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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.	Case No. 11130-CB

PLAINTIFF'S POST-TRIAL REPLY BRIEF

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INTRODUCTION

Plaintiff proved that Defendants opportunistically breached the LPA and are liable for money damages. Defendants subverted the LPA safeharbor protections to approve a conflicted Merger at an unfair price so that their controllers, ETE and Kelcy Warren, could reap hundreds-of-millions of dollars in unearned additional distributions.

Defendants' post-trial brief sidesteps the record (and Plaintiff's opening brief) and pretends they never chose to avail themselves of Special or Unitholder Approval. Reading Defendants' brief, you would think they never argued to this Court and the Supreme Court that Plaintiff's claims should be dismissed because Special and/or Unitholder Approval were satisfied.

Incredibly, Defendants never mention the Supreme Court's decision holding ***in this case*** that "***the conflicts resolution provision also operates for the unitholders' benefit***" and that "implied in the language of the LP[A]'s conflict resolution provision is a requirement that the General Partner ***not act to undermine the protections afforded unitholders in the safeharbor process***."[1] Nor do Defendants discuss this Court's decision granting partial summary judgment, holding that "the Conflicts Committee was not validly constituted from its inception" and that the Proxy falsely represented that Brannon was independent and

[1] *Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017).

the Conflicts Committee's approval of the Merger constituted Special Approval.[2]

Instead, Defendants argue they are not liable for breach of contract because Plaintiff purportedly did not prove that Defendants approved the Merger in subjective bad faith under §7.9(b). Defendants are wrong.

Based on the record and the law of the case, Defendants are liable for breaching the covenant of good faith and fair dealing that, under DRULPA, is implied in §7.9(a). Plaintiff proved that Defendants purposely undermined the protections afforded to unitholders to orchestrate a Merger at an unfair price that was "tremendously accretive" to ETE/Warren and immediately dilutive to Regency unitholders. Defendants' subversion of Special and Unitholder Approval refutes their purported "good faith." As this Court noted at the pleading stage, "[a] transaction that is in the best interests of the Partnership logically should not be highly unfair to the limited partners."[3]

Defendants' attempt to back their conflicts transaction into the "fair and reasonable" standard set by §7.9(a)(iv) fails. A process involving a controller who co-opts management with the promise of continued employment for their assistance, a conflicted Conflicts Committee agreeing to "negotiate" within parameters set by

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[2] *Dieckman v. Regency GP LP*, 2019 WL 5576886, at *11-13 (Del Ch. Oct. 29, 2019).

[3] *Dieckman v. Regency GP LP*, 2018 WL 1006558, at *4 (Del. Ch. Feb. 20, 2018).

the controller that benefit the controller and the other side to the deal, and issuance of an affirmatively false and misleading Proxy cannot be fair and reasonable.

Nor was the price fair and reasonable. Defendants' touted 15% premium was illusory. Since they did not bother to ask for a collar, the real premium was a paltry 0.3%. Moreover, the purported "premium" was based on a unit price that was depressed by the controller's "totally inappropriate" comments to analysts. Meanwhile, Regency was a fundamentally strong and sound company with growing cashflows and a $2.6 billion backlog of predominately "fee-based" and "volume-committed" projects in attractive basins. This deal happened because ETE and Warren coveted those future cashflows and took them from Regency and the Class.

§7.10(b) does not absolve Defendants' misconduct. Unitholders had a reasonable expectation that Defendants could not "flip back into the conclusive presumption" of good faith in §7.10(b) if they purposely undermined the safeharbor protections to orchestrate a self-interested transaction for their controller.[4] Vice Chancellor Glasscock was also correct to find (applying well-settled rules of contract interpretation) that §7.10(b) does not apply to conflicts transactions governed by §7.9(a). Moreover, Defendants have not proven reliance on J.P. Morgan's fairness opinion in approving the Merger. The Conflicts Committee decided that Warren's

[4] *Brinckerhoff v. El Paso*, C.A. No. 7141-CS (Del. Ch. Oct. 26, 2012) ("*Brinckerhoff*") (TRANSCRIPT) at 16-17.

initial proposal was "fair to the unaffiliated unitholders of the Partnership" ***before*** J.P. Morgan completed its financial analysis. J.P. Morgan's fairness opinion was not updated following the amendment to the Merger Agreement and thus did not "value the consideration that the LP unitholders ***actually*** received."[5]

Defendants are liable for money damages. Defendants' acts to undermine the contractual safeharbors for the benefit of ETE/Warren (ignored by Defendants in their brief) constituted willful misconduct, bad faith, and fraud, and are not exculpated under §7.8(a).

Finally, Defendants are wrong to argue their misconduct caused no harm. Plaintiff proved that the Merger terms resulted in an unfair unit price that was below the present value of distributions but for the Merger, resulting in $1.7 billion in pre-interest damages. Defendants' argument that Plaintiff has not proven damages because Delaware law has adopted a rigid "apples-to-apples" straightjacket is wrong. That argument was expressly rejected by then-Chancellor Strine in *Southern Peru* and affirmed on appeal.[6] Plaintiff also proved that the present value of the cashflows that Defendants diverted from Regency unitholders to ETE/Warren was at least $337 million.

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[5] *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400, 422-23 (Del. 2013).

[6] *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 816-817 (Del. Ch. 2011).

The Court should enter judgment for Plaintiff and the Class.

ARGUMENT

I. DEFENDANTS BREACHED THE IMPLIED TERMS OF §7.9(A)

Defendants argue that "the lawsuit is governed by §7.9(b)" and Plaintiff must prove Defendants' lack of good faith in approving the Merger.[7]

Defendants ignore the Supreme Court's instruction that implied terms can "prescribe certain conduct" when "necessary to vindicate the apparent intentions and reasonable expectations of the parties,"[8] and the Court's holding ***in this case*** that §7.9(a) required that Defendants "***not act to undermine the protections*** afforded unitholders in the safe harbor process."[9] As the Court explained, terms like "the General Partner will not mislead unitholders when seeking Unaffiliated Unitholder Approval" and "the General Partner will not subvert the Special Approval process by appointing conflicted members to the Conflicts Committee" are "easily implied" into the LPA because "they are too obvious to need expression."[10]

Plaintiff proved at trial that, *inter alia*:

- Defendants knew about Warren's plan to roll up the Energy Transfer family.[11]

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[7] DB:41.

[8] *Dieckman*, 155 A.3d at 367.

[9] *Id.* at 368.

[10] *Id.*

[11] JX197:4;TT(Warren)1294:14-1295:14;TT(Bryant)966:9-967:15.

- Warren's economic interests were overwhelmingly aligned with ETE.[12]

- Warren admitted that he was more loyal to ETE and ETP than to Regency and pursued his and ETE's interests in structuring the Merger.[13]

- ETE CFO Welch made "totally inappropriate" comments in December 2014 that caused a statistically significant decline in Regency's unit price and increased the spread with ETP's unit price.[14]

- When Warren made an unsolicited proposal for Regency on January 16, he promised Regency's CEO and CFO continued employment if they "quietly and quickly" delivered the Merger.[15]

- Defendants appointed Brannon to the Conflicts Committee on January 17 ***knowing*** that Brannon was a Sunoco director and thus ineligible.[16]

- Defendants delegated all responsibility for the Merger to the Conflicts Committee ***knowing*** that (i) Bryant was loyal to Warren for saving him from financial ruin; and (ii) Brannon and Bryant (as well as Regency directors Ramsey and McReynolds) were part of a decades-long group of close friends and joint venturers with Warren.[17]

- Defendants permitted Brannon to work on the Conflicts Committee, although he deliberately chose not to resign from the Sunoco Board at ETE general counsel Tom Mason's instruction.[18]

- Later, when Brannon prepared a resignation letter, he ***intentionally*** withheld notice of his purported resignation from the Sunoco Board (in

[12] TT(Warren)1292:10-13,1330:4-6;JX188.

[13] TT(Warren)1324:4-1325:8,1328:16-1329:5.

[14] TT(Warren)1314:5-15;TT(Bradley)596:22-597:5;JX842:151.

[15] TT(Warren)1341:21-1343:5;TT(Bradley)578:19-22;TT(Long)1041:21-1042:2.

[16] TT(Bradley)585:10-586:9;TT(Brannon)872:3-6;JX301:4;JX373;JX378;JX379; JX380.

[17] JX364:1;JX373;JX378-80;TT(Bradley)585:3-87:9;TT(Bryant)972:6-20; TT(Brannon)861:20-862:22.

[18] TT(Brannon)871:8-872:2,879:12-21;TT(Bradley)585:10-587:9.

contravention of the Sunoco LLC Agreement) through the announcement of the Merger.[19]

- Defendants accepted Warren's precondition that the Merger must avoid dilution to ETP, and a cap on ETE's IDR giveback well below the hundreds-of-millions of annual accretion ETE would enjoy, ensuring that Regency unitholders were diluted and received unfair value.[20]

- Defendants acceded to ETP's wish to change the Merger consideration in February 2015, making the deal dilutive to Regency unitholders, ***knowing*** that this amendment was for the express purpose of limiting financial disclosures to unitholders.[21]

- Defendants rushed this deal, so Warren could complete a ***different***, undisclosed deal that could not close until Regency/ETP was done.[22]

- Defendants issued a Proxy falsely representing that the Merger was approved by "independent directors" whose approval constituted "Special Approval," ***knowing*** that Brannon and Bryant were not independent and that the Conflicts Committee was not validly constituted.[23]

Defendants' sole response is relegated to footnote 297, where they contend that it does not matter that they "fail[ed] to satisfy the implied covenant under one (or two)" of the subparts of §7.9(a) because "a breach of one prong does not establish liability."[24] However, the Supreme Court made clear ***in this case*** that the covenant

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[19] TT(Brannon)767:15-19,869:11-872:2,873:11-17,875:2-882:20;JX53:8;JX396-99;JX542;JX564;JX600.

[20] TT(Bryant)1005:9-13;TT(Warren)1325:19-1326:13;JX351.

[21] TT(Bryant)1020:22-1022:3; TT(Wolf)1242:22-1243:11;JX633:2;JX839:132-134;OD:9-11;TT(O'Loughlin):29:10-32:1;JX838:45-46.

[22] TT(Wolf)1243:12-1244:22.

[23] SJOp.:31-32.

[24] DB:66.

of good faith and fair dealing – implied in §7.9(a) under DRUPLA – prohibited Defendants from undermining the contractual safeharbors. Thus, Plaintiff proved much more than a failure to meet permissive safeharbors. He proved that Defendants willfully undermined contractual protections for their controllers' benefit, thereby breaching the terms implied in §7.9(a).

The remedy for Defendants' breach of the implied covenant is compensatory damages "based on the parties' reasonable expectations."[25] Here, unitholders had a reasonable expectation that the Merger would be negotiated by a committee "whose members genuinely qualified as unaffiliated with the General Partner and ***independent at all relevant times***" and that "deceptive conduct [would] not be used to create the false appearance of an unaffiliated, independent Special Committee."[26] Instead, Defendants weaponized the very provisions designed to give unitholders a modicum of protection to push through a conflicted and unfair Merger. Defendants' breach supports entry of Plaintiff's full requested damages award.

[25] *Town of Cheswold v. Vann*, 9 A.3d 467, 473 (Del. 2010); *see also Enrique v. State Farm Mu. Auto. Ins. Co.*, 142 A.3d 506, 512 (Del. 2016); *Bandera Master Fund LP v. Boardwalk*, 2019 WL 4927053, at *22 (Del. Ch. Oct. 7, 2019) ("resulting damage to the plaintiff" is element of an implied covenant claim).

[26] *Dieckman*, 155 A.3d at 369.

II. DEFENDANTS BREACHED THE EXPRESS TERMS OF §7.9(A)(IV)[27]

A. THE STANDARD IS "AKIN TO ENTIRE FAIRNESS"

Defendants concede that the §7.9(a)(iv) test is "akin to the 'entire fairness' review of corporate law."[28] As the *ETE* court explained, the Court must examine whether "Defendants have met the burden placed on them to justify a conflicted transaction…. [The Court's] analysis must consider both fair process and fair price, unifying those considerations to reach a single result."[29]

Defendants incorrectly disclaim the burden to show "fairness."[30] But no matter who has the burden, the record shows that the Merger was not "fair and reasonable to [Regency], taking into account the totality of the relationships between

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[27] Defendants have abandoned the claim that they satisfied §7.9(a)(iii), which requires "terms no less favorable to [Regency] than those generally being provided to or available from unrelated third parties." As they should. Plaintiff proved, *inter alia*, that ETE/Warren had absolute power to reject third-party proposals and stood to make millions from the Merger. The Conflicts Committee steeped the "process" in secrecy and never solicited alternative proposals. Thus, negotiations significantly "deviated from the behavior one would expect in an arms-length transaction." *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 857 (Del. Ch. 2012).

[28] DB:46; *see also In re Energy Transfer Equity L.P. Unitholder Litig.* ("*ETE*"), 2018 WL 2254706, at *22 (Del. Ch. May 17, 2018); *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 262 (Del. 2017).

[29] *ETE*, 2018 WL 2254706, at *22.

[30] DB:46-47. *But see ETE*, 2018 WL 2254706, at *22; *Auriga*, 40 A.3d at 856-57. In *ETE*, the Court explained why Defendants' reliance on *Zimmerman* fails. There, unlike *ETE* and unlike here, the agreement gave defendants a specific ***right*** to engage in certain related-party transactions provided that the terms were comparable to those in third-party transactions. 2018 WL 2254706, at *19 n.307.

the parties involved," requiring judgment for Plaintiff.

B. WARREN CORRUPTED THE PROCESS FOR HIS OWN BENEFIT

Defendants do not dispute that Warren's economic interests were completely aligned with ETE. Warren owned 91.6 million ETE units – but ***zero*** Regency units – and knew that he would directly benefit from any increased distributions to ETE.[31] At trial, Warren conceded that his loyalty to Regency did not rise to the level of his loyalty to ETE or ETP.[32] Warren also admitted his absolute control over the Energy Transfer family and that the Merger "would not happen" if he did not agree to the terms.[33]

Defendants do not dispute that Warren understood by October 2014 that the energy industry was entering a cyclical downturn and that ETE (and therefore Warren) could benefit from this downturn by integrating Regency into ETP.[34] Warren unveiled his plan during an October 2014 ETE/ETP Board meeting, in the presence of Brannon who had no role yet at ETE, ETP, or Regency.[35]

Defendants do not dispute that Warren knew that the Merger would be highly accretive to ETE's distributions, driven primarily by taking Regency's cashflows

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[31] TT(Warren)1292:10-1293:5,1321:16-1322:1,1330:4-6;JX1009.

[32] TT(Warren)1324:4-1325:8.

[33] TT(Warren)1325:9-18.

[34] TT(Warren)1289:4-1291:14;JX191.

[35] JX197:1,4.

and funneling them through ETP's IDR split.[36] Warren knew he would receive an ***additional $43.9 million*** in ETE distributions in 2015 and ***$53.1 million*** in 2016 (*i.e.*, about 17% of the total deal accretion to ETE).[37] Warren would not have to pay ***a penny*** to receive these additional distributions, which were projected to continue indefinitely.[38]

Defendants do not dispute that, on January 16, Warren promised Long that he would become the CFO of combined company and Bradley continued employment at ETE if they "quietly and quickly" delivered Warren's desired transaction.[39]

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[36] TT(O'Loughlin)32:23-33:8;TT(Warren)1292:14-1293:5,1303:22-1304:19.

[37] TT(Warren)1322:7-22.;TT(O'Loughlin)35:21-36:14.

[38] TT(Warren)1320:5-1322:22. Defendants argue that the Court should ignore the incredible wealth diverted to ETE/Warren – *i.e.*, the Regency unitholders' distributions, projected synergies, and financing cost savings – because "Delaware law forecloses such comparative allegations." DB:4,55. Defendants ignore the plain language of §7.9(a)(iv), which required the Merger to be "fair and reasonable to [Regency], ***taking into account the totality of the relationships between the parties involved***." As this Court noted at the pleading stage, "[a] transaction that is in the best interests of the Partnership logically should not be highly unfair to the limited partners." *Dieckman*, 2018 WL 1006558, at *4.

[39] TT(Bradley)578:5-582:20;TT(Brannon)917:8-918:18;TT(Warren)1341:21-1343:18. Defendants attempt to chalk up Bradley's and Warren's divergent testimony regarding the genesis of the Merger to "different recollections" about who raised the concept. DB:62. No. Warren fabricated a story that the Merger was precipitated by customer complaints about Regency's performance, clearly to create the impression that the Company was struggling. JX834(Warren)34:21-36:10;TT(Warren)1304:20-1307:14. When Bradley was asked – nearly contemporaneously – he laughed and unequivocally denied Warren's claim. JX833(Bradley)296:13-21;TT(Bradley)578:5-18. This reveals that the narrative of Regency's impending demise is a litigation-driven rationalization.

Defendants do not dispute that Warren could appoint anyone he wanted to the Board, including directors who were "genuinely qualified as unaffiliated with the General Partner and independent at all relevant times."[40] Instead, Warren appointed close friends with deep financial and personal ties to him and each other.[41] Bryant testified he was ***loyal to Warren***, and that "***everyone on the Board knew***" that both he and Brannon "had a long history of personal friendships and business dealings with Warren."[42]

Everyone on the Board also knew that Brannon was a director of Sunoco and ineligible to serve on the Conflicts Committee.[43] Yet, Defendants appointed Bryant and Brannon to serve as Conflicts Committee for a Merger that would benefit Warren anyway.[44]

The Conflicts Committee's "process" was also clearly unfair and

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[40] *Dieckman*, 155 A.3d at 369.

[41] PB:19-22. *See ETE*, 2018 WL 2254706, at **8-9 (ETE created a conflicts committee consisting of "long-time friends of Kelcy Warren" who were "not eligible to serve on the Conflicts Committee" because they were also directors of Sunoco and ETP).

[42] TT(Bryant)961:19-963:17,972:6-20. Defendants' primary response – that much of the history between the Conflicts Committee members, Warren, and other ETE insiders occurred in the 1990s (DB:59-62) – just confirms, rather than refutes, the depth of these relationships.

[43] PB:19-22;JX301:1,3;TT(Bradley):585:1-586:9;TT(Bryant):971:14-22;JX820: 284:10-16;JX814:221:8-222:4.

[44] JX373;JX378;JX379;JX380.

unreasonable. Brannon deliberately did not give notice of his purported resignation to the Sunoco Board, as required by the Sunoco LLC agreement, until after the Merger was announced on January 26.[45] Defendants do not dispute that the Conflicts Committee: (i) had only two, short diligence meetings with ETP, where each side presented ***public*** investor decks that were "pulled off the shelf;"[46] (ii) did not obtain any confidential due diligence from ETP;[47] (iii) moved so fast there was no time to set up a data room;[48] and (iv) determined that the financial terms of ETE's initial proposal were "fair to the unaffiliated unitholders of the Partnership" on January 22 – ***before*** making any counterproposal, when J.P. Morgan had been retained for fewer than 36 hours and had not completed its financial analysis.[49]

Regardless of who has the burden, these undisputed facts firmly support a ruling that the Merger was not the result of a "fair and reasonable process."

C. THE PRICE WAS NOT FAIR OR REASONABLE

Defendants do not dispute that Warren dictated the parameters of the Merger. Warren informed his reports that: (i) any deal proposed could not be dilutive to ETP;

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[45] TT(Brannon)880:21-882:20;PB:45-47.

[46] TT(Bradley)616:11-24;TT(Brannon)907:11-18,908:12-909:1,911:12-912:1, 912:9-13;TT(Bryant)986:6-19;JX406:5-7;JX428:3-4;PB:52.

[47] TT(Bryant)985:5-14;TT(Brannon)901:15-17;TT(Bryant)986:6-19;PB:52.

[48] TT(Bryant)985:5-14;TT(Brannon)901:15-17;PB:28.

[49] JX454:3;TT(Brannon)915:5-916:10;PB:29.

and (ii) any IDR giveback from ETE to support the deal needed to be as low as possible.[50] As Warren testified:

> A. I like to think of this sort of as an equation and solve for an unknown. The unknown to be solved for was how much IDR support ETE would need to give to ETP to acquire Regency. And so that's how we did the math.
>
> Q. And within that math, ***the constant was that the deal cannot be dilutive to ETP, correct***?
>
> A. Correct. That is correct.[51]

The Conflicts Committee embraced Warren's edict. As Bryant testified:

> Q: And one of the other metrics of the transaction was to make sure that the transaction would not be dilutive to ETP unitholders on a cash distribution basis, right?
>
> A: ***Yes, that was our intent***.[52]

Defendants nevertheless argue that the Merger was "fair and reasonable" because the Merger provided unitholders with "an attractive 15% premium."[53] But this 15% premium was illusory. The record is undisputed that Regency unitholders actually received just ***0.3%*** more than the unaffected unit price because Defendants

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[50] TT(Warren)1323:4-14,1324:18-1325:8,1325:19-1326:13.

[51] TT(Warren)1326:3-10.

[52] TT(Bryant)1005:9-13.

[53] DB:3.

did not secure a collar.[54] Defendants never raised the prospect of a collar with ETP.[55]

Moreover, the exchange ratio was based on the Regency and ETP unit prices. Defendants cannot dispute that: (i) Welch's "totally inappropriate" comments at the December 2014 analyst dinner drove down Regency's unit price (as confirmed by Dages's event study); (ii) Regency's unit price did not recover from Welch's comments as the spread between the Regency and ETP unit prices widened; and (iii) when Warren proposed merging Regency into ETP on January 16, the ETP-Regency exchange ratio was 0.3595 – its lowest point in at least two years and far below the two-year median of 0.5060.[56]

Indeed, Warren's proposed exchange ratio only represented a premium over Regency's three- or five-day VWAP, ***after*** Welch's inappropriate comments drove down Regency's unit price.[57] Unsurprisingly, both Canessa and Dages concluded that the present value of Regency's future distributions was higher than the artificially depressed price that was used in setting the exchange ratio. As discussed below, Canessa generated a conservative DDM analysis, predicated on the very projections that Defendants authorized for valuing the Company and reaffirmed in

[54] TT(Brannon)927:22-928:6;JX838:3.

[55] TT(Bryant)977:13-19;TT(Brannon)854:3-11,920:17-21

[56] PB:15-17,22.

[57] PB:23.

the Proxy, which show the Merger undervalued Regency units by as much as 18%.

Defendants also do not dispute that they restructured the Merger on February 17, making it immediately ***dilutive*** to Regency unitholders. The record is clear that this was done to minimize disclosures about the Merger. As Regency's in-house counsel explained to Brannon and Bryant on February 16:

> the amendment will … eliminate the cash consideration and make up the difference by adjustment to the share exchange – this will ***alleviate the enhanced disclosure requirements*** under 13(e).[58]

Defendants' argument that the Merger resulted in "benefits" – *i.e.*, synergies and lower financing costs – does not save them.[59] Consistent with Warren's edict, the Merger was neutral to ETP and "tremendously accretive" to ETE and Warren himself. O'Loughlin's unrebutted testimony established that all these "benefits" went to Warren/ETE – ***not*** to Regency and its unitholders.[60] By contrast, Regency unitholders indisputably received ETP units with lower distributions than Regency units, absent the Merger.[61]

D. DEFENDANTS' *POST-HOC* RATIONALIZATIONS DO NOT MAKE THE MERGER FAIR

Defendants' overarching theme is that "Regency was better off with the

[58] JX0633:2.

[59] DB:4.

[60] TT(O'Loughlin)35:21-38:1;OD:15-18.

[61] PB:68-69.

Merger."[62] A party to a transaction can usually point to some "benefit," but the question is "at what price?" Here, the price was controlled by Warren, who admitted that, in setting the price, he favored the interests of ETE over the interests of Regency and its unitholders:

> Q: Now, nothing prevented you from taking part of the ETE accretion and giving back more to the combined ETP-Regency merger entity and, therefore, making sure it would not be dilutive to anyone on a distribution basis, correct?
>
> A. Well, yeah, sure, but I have a duty. It's a publicly traded entity. And the unitholders expect me to run it to the best of my capabilities. And so I think that would be – ***that's not something I would do***.
>
> Q. When you say, "I have responsibilities to a publicly traded entity," you're talking about ETE, correct?
>
> A. Correct.[63]

Warren was, of course, ETE's largest unitholder and the primary beneficiary of the accretion to ETE.[64]

Moreover, Defendants rely on *post hoc* data like trading prices of ***other*** companies and self-serving testimony to argue the Merger was beneficial to Regency, for example because ETP had an investment grade balance sheet and better

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[62] *See, e.g.*, DB:47-52,55-56,59.

[63] TT(Warren)1328:16-1329:5.

[64] TT(Warren)1330:4-6;PTO¶57.

credit profile.[65] They largely ignore, and leave unrebutted, the record developed by Plaintiff showing that Regency was one of the nation's largest and diverse G&P MLPs and well-positioned to weather the cyclical commodity price downturn. Thus, the financing benefits (which flowed to ETE anyway) did not justify the poor price.

- Between November 2014 and February 2015 – ***after*** the commodity price downturn began and throughout the Merger "process" – Regency management touted the Company's stability from its acquisitions, its strong growth CapEx pipeline, and growth profile.[66]

- Regency CEO Bradley and CFO Long conceded the accuracy of these statements at deposition and trial.[67]

- Regency had a well-balanced debt structure with no maturities for the next three years.[68]

- Regency had sufficient liquidity as of late 2014 to fund its near-term CapEx and was ***not*** in a liquidity crisis.[69]

- No ratings agency had threatened a downgrade and none of the banks in Regency's revolver threatened to pull any debt.[70]

- Bradley testified that Regency was "well-positioned for continued distribution growth" based on assumptions he believed were "probable"

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[65] DB:3.

[66] JX235:5-12,51,54;JX430:4-8;JX648:3.[67] *See, e.g.*, TT(Bradley)598:20-602:119,604:11-605:11,612:22-623:11,647:18-649:20,649:24-650:8,654:4-657:18; TT(Long)1064:20-1065:1.

[67] *See, e.g.*, TT(Bradley)598:20-602:119,604:11-605:11,612:22-623:11,647:18-649:20,649:24-650:8,654:4-657:18; TT(Long)1064:20-1065:1.

[68] JX235:48;TT(Warren)1337:11-18;TT(Long)1064:9-16.

[69] TT(Bradley)641:5-14.

[70] TT(Bradley)642:6-14;TT(Warren)1337:19-21.

as of January 2015.[71] Warren testified there were ***no discussions*** about cutting Regency's distributions.[72]

- Bradley admitted that maintaining stable cashflows in 2015 was a reasonably obtainable goal as of January 21, and he believed that Regency could grow average volumes in 2015, despite declining commodity prices.[73]

- The January projections used to negotiate the Merger (and the predicate for Plaintiff's damages analysis) were prepared on a reasonable basis, reflected management's best assumptions and estimates, incorporated declining commodity prices at the time, and were virtually identical to a revised budget approved by the Board in mid-March.[74]

- Shortly before the January 26 Merger announcement, ETP's Conflicts Committee members had an in-person meeting with Long to go over the assumptions in the January projections and came away with a "warm and fuzzy feeling" that the projections were reasonable.[75]

- As O'Loughlin showed, Regency was expected to meet each of its debt covenants and ratios for the foreseeable future.[76]

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[71] TT(Bradley)607:10-15,655:6-657:18.

[72] TT(Warren)1338:3-7.

[73] TT(Bradley)636:3-40:6,654:4-655:5.

[74] TT(Bradley)626:21-30:12;TT(Long)1061:11-1062:7,1106:19-1107:8.

[75] TT(Grimm)1176:2-1178:6.

[76] OD:44.

Regency's Mid-January 2015 Financial Projections – Key Credit and Financial Ratios (O'Loughlin Report Figure 57)

	Q1.14	Q2.14	Q3.14	Q4.14	Q1.15	Q2.15	Q3.15	Q4.15	Q1.16	Q2.16	Q3.16	Q4.16
Covenants												
Total Debt / LTM EBITDA < 5.5x	4.8	4.6	4.7	4.5	4.7	4.8	4.7	4.5	4.3	4.2	4.2	4.2
Secured Debt / LTM EBITDA < 3.25x	0.53	0.72	0.51	1.02	1.19	1.32	1.21	1.10	1.10	1.08	1.10	1.11
LTM EBITDA/(Annualized Interest) > 2.5x	3.7	3.8	3.7	4.1	4.1	4.0	4.0	4.2	4.4	4.5	4.6	4.5
Other Ratios												
Distribution Coverage Ratio	1.02	1.01	1.01	0.90	0.86	0.86	0.96	1.07	1.00	0.98	0.99	1.05
Liquidity ($ millions)	$912	$635	$769	$449	$752	$545	$691	$817	$710	$680	$618	$576

Sources: O'Loughlin Workpapers; JX0396.

- Demand for legacy Regency's services ***grew*** post-closing.[77]

Defendants dismiss the foregoing as "puffery."[78] Not so. These are specific statements regarding ***facts*** of Regency's performance and detailed analysis and financial planning of Regency's prospects in the face of declining commodity prices.

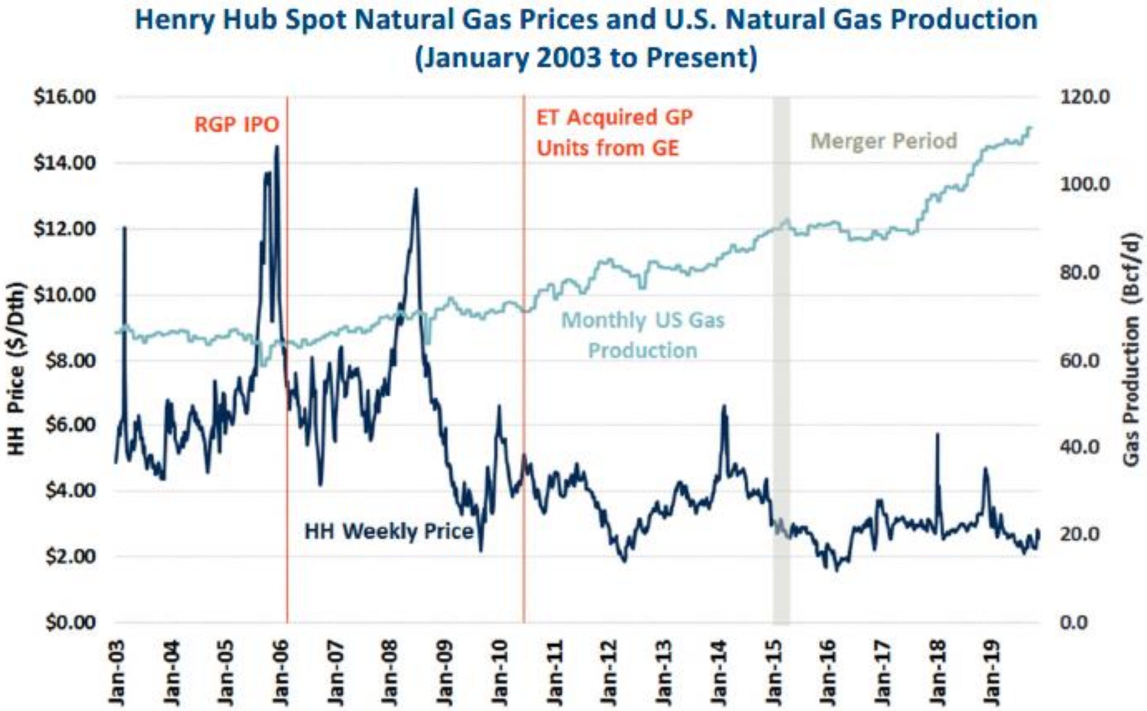
Meanwhile, Defendants' myopic focus on Q4 2014 and Q1 2015 results obscures the well-known cyclical nature of commodities prices. Regency experienced downturns before and had a plan to handle the coming downturn, which Bradley believed was achievable.[79] Defendants ignore that U.S. natural gas production exploded in the years prior to the Merger, even growing during the price

[77] JX742;14(Chief Commercial Officer of the combined company told analysts in August 2015 that "the biggest challenge we have with the Regency acquisition ***is building the assets quick enough to accommodate the volumes that [we] are committed to***"); JX747:14(November 17, 2015 ETP investor presentation showing that ETP's midstream business, which consisted of majority legacy Regency assets, experienced ***30%*** volume growth in 2015).

[78] DB:52.

[79] TT(Bradley):655:6-657:18.

downturn through to the present, just as EIA forecasted at the time.[80] For a midstream company like Regency, throughput volume was a critical macroeconomic factor.[81]



Sources: O'Loughlin Workpapers; JX824; JX915.

Defendants also contend that Regency was a drag on ETP.[82] Not only is this rank speculation inconsistent with ETP's contemporaneous statements; Dages's own event study showed that ETP's unit price did ***not*** move when Regency announced

[80] TT(O'Loughlin)43:12-44:2,44:13-45:3,48:6-18,58:10-59:13;OD:27,32.

[81] JX839:66-68.

[82] DB:35-37.

disappointing results in Q1 2015, after the Merger announcement.[83]

III. §7.9(B) DOES NOT ABSOLVE DEFENDANTS

A. §7.9(B) DOES NOT APPLY

Defendants recognize that §7.9(b) does not apply if "another express standard is provided for in this Agreement."[84] To salvage their argument that §7.9(b) applies, Defendants insist that §7.9(a) merely "provides optional safe harbors, not a governing standard."[85] However, Defendants conflate the safeharbors of §7.9(a)(i) and (ii) with the "standards" of §7.9(a)(iii) and (iv) and ignore the plain language of the contract.

Critically, §7.9(a) itself refers to subparts (iii) and (iv) (and not (i) or (ii)) as ***standards***:

> If Special Approval is not sought and the Board of Directors of the General Partner determines that the resolution of or course of action taken with respect to a conflict of interest satisfies either of ***the standards set forth in clauses (iii) or (iv) above***, then it shall be presumed that, in making its decision, the Board of Directors of the General Partner acted in good faith...

These "standards of conduct" mirror the common law "entire fairness" doctrine. *See Brinckerhoff*, 159 A.3d at 256-57 ("fair and reasonable ***standard*** is

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[83] JX842:163;TT(Canessa)319:17-320:2;TT(Dages)1557:13-1558:2,1558:10-1559:14.

[84] DB:42.

[85] DB:41.

‘something similar, if not equivalent to, entire fairness review.’”). This interpretation is consistent with the LPA’s contractual framework. As the *El Paso* court explained, §7.9 “resembles the analytical progression of fiduciary duty law, where the highly deferential business judgment rule applies to ***non-conflict*** transactions, [and] the entire fairness test applies to ***conflict*** transactions.”[86]

Each of Defendants’ cases interpreted the equivalent contractual provisions of the §7.9(a)(i) and (ii) permissive safeharbors, and ***not*** the equivalent of the §7.9(a)(iii) and (iv) standards, or are otherwise unavailing to Defendants.[87]

B. DEFENDANTS DID NOT ACT IN GOOD FAITH

Even if §7.9(b) applies, Defendants’ actions in subverting Special and Unitholder Approval to orchestrate a Merger that was “tremendously accretive” to

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[86] *Allen v. El Paso Pipeline GP Co., LLC*, 90 A.3d 1097, 1103 (Del. Ch. 2014); *see also Boardwalk*, 2019 WL 4927053, at *11 (§7.9 “as a whole” structured such that general partner acts in potential conflicts is “the most closely regulated category of action.”).

[87] *See Brinckerhoff*, 159 A.3d 242, 254 n.37 (holding there was an affirmative obligation to ensure that a conflicted transaction was “fair and reasonable” compared to the permissive conflicts resolution provision); *Allen v. Encore Energy Partners L.P.*, 72 A.3d 93 (Del. 2013) (discussing §7.9(a) “Special Approval,” not standards under §7.9(a)(iii-iv)); *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354 (Del. 2013) (applied lenient discretion standard absent here); *Spectra*, 2017 WL 2774559 (parties contested whether §7.9(a)’s Special Approval, not standards under §7.9(a)(iii-iv), satisfied “contractual good faith standard”); *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 WL 4975270 (Del. Ch. Aug. 20, 2015) (applicable section materially different from LPA as conflicted transactions were “conclusively deemed fair and reasonable to the Partnership” upon “Special Approval”).

ETE/Warren and immediately dilutive to Regency unitholders, and pursuant to deal parameters dictated by Warren, refutes their purported "good faith."

Boardwalk is instructive. There, the controller manipulated the MLP's unit price through a misleading public disclosure and then exercised a call right to acquire units at an artificially depressed price. As Vice Chancellor Laster explained:

> A party in control of an enterprise should not be able to transfer value from a particular constituency to itself, even under a constituency-based regime. Rather than a reasoned exercise of judgment about what is in the best interests of the entity, that ***type of value expropriation more closely resembles theft***.[88]

Thus, to the extent a lack of subjective good faith is the standard (and it is not), Defendants do not refute the conclusive record showing that Defendants structured and timed the Merger to benefit ETE/Warren at the expense of Regency unitholders, using a conflicted Conflicts Committee operating within the parameters set by the controller, and struck an unfair price.

IV. §7.10(B) DOES NOT ABSOLVE DEFENDANTS

A. §7.10(B) DOES NOT APPLY

Defendants do not contest that, in *Spectra*, Vice Chancellor Glasscock applied "settled rules of contract interpretation," and found §7.10(b) inapplicable to §7.9(a) conflicts transactions because:

[88] *Boardwalk*, 2019 WL 4927053, at *16.

> [T]he conclusive presumption [in §7.10(b)] sought to be invoked is not within the Conflicts Committee portion of the LPA, rather it is in a separate provision referring generally to "other matters" concerning the General Partner.[89]

The same is true here, where §7.10(b) appears under the heading "<u>Other Matters Concerning the General Partner</u>," entirely separate from §7.9(a)'s specific "<u>Standards of Conduct</u>."[90] The Court should adopt the logic of *Spectra*, which it described as "persuasive" at summary judgment.[91]

Defendants' attempt to distinguish *Spectra* fails. According to Defendants, the concern motivating the *Spectra* court – that a ***rebuttable*** presumption of good faith in §7.9(a) would be read out of the contract if §7.10(b)'s easier-to-meet ***conclusive*** presumption of good faith was available – is absent here.[92] However, Defendants ignore that Regency's §7.9(a) ***also*** includes a rebuttable good-faith presumption for *ex ante* decisions to follow §7.9(a)(iii) or (iv). While not a presumption Defendants can avail themselves of here (because they made no such *ex ante* decision), Defendants' interpretation reads this language out of the LPA.

Defendants do not even try to reconcile *Brinckerhoff*, which held that Defendants cannot abuse §7.9(a) and "flip back" to the conclusive presumption as

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[89] *Spectra*, 2017 WL 2774559, at *11.

[90] The LPA does ***not*** prohibit reference to headings when describing or defining the meaning of LPA provisions. SJOp.:14,n.34.

[91] SJOp.:15.

[92] DB:45.

an escape hatch.[93] Nothing in §7.10(b) supports a finding that Defendants acted in good faith when they undermined the safeharbor protections in §7.9(a). And J.P. Morgan never opined that Defendants could knowingly subvert the projections of the LPA.

In a footnote, Defendants observe that *Brinckerhoff* predates *Norton* and *Gerber*.[94] But during the summary judgment hearing, Defendants conceded that those decisions do not hold that a general partner could rely on §7.10(b) in conflicts transactions governed by §7.9(a).[95] Rather, the clear implication from *Allen* – decided after *Norton* and *Gerber* – is that this remains an open question.[96]

Moreover, *Gerber* supports Plaintiff. The Court reversed dismissal of the complaint and ***refused*** to apply the conclusive presumption of §7.10(b) to a conflicts transaction if that would "lead to nonsensical results."[97] As the Court explained, "[e]xamples readily come to mind of cases where a general partner's actions in obtaining a fairness opinion from a qualified financial advisor themselves would be

[93] *Brinckerhoff* at 16-17;PB:42,58-59.

[94] DB:45,n.209.

[95] SJTr:89:22-94:5.

[96] *Id.*

[97] *Gerber*, 67 A.3d at 420.

arbitrary or unreasonable, and thereby frustrate the fruits of the bargain that the asserting party reasonably expected."[98] The same is true here.

B. DEFENDANTS DID NOT RELY ON J.P. MORGAN'S FAIRNESS OPINION

Defendants concede that the Board relied on the Conflicts Committee for evaluating this Merger.[99] None of the other directors could "participate in that evaluation," "because of known potential conflicts."[100]

Defendants' argument that "banks do not deliver fairness opinions until a deal is reached in principle" does not save them.[101] No one forced the Conflicts Committee to determine on January 22 that Warren's proposal was "fair to the unaffiliated unitholders of the Partnership," when J.P. Morgan had been retained for fewer than 36 hours and had not completed its analysis.[102] The Conflict Committee could also have waited for J.P. Morgan to complete its financial analysis before accepting a "proposal in principle."[103] The Conflicts Committee chose not to do so. As a result, Defendants have ***no answer*** to *Enbridge,* where the Court declined to apply §7.10(b) when "financial terms were fully baked by the time [the financial

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[98] *Id.*

[99] DB:68.

[100] TT(Bradley)593:7-594:13;PB:30-31.

[101] DB:67.

[102] PB:29.

[103] PB:30.

advisor] appeared on the scene."[104]

Nor did anyone prevent the Conflicts Committee from asking J.P. Morgan to update its fairness opinion when the terms were amended so that the fairness opinion would "value the consideration that the LP unitholders ***actually*** received."[105] Again, the Committee chose not to do so (unlike ETP's committee).[106]

Thus, Defendants failed to prove they relied on J.P. Morgan's fairness opinion in approving the Merger.

V. DEFENDANTS' BREACHES OF CONTRACT HARMED REGENCY UNITHOLDERS

Plaintiff proved that Defendants opportunistically breached the LPA to benefit ETE/Warren and harmed Regency's unitholders by: (i) effectuating a Merger that significantly undervalued Regency; and (ii) diverting hundreds-of-millions of dollars in distributions from Regency unitholders to ETE/Warren.

A. THE MERGER SIGNIFICANTLY UNDERVALUED REGENCY

Defendants dispute only one of the inputs that Canessa used for his standard DDM calculating the value of future distributions that Regency unitholders gave up in the Merger. The sole dispute is whether the Court should use: (i) the "Fairness Opinion Projections" – which were used by J.P. Morgan with the approval of

[104] 159 A.3d at 261.

[105] *Gerber*, 67 A.3d at 422-23.

[106] PB:33.

management and disclosed in the Proxy;[107] or (ii) the "April Spreadsheet" – an Excel file that was not reviewed by Long or approved by the Board.[108]

Regardless of which projections the Court uses, comparing the "get" with the "give" demonstrates that Regency unitholders suffered significant harm.[109]

	Canessa DDM (Fairness Opinion Projections)	Dages DDM (Fairness Opinion Projections)[110]	Canessa DDM (April Spreadsheet)	Dages DDM (April Spreadsheet)[111]
NPV of Regency Distributions Given Up	$29.06	$28.02	$28.56	$26.76
Merger Consideration	$23.83	$23.83	$23.83	$23.83
Damages Per Unit	$5.23	$4.19	$4.73	$2.93
Units Held by Class Members	322,208,786	322,208,786	322,208,786	322,208,786
Aggregate	**$1,685,644,286**	**$1,350,054,813**	**$1,524,539,893**	**$944,071,742**

[107] JX509;JX682:75;JX838:49;TT(Canessa)296:5-300:7;PB:65.

[108] JX842:193;TT(Dages)1579:9-1580:19.

[109] CD:115. By contrast, the Dages-created "sensitivity" is inherently unreliable. Dages admitted that he had no expertise in creating projections for Regency and that he had not seen any evidence suggesting that Regency management believed that 2016-2019 distributions would be at the level contemplated in his "sensitivity" projections. TT(Dages)1584:19-1586:24.

[110] Based on midpoint of DDM range of $23.89-$34.36. TT(Dages)1583:17-1584:2.

[111] Based on midpoint of DDM range of $22.68-$33.01. TT(Dages)1584:3-6.

Damages[112]				

To avoid this reality, Defendants argue that Plaintiff (i) incorrectly inflated the "give"; (ii) incorrectly deflated the "get"; and (iii) used an improper "apples-to-oranges" methodology in calculating damages. Defendants are wrong.

1. Plaintiff Properly Valued The "Give" In The Opportunistic Merger Benefitting ETE/Warren

Defendants do not dispute that Regency unitholders gave up their right to Regency's future distributions because of the Merger. According to Defendants, Plaintiff improperly inflates the present value of those distributions by (i) using out-of-date projections and/or (ii) not using Regency's unit price to determine the value of what Regency unitholders gave up. Both arguments fail.

First, Dages concedes that the Fairness Opinion Projections were reliable as of January 25.[113] Post-January 2015 developments did not render the Fairness Opinion Projections unreliable. On March 16, the Board approved a revised budget (the "March Budget"), projecting year-over-year distribution growth.[114] The March Budget incorporated the full 2014 results, January 2015 commodity prices (reflecting much of the commodity price decline), and Regency's actual January

112 Excluding pre-judgement interest.

113 TT(Dages)1572:20-1573:8.

114 JX679:14.

results.[115] The March Budget closely aligned with the Fairness Opinion Projections.[116]

Metric	**Fairness Opinion Projections**	**March Budget**	**Delta**
DPU	$2.01	$2.01	0%
EBITDA	$1.419 billion	$1.407 billion	(0.8%)
DCF	$936 million	$917 million	(2%)
Coverage Ratio	0.99x	0.96x	(0.03x)

Two weeks after the March Budget was approved, Regency published years 2015-2016 of the Fairness Opinion Projections in the Proxy.[117] Long did not tell anyone that these Projections had become unreliable and should not be included in the Proxy.[118]

This is consistent with Regency's history of stable distributions during prior periods of significant commodity price decline.[119]

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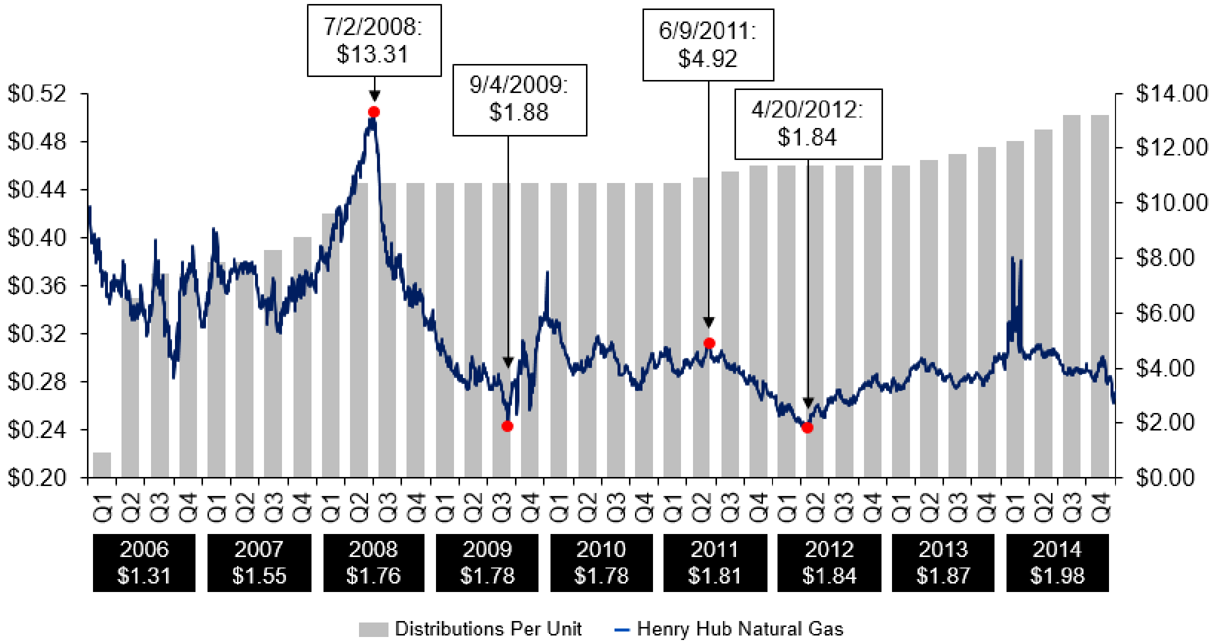
[115] JX638;JX1001;TT(Long)1105:7-1107:4.

[116] JX679.

[117] JX682:83.

[118] TT(Long)1107:9-13.

[119] JX838:Table 4;CD:84.



Second, Defendants' assertion that Regency's January 2015 unit price reflected the value of Regency's future distributions is wrong. Regency did not give guidance on future distributions, and Welch improperly talked down Regency's unit price in a statistically significant way.[120] Regency's unit price was also negatively affected by a "valuation overhang" caused by ETE's control over Regency and its economic incentive to funnel growth opportunities to the higher-split ETP.[121] Dages agreed that Regency's unit price did not reflect the present value of Regency's future distributions either, and that Regency should be valued using a DDM.[122]

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[120] PB:15-17;JX843:150-154.

[121] PB:38,67;TT(Canessa)244:13-249:17. The valuation overhang did not impact ETP to the same extent. TT(Canessa)251:3-253:24;JX96:6;JX77:1;JX1011:77.

[122] TT(Dages)1571:24-1572:11 Instead, he merely contests that ***if*** the "get" is measured by ETP's unit price, ***then*** the Court should look to Regency's (unreliable)

Defendants nevertheless assert that any valuation that "removes" the overhang is inappropriate, because ETE's control was an "inherent feature of investing in Regency."[123] Not so. Although ETE's control over Regency was real, unitholder rights to future distributions – including the split of distributions vis-à-vis ETE – were ***fixed*** in the LPA.[124] ETE used its control to orchestrate this corrupt Merger in breach of the LPA to change this. A calculation of damages that uses the present value of Regency's future distributions as the "give" in the improper transaction is "logically and reasonably related to the harm or injury for which compensation is being awarded."[125]

2. Plaintiff Properly Valued The "Get" In The Opportunistic Merger Benefitting ETE/Warren

Defendants do not dispute that the cash value of the Merger consideration was $23.83. Defendants argue that it is improper to use the cash value of the "get" to quantify damages when the "give" is the present value of future distributions that unitholders admittedly gave up, because that would be an "apples-to-oranges" comparison.[126] Wrong.

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unit price. TT(Dages)1587:18-1588:7. As discussed below, this position is inconsistent with Delaware law.

[123] DB:80.

[124] JX25:57-59;PTO¶167.

[125] *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006).

[126] DB:69.

Delaware has no "apples-to-apples" damages rule. Rather, expectation damages are "measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract" and "[t]he injured party 'need not establish the amount of damages with precise certainty where the wrong has been proven and injury established.'"[127]

Moreover, in this analysis the Court applies the "established presumption that doubts about the extent of damages are generally resolved against the breaching party" and, as a corollary to this presumption under the "wrongdoer rule," the Court can "***take into account the willfulness of the breach*** in deciding whether to require a lesser degree of certainty."[128]

Under this framework, analyzing contract damages for Defendants' opportunistic breach of the LPA does not, as Defendants suggest, require the Court to (i) compare the present value of the future distributions of one company with the present value of future distributions of another company; or alternatively (ii) compare the unit price of one company on one date with the unit price of another company months later.

Southern Peru is instructive. There, plaintiffs challenged Southern Peru's acquisition of Minera, which was funded with Southern Peru stock that had a $3.1

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[127] *Siga Tech., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015).
[128] *Id.* at 1131.

billion cash value.[129] After Southern Peru's special committee determined that Minera was worth $1.7 billion, its financial advisors embarked on a "relative valuation" exercise: instead of comparing Minera's value to Southern Peru's $3.1 billion market value, the financial advisors compared Minera's value to a $2.1 billion DCF value of Southern Peru.

Then-Chancellor Strine found that "the difference between the standalone equity values of Minera derived by Goldman and the plaintiff's expert and ***actual cash value*** … in Southern Peru stock that was actually paid" supported an over $2 billion damages award.[130] The Court determined damages by balancing three different values: (i) a DCF of Minera; (ii) the market value of the special committee's counter offer; and (iii) Minera's equity value based on comparable companies methodology.[131] The Supreme Court upheld the award, expressly rejecting defendant's argument "that relative valuation is the only way to perform an 'apples-to-apples' comparison of Southern Peru and Minera,"[132] establishing that there is no "apples-to-apples" requirement as Defendants contend.

Defendants' other cases do not support an "apples-to-apples" requirement

[129] *In re Southern Peru Copper Corp. S'holder Litig.*, 52 A.3d 761, 763 (Del. Ch. 2011).

[130] *Id.* at 816.

[131] *Id.* at 816-817.

[132] *Am. Mining Corp. v. Theriault,* 51 A.3d 1213, 1246 (Del. 2012).

either. In *Citron*, the Court rejected plaintiff's claim that she had not received fair value in a stock-for-stock merger, while noting that the merger consideration's cash value fell within the target's DCF value.[133] Thus, *Citron* supports comparing the target's ***intrinsic value*** to the acquirer's ***cash value*** in a stock-for-stock deal. *Emerald Partners v. Berlin* dealt with inconsistencies in how plaintiff's expert valued one of the parties to the merger as of ***different dates*** – not an alleged inconsistency in how the expert valued the target and the acquirer.[134]

Meanwhile, Defendants' proposed "get" violates their own "apples-to-apples" rule. According to Dages, Regency unitholders received shares worth $30.39 per unit. Dages calculated this value by determining the present value of the future distributions of combined Regency-ETP (using a DDM) and multiplying the resulting value by the Merger Agreement's exchange ratio (as amended).[135] In other words, Dages multiplied a market-based variable (the exchange ratio based on the

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[133] *Citron v. E.I. DuPont de Nemours & Co.*, 584 A.2d 490, 507 (Del. Ch. 1990).

[134] 2003 WL 21003437, at *36 (Del. Ch. Apr. 28, 2003). *Sterling v. Mayflower Hotel Corp.* and *Rosenblatt v. Getty Oil Co.* say nothing at all about the propriety of comparing the target's intrinsic value to the acquirer's cash value in a stock-for-stock deal. 93 A.2d 107, 304-05 (Del. 1952); 1983 WL 8936, at *26 (Del. Ch. Sept. 19, 1983).

[135] JX842:69-70,73,75-76. Initially, Dages used ETP's cost of equity as a discount rate for combined Regency-ETP. This was obviously wrong. With the Court's permission, Defendants introduced a *pro forma* discount rate (for the first time) at trial.

relative unit prices), times the model-based present value of future distributions.[136] Thus, Defendants violate their own "apples-to-apples" rule. Dages's valuation of future distributions of combined Regency-ETP is also unnecessarily speculative, given the readily available, undisputed cash value. Dages admitted that he does not "know much of anything" about the ETP projections he used.[137]

3. Awarding Damages Does Not Shift Regency Underperformance to ETP

Defendants argue that Plaintiff's damages calculation "shifts [Regency's] underperformance to the 'get' by using ETP's closing-date unit price."[138] This is baseless. Dages's event study shows that ETP's unit price did not move in a statistically significant way when Regency announced its 2014 and Q1 2015 financial results following the announcement of the Merger.[139]

Defendants also ignore ETE's performance following the announcement of the Merger. ETE's unit price jumped and continued to rise, gaining a total of ***$6.8 billion*** in market cap by closing.[140] Because ETE was an "IDR collector," ETE's

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[136] TT(Canessa)358:3-359:2;CD:113.

[137] TT(Dages)1591:10-13; Dages:212:21-23. Defendants claim that Long testified that ETP used "the same assumptions" as Regency, but Long merely testified that ETE management had ***provided*** the same ***price deck*** to Regency and ETP. *Compare* DB:77 *with* TT(Long)1044:13-1045:8.

[138] DB:83-84.

[139] TT(Canessa)316:4-320:17;TT(Dages)1557:13-1558:2,1558:10-1559:14.

[140] TT(Canessa)350:23-354:5;CD106-107.

unit price likely would have declined if the market thought Regency's distributions were significantly at risk.[141]

B. PLAINTIFF'S CALCULATION OF THE IMPROPERLY DIVERTED DISTRIBUTIONS IS UNDISPUTED

Defendants have not disputed O'Loughlin's testimony or calculation of the dilution in distributions that Regency unitholders suffered because of the Merger.[142]

At trial, the Court permitted Defendants to introduce for the first time a *pro forma* cost of equity for combined Regency-ETP because it was "just a mathematical calculation [the Court] could ask for post-trial, if it was something of interest to [the Court]."[143] Dages's *pro forma* cost of equity blended the standalone Regency cost of equity and the standalone ETP cost of equity and, therefore, reflects the relative "riskiness" of the combined company's future distributions. Applying Dages's *pro forma* cost of equity to the undisputed, net diverted cash distributions – without any modifications or assumptions – shows that the Merger diverted at least $337,997,017.

[141] TT(Warren)1261:18-22;TT(Canessa)265:16-268:10,350:23-354:5. Had Defendants proved that Regency's performance caused ETP's decline between signing and closing, the Court could avoid providing Plaintiff a "windfall" by using ETP's ***announcement date*** closing price is assessing damages. Canessa provides damages calculations based on ETP's announcement date price: $700 million using the Fairness Opinion Projections and $538 million using the April Spreadsheet. JX838:Ex.8.

[142] TT(O'Loughlin)13:6-11,14:8-19,24:12-25:1;PB:36,68-69;OD:11.

[143] TT1434:13-1435:12.

This is not a "fundamentally new damages methodology."[144] Plaintiff mathematically applied two inputs that were part of the trial record: the *pro forma* cost of equity that ***Defendants*** asked the Court to admit during the trial, and the undisputed quantum of the diverted cash distributions determined by O'Loughlin.[145]

Fletcher and *Zaman* are easily distinguished. In *Fletcher*, plaintiff attempted to introduce a new damages ***model*** that was "not supported by the record."[146] Here, the amounts of the improperly diverted IDRs and the *pro forma* cost of equity are ***undisputed*** and were both presented at trial. In *Zaman*, plaintiffs asserted a new "bad faith" indemnification claim for the first time after trial. Defendants did not have an opportunity to present evidence concerning this new claim at trial and the Court promptly rejected it as untimely, unfair, and waived.[147]

Here, there is nothing "unfair" about applying a *pro forma* cost of equity that ***Defendants*** introduced at trial to calculate a present value of the diverted IDR streams, which Plaintiff has consistently challenged throughout the case (and

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[144] DB:86.

[145] JX0839:12-13,117-118,138-149;PPB:22-24,48,58;TT(O'Loughlin)14:8-19; TT(Canessa)478:13-479:10;TT(Bryant)1016:1-14;TT(Grimm)1180:21-1181:15;TT(Wolf)1239:14-20;TT(Warren)1292:21-1293:5,1318:5-12.

[146] *Fletcher Int'l Ltd. v. Ion Geophysical Corp.*, 2013 WL 6327997, at *21 (Del. Ch. Dec. 4, 2013).

[147] *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *16 (Del. Ch. May 23, 2008).

provided an unrebutted calculation of).[148]

VI. DEFENDANTS ARE LIABLE FOR MONEY DAMAGES

A. DEFENDANTS WAIVED §7.8(A)

Defendants claim that anything that is "part of the agreement that Plaintiff alleges has been breached" is "part of Plaintiff's cause of action" and thus outside the ambit of Rule 8(c).[149] Defendants are wrong. To prevail on its breach of contract claim, Plaintiff need only prove a breach and damages.[150]

Defendants distinguish *Nantucket Island* on the basis that the source of the "affirmative defense" at issue there was a statute, not a contractual provision.[151] *Nantucket Island* did not turn on this distinction, finding that a device that permits a party to "'avoid' liability for what might otherwise be a breach of legal or equitable duty" is a "natural affirmative defense" that must be raised in an answer.[152] The same is true for §7.8(a), which allows Defendants to "'avoid' liability for what might

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[148] JX779(Compl.¶¶30,45);PSJM.:8 (TransactionID#63283177);PTB:22-24,48,58;JX0839:12-13,117-118,138-149;TT(O'Loughlin)14:8-19;TT(Canessa)478:21-479:10;TT(Bryant)1016:1-14;TT(Grimm)1180:21-1181:15;TT(Wolf)1239:14-20;TT(Warren)1292:21-1293:5,1318:5-12.

[149] DB:43.

[150] *See VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

[151] DB:43.

[152] 2002 WL 31926614, at *2 (Del. Ch. Dec. 16, 2002).

otherwise be a breach of legal or equitable duty."[153] Defendants admittedly did not raise this affirmative defense in their Answer as required, and it was waived.

B. DEFENDANTS ENGAGED IN WILLFUL MISCONDUCT, BAD FAITH, AND FRAUD

Defendants argue that they are not liable for money damages because "under either §7.9(b) and §7.8(a) the applicable standard is whether Defendants approved the Merger in good faith."[154] Plaintiff has proven that Defendants did not act in good faith.[155]

Moreover, §7.8(a) is not limited to bad faith. Defendants are also liable for money damages if they engage in "willful misconduct" or "fraud." Defendants' brief ignores the record proving that: (i) their misconduct in undermining the protections afforded to unitholders in the safeharbors of the LPA was "willful" and (ii) they committed fraud by knowingly issuing a false and misleading Proxy.

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[153] Defendants cannot rely on *Brinckerhoff*, 159 A.3d at 247 or *In re K-Sea Transp. Partners L.P*, 2012 WL 1142351 (Del. Ch. Apr. 4, 2012), as neither court was asked to decide whether exculpation provisions in LPAs were affirmative defenses.

[154] DB:44.

[155] PB:55-58; *supra* Section(III)(B).

CONCLUSION

Judgment should be entered for Plaintiff and the Class.

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CERTIFICATE OF SERVICE

I, Gregory V. Varallo, hereby certify that, on February 21, 2020, I caused a copy of the foregoing *Plaintiff's Post-Trial Reply Brief* to be filed and served upon the following counsel of record via File & Serve*Xpress*:

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