:1-923:3; JX543:2.

Second, Plaintiff's assertion that the rest of the Board did not rely on JPMorgan's opinion is mistaken.[301] Further, the Committee's reliance extends to the whole Board. *Norton*, 67 A.3d at 367-68; *Encore*, 2012 WL 3792997, at *14.

Third, Plaintiff offers no support that changing 1% of the Merger consideration's form after receiving JPMorgan's opinion negates reliance. This is a far cry from *Gerber*, where a committee approved one transaction based on a fairness opinion that combined two wholly separate transactions. 67 A.3d at 406. JPMorgan analyzed the Amendment and determined that updating its fairness opinion was unnecessary. *Supra* §II.H. Plaintiff bemoans that the Amendment made the Merger "immediately dilutive" to distributions, but the fact that the Merger can become "dilutive" by changing the *form* of the make-whole payment simply reinforces why Plaintiff's myopic focus on distribution accretion/dilution is misguided. *Supra* §III.B.2.b; *El Paso*, 2015 WL 1815846, at *17, *19 (faulting "preoccupation with accretion" because "anyone can make a deal look accretive just by playing with the consideration used").

C. Unitholders Were Not Damaged by the Merger.

Plaintiff propounded only one damages framework at trial: the *DDM value* of a Regency unit, minus the *market value* of the ETP units received.[302] As Canessa

[301] TT(Gray)1368:5-22; TT(Bradley)565:16-18.

[302] JX838:122.

acknowledged, this apples-to-oranges comparison is the only way Plaintiff can show damages.[303] That framework is logically and legally unsound (*infra* §III.C.1), and even if accepted yields no damages after correcting for other errors in Canessa's analysis (*infra* §III.C.2).

Rather than defend Canessa's methodology, Plaintiff's Brief raises unpersuasive criticisms of the apples-to-apples valuations conducted by Kevin Dages, Defendants' expert (*infra* §III.C.1.c) and offers a completely new damages model that is waived and, in any event, equally flawed (*infra* §III.C.3).

1. Canessa's Apples-to-Oranges Methodology Is Unsound.

Plaintiff relies on a flawed methodology to conjure $2 billion in damages from a transaction that benefited Unitholders who wanted to sell (market-to-market) or hold for distributions (DDM-to-DDM).

a. Plaintiff Cannot Use ETP's Market Price While Ignoring Regency's Market Price.

The chronology of Plaintiff's half-hearted effort to justify Canessa's apples-to-oranges methodology reflects the baselessness of this position. Canessa's report did not even *attempt* to justify this methodology. After valuing Regency with a DDM (and explaining at length why he ignored Regency's market price), Canessa

[303] TT(Canessa)363:8-20.

simply used ETP's market price without comment.[304] This silence is particularly striking because (i) he admits there are damages only if the Court accepts this inconsistent treatment, and (ii) Canessa's sole basis for disregarding Regency's market price (*i.e.*, ETE's control) *also applies to ETP*. The general partner powers, SEC risk disclosures regarding conflicts, and analyst reports that Canessa used to justify disregarding Regency's unit price are substantively equivalent for ETP.[305] Canessa ignores these factors for ETP.[306]

When confronted with these inconsistencies at deposition and trial, Canessa backpedaled from his opinion (and Plaintiff's pre-trial contention)[307] that the *mere presence of a controller* caused a "valuation overhang" that justified disregarding Regency's unit price (which indisputably necessitated ignoring ETP's unit price, too).[308] He attempted unsuccessfully to distinguish Regency's and ETP's situations by asserting that ETE's control caused a "valuation overhang" only on Regency's unit price because ETE had an "incentive to send the growth opportunities to ETP,

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[304] TT(Canessa)372:11-14.

[305] Defs.' Pretrial Br. ("DPB") 68-70; TT(Canessa)246:22-247:17; TT(Dages)1489:3-1491:1.

[306] TT(Canessa)435:16-436:4; JX851-Canessa 212:14-213:7; TT(Dages)1491:2-16.

[307] PPB:39.

[308] JX851-Canessa 152:15-153:3.

not Regency" and Warren "had more loyalty towards ETP than" Regency.[309] But (unbeknownst to Canessa) Regency grew at a *faster* rate than ETP in the years preceding the Merger, primarily through acquisitions *that ETE financially supported*.[310] Indeed, Canessa cited analyst reports explaining that "ETE has shown it can be supportive during transactions" and that "we have witnessed little conflict as…both ETP and [Regency] have grown."[311] And Warren's testimony simply explained that his contractual duties as ETP's CEO differed from those as owner of Regency's general partner.[312]

Further, Plaintiff's favoritism theory does answer whether ETP *also* suffered a "value overhang." Canessa testified that "the market perceived that ETE was being punitive or unfair" to ETP in the Merger,[313] and he has no opinion on whether ETP's market price fully reflected its value.[314] He conducted no DDM valuation of ETP,

[309] PB:67; TT(Canessa)247:3-17; 249:8-17.

[310] TT(Canessa)417:20-422:19; TT(Dages)1481:20-1484:1; TT(Warren)1274:5-1275:21.

[311] TT(Canessa)422:20-426:3; JX211:21; JX96:6.

[312] TT(Warren)1263:5-13, 1323:10-1324:3.

[313] TT(Canessa)436:5-11.

[314] TT(Canessa)406:4-20, 435:9-15.

and does not dispute Dages' conclusion that ETP traded $10 below its midpoint DDM value.[315]

Rather than address these points, Plaintiff's Brief contends "it is unnecessary and inappropriate" to calculate a DDM value of ETP units because they were publicly traded and had a "known market value."[316] Relatedly, Canessa considers ETP's DDM value "fictitious" because no one could sell their units for that price.[317] Of course, Regency was also publicly traded with a market price providing a "known market value," and Unitholders likewise could not sell Regency units for their DDM value.[318]

In short, Canessa's reasons for disregarding Regency's unit price also apply to ETP, and his reasons for disregarding ETP's DDM value also apply to Regency.

b. Plaintiff's Damages Formulation Is Contrary to Long-Established Delaware Law.

Plaintiff's apples-to-oranges methodology also contravenes Delaware law. Plaintiff asserts that "Defendants offered no support in…the law for" this

[315] TT(Canessa)406:4-6, 434:24-435:15; JX842:190, 192.

[316] PB:68; TT(Canessa)236:13-20, 364:3-13.

[317] TT(Canessa)391:13-16.

[318] TT(Canessa)364:14-19; 392:2-24.

principle,[319] but as explained over *several pages of Defendants' Pretrial Brief*, Delaware courts have long rejected similar attempts to conjure damages in stock-for-stock mergers by comparing the alleged intrinsic value of the target's shares to the market value of the acquiror's shares.[320] Plaintiff offers no response to the following:

- The Supreme Court rejected as "unsound" the contention that "the *market* value of the [acquiror's] stock issued to the stockholders of the [target] must equal the *liquidating* value of the [target's] stock," because that "***attempts to equate two different standards of value***." *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 111 (Del. 1952). The plaintiff's refusal to value the two stocks "by the same method" was "***[m]anifestly…unjustifiable***." *Id.* at 113.
- Subsequent stock-for-stock merger cases have applied this reasoning. *See Rosenblatt v. Getty Oil Co.*, 1983 WL 8936, at *26 (Del. Ch. Sept. 19, 1983) (rejecting plaintiff's argument that "fairness required the…minority shareholders to receive [new] stock having a market value equal to the asset value of their [old] stock"), *aff'd*, 493 A.2d 929 (Del. 1985); *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 509 (Del. Ch. 1990) (rejecting "apples

[319] PB:66-67.

[320] DPB:71-75.

to oranges" damages model that compared "[target's] book value to [acquiror's] market price, rather than valuing [acquiror's] and [target's] shares in the same manner and then comparing those values"); *Emerald Partners v. Berlin*, 2003 WL 21003437, at *36 (Del. Ch. Apr. 28, 2003) (rejecting "apples to oranges" damages model that did not value acquiror and target in consistent manner), *aff'd*, 840 A.2d 641 (Del. 2003).

Plaintiff offers two sound bites in attempting to justify his apples-to-oranges methodology.

First, Plaintiff cites *El Paso*, which bases damages on "the transaction price," and *Genencor*.[321] *El Paso* involved an MLP's purchase of assets *for cash*, so it is irrelevant to damages in stock-for-stock mergers. 2015 WL 1815846, at *9, *12. *Genencor* says nothing about valuation or damages. *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000).

Second, in a single sentence, Plaintiff cites *Southern Peru*, asserting only that an ETP DDM would "obscure the fundamental fact that the NYSE-listed company had a proven cash value." PB:68 (citing *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 764 (Del Ch. 2011), *aff'd sub nom, Am. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012)). Plaintiff fails to engage with Defendants'

[321] PB:64.

lengthy pre-trial explanation of *Southern Peru*'s inapplicability[322] or the Supreme Court's affirmance, which emphasized that "relative valuation is a valid valuation methodology." *Theriault*, 51 A.3d at 1247-48. (Indeed, it is standard practice in valuing stock-for-stock mergers. *Supra* §II.E.1.) Here, unlike *Southern Peru*, both companies were publicly traded, there are no allegations that the parties' analyses were manipulated to justify a deal, and the Committee did not ignore Regency's market value in favor of a lower DDM valuation.

c. Any Consistent Damages Formulation Yields No Damages, and Plaintiff's Challenges of Dages' DDM Analyses Fail.

As Canessa concedes, any market-to-market or DDM-to-DDM valuation yields no damages under his framework—whether measured at signing or closing, compared to ETP *pro forma* or standalone, and regardless of which Regency projections are used.[323]

[322] DPB:73-75.

[323] TT(Canessa)363:8-364:2; TT(Dages)1496:20-1498:1, 1514:11-1515:3, 1518:14-22.

Valuation Input:	Market Price ($/unit)		Dividend Discount Model ($/unit) January 2015 Projections		April Projections
Valuation Date	1/25/2015	4/30/2015	1/25/2015	4/30/2015	4/30/2015
Canessa					
Merger Consideration	$26.89	$23.83	-	-	-
Regency standalone value	-	-	$30.42	$29.06	$28.56
Dages					
Merger Consideration	$26.89	$23.83	$30.95	$30.10	$30.10
Regency standalone value	$23.75	$23.75*	$28.74	$28.02	$26.76
Dages					
Pro Forma Consideration	-	-	$31.24	$30.39	-
Regency standalone value	-	-	$28.74	$28.02	-

* Last unaffected unit price. After the merger announcement, Regency units traded based on the merger consideration and not based on fundamental value.

JX 842 (Dages Report, ¶¶ 10, 44); JX 838 (Canessa Report, Exhibit 8).

While providing no ETP DDM of his own, Plaintiff unpersuasively challenges Dages' ETP DDM. Abandoning his critiques of Dages' *pro forma* cost of equity,[324] Plaintiff instead contends that "Dages did not assess the reliability of the *pro forma* projections…."[325] These same projections were used in O'Loughlin's accretion/dilution analysis, described as "reasonable" by O'Loughlin, and (belatedly) offered by Plaintiff as a damages figure.[326] Further, the projected $0.05/year increase in ETP *pro forma* distributions was used by Barclays and

[324] A weighted blending of ETP's and Regency's cost of equity had no material effect on ETP's *pro forma* cost of equity because, among other reasons, Regency's "size premium" would not apply. TT(Dages)1506:16-1507:17.

[325] PB:68.

[326] JX839:133-134; TT(O'Loughlin)27:10-28:5; PB:68-69.

JPMorgan based on assumed annual synergies of $130 million,[327] which ETP later estimated at $160-$225 million.[328]

Plaintiff fares no better challenging Dages' analysis of ETP's standalone projections. Dages determined that (i) the January Projections and ETP Projections were prepared for the same purpose using the same assumptions,[329] and (ii) "ETP's Q1 2015 financial results exceeded" the projections, confirming their validity.[330]

Given that ETP exceeded projections while Regency fell ~20% short, it is remarkable for Plaintiff to contend that a DDM-to-DDM valuation is unfeasible because there are no reliable *ETP* projections.[331]

2. Plaintiff's Damages Calculation Inflates the "Give" While Deflating the "Get."

By wholly ignoring Regency's market price (*infra* §III.C.2.a), using Regency's January Projections in his April valuation (*infra* §III.C.2.b), and using

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[327] JX540:21.

[328] JX1006:5; JX721:1.

[329] *Supra* §II.E; JX842.52-61; TT(Dages)1494:9-17; TT(Long)1043:10-10:45:8; JX477.

[330] JX842:60-61; TT(Canessa)442:21-443:5.

[331] Plaintiff mistakenly argues that ETP's *standalone* DDM value is irrelevant. (PB:68). Financial advisors routinely compare the two standalone values of the merger consideration along consistent metrics in stock-for-stock mergers. TT(Castaldo)728:2-8, 739:21-740:13; TT(Wolf)1196:8-1197:18. This makes sense because it compares each side's contribution to the combined entity.

ETP's April unit price (*infra* §III.C.2.c), Canessa's model illogically causes Regency's poor performance to increase damages.

a. The Purported "Value Overhang" Is Not a Basis to Ignore Regency's Market Price.

Canessa disregards Regency's unaffected market price on the sole ground that it reflects an "ever-present, value-reducing ETE conflict of interest overhang."[332] For several reasons, the alleged overhang is an inappropriate basis to disregard Regency's market price.

When shares trade in an efficient market, market price is "generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness." *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd*, 177 A.3d 1, 24 (Del. 2017). Each market-efficiency factor other than the presence of a controller supports that Regency traded in an efficient market.[333] And if the presence of a controller was dispositive, MLPs (which are always controlled by a general partner) would never trade in an efficient market.

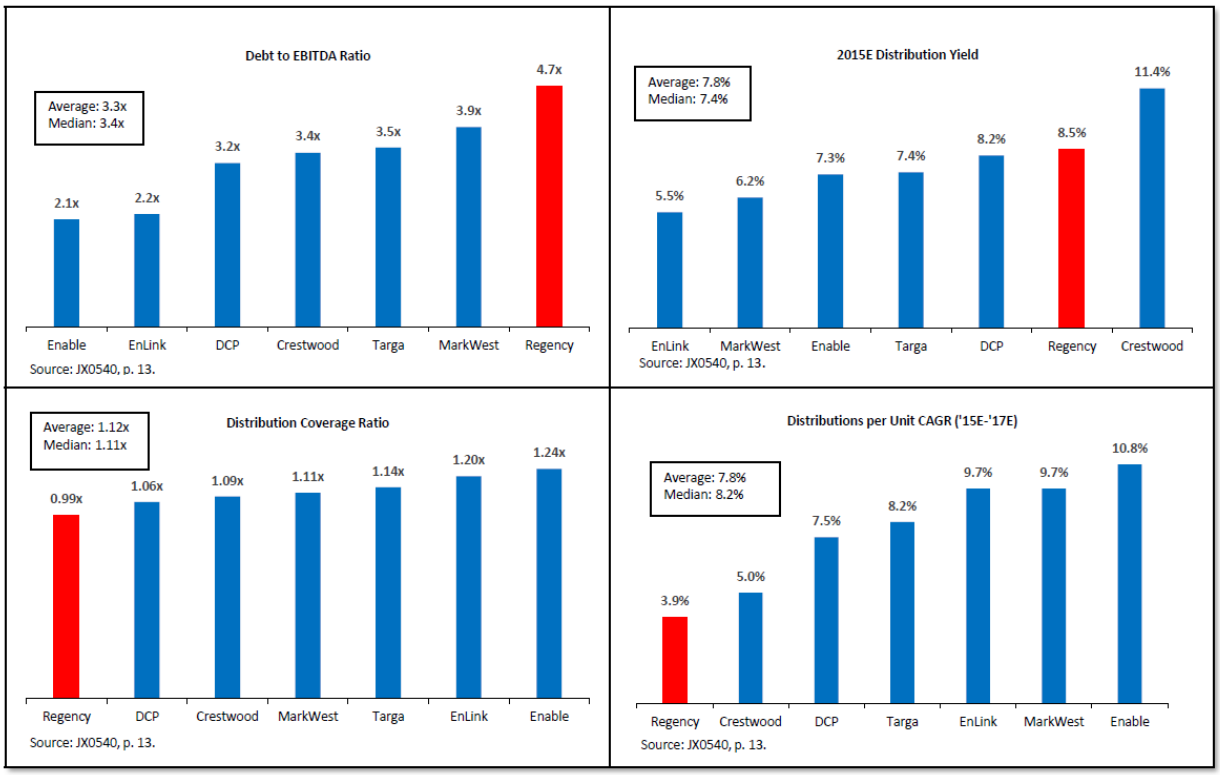
While Canessa asserts that a control overhang caused the gap between Regency's market price and his DDM valuation, the record indicates a more plausible explanation: the market was less sanguine about Regency's prospects than

[332] JX838:34.

[333] *Dell*, 177 A.3d at 7 (listing factors); JX842:22-25, 138.

a DDM based on the January Projections, and for good reason.[334] Canessa attributes Regency's unit price fall from $30 to $23 in late 2014 to "market anticipation" of Regency's "horrible" results,[335] the January Projections proved ~20% too optimistic, and by January 2015 Regency fared worse than its peers in several key metrics:[336]

Regency Metrics Compared to Peers as of January 23, 2015



Regardless, a Regency valuation *should* reflect any alleged "value overhang" caused by ETE's control. Canessa contends the "ever-present" overhang always

[334] TT(Dages)1484:22-1488:23; TT(Canessa)413:14-414:8.

[335] TT(Canessa)410:24-411:9, 444:2-11.

[336] TT(Dages)1486:14-1488:16; TT(Canessa)443:16-444:1; *supra* §II.B.3.

existed on a "constant percentage basis" and "would have continued to exist had the merger never occurred."[337] He attributes the entire $6.35 difference between Regency's last unaffected unit price and his DDM valuation to this "control overhang."[338] Thus, the entirety of Canessa's alleged damages ($5.23/unit)[339] was caused by an inherent feature of investing in Regency—not by the Merger. This is manifestly unsound, because "damages must be logically and reasonably related to the harm or injury for which compensation is being awarded." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006); *Genencor*, 766 A.2d at 11. Canessa's standalone valuation must—but does not—reflect what Unitholders gave up (and would own absent the Merger), *i.e.*, units subject to ETE's control. *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *13 (Del. Ch. Sept. 30, 2013) (damages must be based on "the hypothetical world that would exist if the Agreement had been fully performed").

b. Plaintiff Overstates Regency's Standalone Value.

While Canessa purports to value Regency as of the April 30, 2015 closing, his DDM analysis is based on the January Projections—despite the fact that they overstated Regency's distributable cash flow by 17% in Q1 2015 (the only period

[337] TT(Canessa)399:15-400:8; JX838:34.

[338] TT(Canessa)396:21-397:12.

[339] JX838:122.

with actual results),[340] which, Canessa agrees, "calls into question the likelihood of achieving the projected results in future periods."[341] With such results and a 0.77x coverage ratio, Regency indisputably could not long maintain its current distributions, let alone increase them per the January Projections.[342]

Plaintiff's Brief is essentially silent on this issue, arguing only that the January Projections were provided to JPMorgan and described in the Proxy as having "reflected the best currently available estimates" (when JPMorgan conducted its analysis).[343] That these projections were the best available in *January* in a rapidly deteriorating environment says nothing about their continued validity in *April*, particularly given their material divergence from actual results.[344] Regency's VP of Financial Analysis, Dylan Bramhall, refuted Plaintiff's attempt to paint the April Projections as an unofficial spreadsheet.[345] While Plaintiff argues that the April

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[340] *Supra* §II.I.

[341] TT(Canessa)443:2-6.

[342] TT(Canessa)445:4-7; TT(Welch)1417:5-1419:13; TT(Bradley)537:5-10; TT(Brannon)805:1-806:21.

[343] PB:65; JX682:45.

[344] *Dell*, 177 A.3d at 27 & n.129; *In re PetSmart, Inc.*, 2017 WL 2303599, at *33 (Del. Ch. May 26, 2017); *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *42 (Del. Ch. Sept. 4, 2014).

[345] TT(Bramhall)1133:6-1138:12.

Projections were "not meant to provide a 'projection' of Regency's long-term performance,"[346] they indisputably provided the most accurate projection of 2015 performance, and should be the starting point for any closing-date Regency DDM.[347]

Canessa's "downward sensitivity" analysis is likewise too optimistic.[348] It assumes that the 2015 25% shortfall from the January Projections would disappear in 2016 onward, "like flipping on the switch."[349] Canessa does not know what caused this shortfall, and he offered no reason to think Regency's "horrible results" would suddenly improve.[350] This is unsound, and Plaintiff does not even attempt to defend it.[351] As Bramhall explained, "volumes on January 1st, 2016, are going to look an awful like the volumes on December 31st, 2015."[352]

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[346] PB:65.

[347] TT(Dages)1521:15-1523:6, 1525:15-1526:2; TT(Bramhall)1137:23-1138:12. Plaintiff can only argue that these projections were "never shared with the Board," (PB:65), which is unsurprising given that (1) they were finalized the day the Merger closed and (2) 3+9 forecasts were traditionally not shared with the Board. TT(Bramhall)1145:6-1146:20.

[348] JX838:86; TT(Canessa)452:7-453:7.

[349] TT(Canessa)453:1-7.

[350] TT(Canessa)444:2-11, 448:12-16.

[351] PB:66.

[352] TT(Bramhall)1130:6-1131:5, 1137:12-15.

It is more appropriate to value Regency assuming that the 25% cashflow reduction reflected in the April Projections would have continued through 2019, as Dages did in his sensitivity analysis.[353] The industry conditions causing Regency's underperformance were expected to (and did) persist for years. *Supra* §II.B.1. Many of Regency's peers have not increased their distributions since Q4 2014, and during 2015-16, Regency's G&P business fell 40% below forecast. *Supra* §II.J. As Bramhall testified, had Regency needed projections beyond 2015 as of the closing date, it would have used the April Projections "as a base point and then projected off from there revising January '16 forward,"[354] much like Dages did. Using Dages' April sensitivity, there are no damages even under Canessa's apples-to-oranges framework.[355]

c. Plaintiff Shifts Regency's Poor Performance to ETP.

Canessa not only inflates the "give" by ignoring Regency's underperformance in calculating Regency's value, he shifts that underperformance to the "get" by using

[353] JX842:74-75, 193.

[354] TT(Bramhall)1137:16-22.

[355] TT(Dages)1494:22-1496:23; JX842:193 ($20.55 midpoint DDM under April sensitivity).

ETP's closing-date unit price. According to Canessa, damages increased over $500 million between signing and closing due to ETP's declining unit price.[356]

Canessa acknowledged that it would be a "windfall to the plaintiff[]" if ETP's decline "is because of Regency."[357] Yet Plaintiff's Brief (like Canessa's report) says *nothing* about what caused this decline. During this period, ETP's unit price moved based on the combined Regency-ETP entity's prospects, gas prices worsened another 13%, and Regency missed analyst expectations and its own (January-revised) projections by ~20%, while ETP exceeded analyst expectations and its projections.[358] *Supra* §II.I. By the end of Q1 2015, Regency was foundering under every key MLP financial metric. *Id*. ETP adding Regency's commodity exposure is the only plausible explanation for ETP's decline—and the one given by analysts at the time. *Supra* §§II.G, I.

3. Plaintiff's New Damages Model Is Untimely and Unsound.

a. Plaintiff's Dilution Theory Is Waived.

Tacitly conceding that Canessa's apples-to-oranges theory is unsound, Plaintiff's Brief suggests for the first time that damages could be awarded based on O'Loughlin's calculation of the difference in projected 2015-19 distributions

[356] TT(Canessa)467:20-468:12; JX838:122.

[357] TT(Canessa)316:12-17.

[358] JX851-Canessa 242:23-243:2; TT(Dages)1526:21-1528:23.

between Regency and *pro forma* ETP (discounted to present value for the first time in Plaintiff's Brief).[359] O'Loughlin testified that his dilution analysis was "not providing an amount by which [he] believe[s] the Court should enter judgment."[360] Plaintiff's expert disclosure said nothing about O'Loughlin providing a damages opinion, but did for Canessa.[361] Canessa agreed that "the only way you get damages" is to "compare Regency's DDM…to ETP's market price."[362]

Plaintiff was free during expert discovery to propose different damages frameworks but chose to go "all in" on a single theory yielding one of the largest damages figures in Delaware history. It is too late to backpedal. *Fletcher Int'l, Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *16, *21 (Del. Ch. Dec. 4, 2013) (disregarding "new damages theory" raised for first time in post-trial brief "after the viability of [earlier] theory was undercut at trial"); *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *16 (Del. Ch. May 23, 2008) (finding waiver of argument raised for first time in post-trial brief).

[359] PB:68-69.

[360] TT(O'Loughlin)208:3-11.

[361] Trans. ID #63017625.

[362] TT(Canessa)363:8-12.

Plaintiff cannot justify this tactic as a "mathematical application" similar to Dages' ETP *pro forma* cost of equity sensitivity.[363] Dages provided this rebuttal calculation in advance of his testimony—not after trial—and was simply providing additional justification for the cost-of-equity range used in his report.[364] This is a far cry from proposing a fundamentally new damages methodology that was never advanced (and expressly disclaimed) at trial.

b. Plaintiff's Dilution Theory Is an Invalid Measure of Damages.

Even if not waived, Plaintiff's dilution theory is an improper basis for awarding damages. First, O'Loughlin's dilution calculation simply subtracts projected ETP *pro forma* distributions from projected Regency distributions, which assumes both were "equally likely to be achieved" rather than accounting for their differing risks.[365] That is plainly unsound. *Supra* §III.B.1.b; *El Paso*, 2015 WL 1815846, at *26 ("Arriving at an accurate valuation…requires an assessment of the reliability of…future cash flows," and courts accordingly reject an "expert [who] did not account for any risk to [the company's] cash flows."). When accounting for risk,

[363] PB:37 n.188.

[364] TT(Canessa)345:19-349:10; TT(Dages)1510:5-1515:12.

[365] TT(O'Loughlin)207:4-18; TT(Canessa)387:19-388:17 (Regency's higher distribution yield "reflects a perception of more risk"); TT(Castaldo)734:22-736:20.

the present value of *pro forma* ETP's future distributions ***exceeded*** Regency's. *Supra* §III.C.1.c.

Second, O'Loughlin's dilution calculation does not account for the other benefits to Unitholders—most notably a $3.14/unit premium based on the companies' last unaffected unit prices, which dwarfs Plaintiff's alleged $1.05/unit in projected dilution-based damages.[366] Damages cannot be measured based solely on what Plaintiff contends is one unfavorable aspect of the Merger.

IV. CONCLUSION

Defendants respectfully request that the Court deny all relief requested by Plaintiff, find for Defendants, and grant Defendants all relief to which they are entitled.

[366] TT(O'Loughlin)195:19-196:12, 198:6-11, 199:19-201:6, 203:20-204:24, 220:9-18, 228:3-12; TT(Welch)1448:6-1449:6.

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