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Case Number 330,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE WILLIAMS COMPANIES, INC.,	)	
	)	
Plaintiff Below-Appellant,	)	No. 330, 2016
	)	
v.	)	Court below: Court of Chancery of the State of Delaware
	)	
ENERGY TRANSFER EQUITY, L.P., et al.,	)	C.A. Nos. 12168-VCG and 12337-VCG
	)	
Defendants Below-Appellees.	)	
	)	

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT[1]

ETE's Answering Brief ("ETE Br.") is notable for what it does *not* say. ETE does not dispute that the Merger Agreement required ETE to take affirmative steps to try to obtain the 721 Opinion, and does not point to anywhere in the Opinion where the Court of Chancery actually held ETE to that standard. Further, ETE does not argue that it did all it could—including "cooperate" with Williams—to try to obtain the 721 Opinion and does not contest the trial court's factual findings on the litany of actions that ETE failed to take. (Op. 49-50.)

Instead, ETE contends that the "unique context" of this case excused ETE from failing to take affirmative steps to secure the 721 Opinion. (*See* ETE Br. 28.) Unable to argue that ETE deliberated with Williams and its counsel in an effort to find a solution to the supposed tax issue, ETE asserts that the Merger Agreement did "not require ETE to involve" them. (*Id.* at 31.) Unable to argue that ETE asked its three tax advisors to put their heads together to troubleshoot the tax issue, ETE asserts that such efforts were unnecessary as they "would not have affected" Latham's conclusion. (*Id.* at 32.) Unable to argue that ETE and its advisors gave robust consideration to Williams' solutions, ETE asserts that the solutions would not have worked. (*Id.* at 33.) And, unable to argue that ETE put its obligations to effectuate the Transaction ahead of its own economic interests, ETE asserts that it

[1] Terms not defined in this Reply Brief have the meanings ascribed to them in Williams' Opening Brief ("Williams Br.").

should be allowed instead to take account of "its own interests". (*Id*. at 34.)

In short, ETE makes no effort to show that it took all of the affirmative actions it reasonably could to try to obtain the 721 Opinion, and argues instead that the issue is moot because Williams cannot prove that meaningful efforts and cooperation by ETE would have caused Latham to reach a different conclusion. In doing so, ETE confuses breach and causation—the same error made by the Court of Chancery. Based on the trial court's factual findings, ETE's approach is fatal to its defense and makes clear that reversal is required on whether ETE breached its efforts obligations. With respect to causation, ETE misreads established Delaware precedent following the Restatement of Contracts in holding that the party in breach (here, ETE) bears the burden of proving that its breach did not materially contribute to the failure of a condition precedent. (*See infra* Section I.)

Additionally, having represented and warranted that the essential facts in its possession as of September 2015 could not "reasonably be expected to prevent" the Transaction from qualifying as tax free under Section 721, and having induced Williams to rely on that representation, ETE was equitably estopped from taking an inconsistent position in June 2016. (*See infra* Section II.)

As a result of the Court of Chancery's legal errors, the partial final judgment should be reversed, and judgment entered in Williams' favor (or the matter remanded if this Court believes additional fact-finding is necessary).

ARGUMENT

I. THE COURT OF CHANCERY APPLIED THE WRONG LEGAL STANDARD IN RULING THAT ETE WAS NOT IN BREACH OF ITS EFFORTS OBLIGATIONS WITH REGARD TO THE 721 OPINION.

In an attempt to avoid *de novo* review, ETE insists that Williams' arguments are "nothing more than disagreements with the Trial Court's factual findings". (ETE Br. 31; *see also id*. at 26.) Tellingly, ETE does not (because it cannot) identify a single factual finding that Williams challenges on appeal. To the contrary, for purposes of this appeal, Williams accepts the Court of Chancery's factual findings. Under the correct legal standard, those factual findings compel judgment in Williams' favor that ETE breached its efforts obligations.

Williams' appeal arguments are pure questions of law—that the Court of Chancery erred when it (i) "interpreted 'commercially reasonable efforts' and 'reasonable best efforts' as imposing only a negative duty not to obstruct performance of the contract"; (ii) "elided the breach and causation inquiries"; and (iii) failed to "shift[] the burden to ETE to prove that [its] acts and omissions did not materially contribute to the failure of the closing condition". (Williams Br. 23.)[2] These legal questions are reviewed *de novo*.[3]

[2] *See BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012) ("[T]his Court reviews the trial court's interpretation of contract terms *de novo*."); *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 13 (Del. 2000) ("Questions of contract interpretation are subject to *de novo* review."); *Alliance Data Sys. Corp. v. Blackstone Capital Partners V* (*ADS*), 963 A.2d 746, 765 (Del. Ch. 2009) (construction of "reasonable best efforts" clause is a question of law), *aff'd*, 976 A.2d 170 (Del. 2009) (table).

A. The Court of Chancery Ignored ETE's Affirmative Obligations.

ETE concedes that its efforts obligations encompassed an affirmative duty to take all reasonable steps to procure the 721 Opinion. (*See* ETE Br. 2, 27.) But ETE asserts that the Court of Chancery "correctly" imposed this affirmative duty on ETE. (*Id.* at 27.) This is a clear misreading of the Opinion.

According to ETE, the Court of Chancery "correctly held that ETE 'bound itself to do those things objectively reasonable to produce the desired 721 Opinion, in the context of the agreement reached by the parties.'" (*Id*. (quoting Op. 46).) While the Court of Chancery did recite this standard on page 46 of its Opinion, the court did not actually *apply* it, and merely reciting the proper legal standard will not rescue an opinion that does not properly apply that standard. *See, e.g.*, *Am. Ins. Grp. v. Risk Enter. Mgmt., Ltd.*, 761 A.2d 826, 830 (Del. 2000) (reversing where, "[w]hile the Superior Court noted [the legal principle], it is not clear from the present record that it applied it"). Review of the Opinion makes clear that the Court of Chancery applied the legally erroneous standard that Williams was required to prove that ETE took steps to "torpedo" the 721 Opinion.

First, the Court of Chancery's conclusion that ETE did not breach its efforts

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[3] The cases ETE cites for clear error review (ETE Br. 26) provide no support for ETE's argument. They both involved appeals of factual findings—and did not involve the standard of conduct imposed by a contractual "commercially reasonable efforts" clause or how to apply that standard when the cause of the failure of a condition is in dispute. *See Addessi v. Wilmington Tr. Co.*, 530 A.2d 1128 (Del. 1987) (table); *RBC Capital Mkts. v. Jervis*, 129 A.3d 816, 864 (Del. 2015) (*Rural/Metro*) (appeal point on proximate cause).

obligations rested on the trial court's findings that ETE had *not* taken a list of actions to "obstruct" Latham's delivery of the 721 Opinion:

> "Williams has not pointed to other facts which [ETE] *withheld from or misrepresented to Latham* that have caused it to withhold the 721 Opinion. There is simply nothing that indicates to me that [ETE] has *manipulated the knowledge or ability of Latham* to render the 721 Opinion, or *failed to fully inform Latham*, or do anything else, whether or not commercially reasonable, *to obstruct Latham's* issuance of the condition-precedent 721 Opinion, or that had a material effect on Latham's decision. *Therefore, I have no basis to find that [ETE] is in material breach of the commercially reasonable efforts requirement* . . . ." (Op. 48-49 (emphases added).)

This was a mistaken application of the efforts obligations as embodying only a negative covenant, not an affirmative one.

Second, when the Court of Chancery did consider whether ETE took affirmative steps to attempt to procure the 721 Opinion, it found that ETE had *failed* to take such steps. The trial court found expressly that ETE:

- "did not direct Latham to engage earlier or more fully with Williams' counsel";
- "failed itself to negotiate the issue . . . directly with Williams";
- "failed to coordinate a response among the various players"; and
- "generally did not act like an enthusiastic partner in pursuit of consummation of the . . . Transaction". (*Id.* at 49-50.)

These factual findings are dispositive of this appeal. They establish a breach of ETE's efforts obligations. "[A]ct[ing] like an enthusiastic partner in pursuit of consummation of the . . . Transaction" is *precisely* what ETE's efforts obligations

required.[4]

Third, in distinguishing *Hexion*, the Court of Chancery relied solely on the ground that, in that case, "the buyer took affirmative steps to scuttle its financing":

> "Unlike the record in this case, in *Hexion* the buyer actively and affirmatively torpedoed its ability to finance. *If the record here reflected affirmative acts by [ETE] to coerce or mislead Latham*, by which actions it prevented issuance of the 721 Opinion, the facts here would more resemble *Hexion*, and *the outcome here would likely be different*." (Op. 50-51 (emphases added).)

That is, the trial court erroneously found that the lack of evidence it saw that ETE "torpedoed" the 721 Opinion was outcome-determinative.

B. ETE, Like the Court of Chancery, Improperly Conflates Breach and Causation.

ETE repeatedly asserts that its affirmative obligations under the efforts clauses were relaxed as a result of the "unique context of attempting to obtain a 721 Opinion". (ETE Br. 28.) The two "unique contexts" on which ETE focuses are Latham's status as a third party to the Merger Agreement and the tax decision in *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945), which ETE argues left it unable to overcome Latham's objections. ETE's arguments make the same fundamental mistake as the Court of Chancery because they conflate breach and causation. They also fail in their own right, as explained below.

[4] *See Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 749 (Del. Ch. 2008) (reasonable best efforts requires a party to take any "act [that] was both commercially reasonable and advisable to enhance the likelihood of consummation"); A671 § 5.03(a); A680 §§ 5.07(a), (b).

1. Latham's Status as a Third Party Did Not Relieve ETE of Its Affirmative Duty To Try To Obtain the 721 Opinion.

ETE argues that its efforts obligations were watered down here because the parties contracted for the 721 Opinion to be delivered by Latham—a third party—and ETE could not *force* Latham to act against its own judgment. (ETE Br. 29, 37.) But efforts obligations are not relaxed merely because a closing condition is contingent on a third party's action. Closing conditions regularly implicate third-party action. Indeed, it is *because* third parties introduce uncertainty that merger parties negotiate to include efforts clauses for the satisfaction of those conditions; if a matter is entirely within the parties' control, they simply promise to perform, rather than to use efforts to do so.[5] ETE reads its duty to "use its commercially reasonable efforts to obtain the [721] [O]pinion" out of the Merger Agreement.

Here, Williams agreed to allow Latham to render the 721 Opinion *because* (i) ETE had promised to use its reasonable best efforts to obtain that opinion and satisfy the closing conditions; and (ii) ETE had also represented and warranted—on Latham's advice—that it knew of no facts that would reasonably be expected to prevent the 721 Opinion from issuing. (*See* A2871/342:21-343:15, A2889/412:14-413:7 (Needham).) To hold that Williams' agreement to permit Latham to serve as

[5] *See* James C. Freund, *Anatomy of a Merger: Strategies and Techniques for Negotiating Corporate Acquisitions* 289 (1975) ("[T]he [party's] lawyer is often reluctant to allow his client to promise the accomplishment of tasks that require third party concurrence . . . . [T]he pledge to use one's best efforts to fulfill a stated objective has been devised to fill this void.").

Section 721 "arbiter" had the effect of relaxing ETE's commitments makes no sense and is directly contrary to the Merger Agreement.

Assuming that Latham was, in fact, acting in good faith and ETE did not, in fact, coerce Latham, ETE could not have known in advance what the outcome of Latham's analysis would be. ETE was obligated to take every reasonable action "advisable to enhance the likelihood" that Latham would provide the opinion. *Hexion*, 965 A.2d at 749. ETE's argument that the trial court's *ex post* findings on causation excused ETE from taking such actions because they would have been moot conflates causation with breach—the same error made by the trial court.

ADS provides no support for ETE's argument. (ETE Br. 29.) In *ADS*, the buyer promised to use its reasonable best efforts to obtain regulatory approval for a merger. The Court of Chancery held that the party to the contract—Aladdin, an entity set up by private equity fund Blackstone to effectuate the merger—was not required to force a non-party (Blackstone) to exert its *own* efforts to satisfy the closing condition (in this case, regulatory approval) because the seller had contracted for Aladdin's efforts, not Blackstone's. 963 A.2d at 761-64. Here, ETE is in the same position as Aladdin was in *ADS*, and the presence of third parties (the regulator in *ADS* or Latham here) does not dilute the obligation.[6]

[6] Indeed, *ADS* supports Williams' position here. In a decision that was careful to distinguish between affirmative and negative covenants, the Court of Chancery in *ADS* held Aladdin to its affirmative efforts obligations and found that they were satisfied because, in order to meet the

ETE cannot hide behind Latham's status as a third party, and cannot use the trial court's finding of *Latham*'s good faith, as a substitute for *ETE*'s obligations.

2. *Court Holding* Did Not Relieve ETE of Its Affirmative Duty To Try To Obtain the 721 Opinion.

Next, ETE argues that the *Court Holding* decision absolved it of its obligation to consider Williams' proposed solutions to Latham's purported tax concerns. (ETE Br. 29.) This argument fails for several reasons.

First, the *Court Holding* doctrine is only relevant (if at all) to how ETE responded to Williams' proposals to restructure the Transaction. *Court Holding* cannot excuse ETE from failing to meet its antecedent obligations to cooperate with Williams and to allow its other tax counsel (Wachtell and Morgan Lewis) to try to talk Latham out of the erroneous price change and "perfect hedge" positions, which no one except Latham believed. (*See* Williams Br. 17-21, 38-40.)

Second, the record is undisputed that ETE and Latham did not consider *Court Holding* until after Williams presented its solutions. On April 15, Stein wrote to Fenn to suggest that "it might make sense to have one of the associates beat up the *Court Holding* line" because Latham could get "pushed hard on [Williams'] Proposal B. We all agree it helps . . . and I could see getting pushed

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regulator's demands, "Aladdin offered to set up" a $400 million credit facility to support the combined entity "and to live with other stringent capital and leverage requirements which would have had the indirect effect of limiting [Blackstone's] return on investment". *Id.* at 764. These economic concessions to meet the efforts obligations stand in sharp contrast to ETE's own position that it was required to make *no* changes to the Transaction whatsoever, whether economic or non-economic, to try to obtain the 721 Opinion. (*See* ETE Br. 29.)

that it 'helps enough' to get us over the line." (A928.) It was only *after* Latham had arrived at its definitive conclusion "as a firm" not to render the 721 Opinion, *after* it had disclosed that conclusion to Cravath on April 12, and *after* Cravath had responded on April 14 with simple fixes to clarify the deal's economic substance, that ETE or Latham ever thought about *Court Holding*. ETE is wrong to suggest that *Court Holding* excuses its breaches in the period *before* Latham definitively concluded that it would not issue the 721 Opinion.

Third, ETE wrongly asks this Court to assume the correctness of Latham's view that *Court Holding* prevented ETE from obtaining the desired tax result by restructuring the deal. The trial made no findings on this issue, in the erroneous belief that it was sufficient that Latham held that view in good faith. (Op. 44-45.)

Finally, ETE's reading of *Court Holding* is wrong as a matter of tax law. *Court Holding* is the first of a pair of U.S. Supreme Court cases about restructuring a transaction to achieve a different tax result. In *Court Holding*, a corporation agreed to sell its sole asset (an apartment building) to a buyer. 324 U.S. at 332. When the corporation learned that such a sale would be taxable, it opted instead to deed the building to its shareholders as a liquidating dividend (a non-taxable transaction under the tax law then in place), and for the shareholders then to complete the sale to the original buyer on substantially the original terms. *Id.* at 332-33. The Supreme Court affirmed the Tax Court's decision to disregard the

restructuring of the transaction as a liquidating dividend, *id.* at 333, because "[t]he incidence of taxation depends upon the substance of a transaction", and "the true nature of a transaction" may not "be disguised by mere formalisms", *id*. at 334.

The U.S. Tax Court has held that "[a]ny analysis of *Court Holding* would be incomplete without an examination of *United States v. Cumberland Pub. Serv. Co.*, 338 U.S. 451 [(1950)]". *Martin Ice Cream Co. v. Comm'r*, 110 T.C. 189, 211 (T.C. 1998); (*see also* A2927/564:5-10 (Yale).) Yet ETE ignores *Cumberland*, a decision in which the Supreme Court considered a transaction nearly identical to that in *Court Holding* and determined to *respect* its form because the lower court had found the form to be consistent with the substance of the transaction. 338 U.S. at 453. Read together, *Court Holding* and *Cumberland* stand for the proposition that courts may disregard formalisms that *disguise* a transaction's economic substance, but will respect those that are *consistent* with such substance. (A1987 (Rosow); A2879/372:13-374:10 (Needham)); *see also Martin*, 110 T.C. at 212-13.[7]

Thus, *Court Holding* in no way precluded ETE from considering structural changes to the Transaction in order to *clarify* the economic substance—which is precisely what Williams' Proposals A and B did. Latham's purported concern was that "the IRS could . . . integrate" the two exchanges between ETE and ETC—

[7] It is thus notable that it was only the *Court Holding* line of cases—*i.e.*, those that sought to disregard the formal structure of the transaction—and not the *Cumberland* line that Latham sought to "beat up". (A928.)

i.e., the $6.05 billion in cash for hook stock, on the one hand, and Class E units for Williams' assets, on the other. (ETE Br. 11.) But the two exchanges were separate as a matter of economic substance and had distinct counterparties: the cash would go to the former Williams stockholders (who would sell 19% of their equity in ETC, the hook stock, to ETE), whereas the Class E units would remain with ETC. (A2892/427:1-22 (Abrams); A2879/373:9-21 (Needham).) Williams' Proposals A and B would have made changes to the Transaction to *clarify* the economic substance,[8] which is permitted by *Court Holding* and *Cumberland*.

Nevertheless, ETE continues to insist that its *post hoc* rationalization regarding *Court Holding* absolved it from working to solve the problem. In essence, ETE insists that Whitehurst's "epiphany" resulted in a tax problem with no solution—perhaps a first in dealmaking history, as none of ETE's practitioners was able to name a single prior deal that failed due to a tax opinion condition.[9]

C. The Court of Chancery Wrongly Placed the Burden of Proof of Causation on Williams.

ETE has no answer to Williams' showing that the trial court failed to shift the burden on causation other than to assert that the argument is not preserved and

[8] For example, under Williams' Proposal A, ETE would form a merger subsidiary and capitalize it with the $6.05 billion in cash. (*See* B1389.) After Williams merged into ETC, the merger subsidiary would then merge into ETC in exchange for the 19% hook stock. (*See id.*) A "reverse subsidiary merger" such as this is treated for tax purposes as a sale of the hook stock directly from the former Williams stockholders to ETE—thereby *clarifying* the substance of who the true economic parties are to that transaction. Indeed, IRS revenue rulings directly on point establish this principle. Rev. Rul. 90-95, 1990-2 C.B. 67; Rev. Rul. 73-427, 1973-2 C.B. 301.

[9] A2081/323:12-20 (Fenn); A2746/118:21-119:5 (McKee); A2288/119:9-15 (Yale).

to disavow the substantial body of authority requiring a shift. These points fail.

1. The Argument on Burden of Proof Is Preserved for Appeal.

Williams did not waive its burden argument. (ETE Br. 39.) Williams' post-trial briefing expressly invoked the prevention doctrine and cited the leading Delaware cases placing the burden of proof on the party in breach. (A2984-86.) Williams argued that, "'[w]here a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused'". (A2984-85 (quoting *WaveDivision Holdings LLC v. Millennium Digital Media Sys., L.L.C.*, 2010 WL 3706624, at *14 & n.110 (Del. Ch.)).) The Court of Chancery understood Williams' argument, noting that "Williams appears, in post-trial briefing, to argue that the burden is on [ETE] to demonstrate a negative—that its lack of more forceful action after discovering the Section 721(a) problem did *not* cause Latham's inability to render the 721 Opinion." (Op. 47 n.130.) And, most important, the trial court squarely addressed the burden-shifting argument (*id.*), which alone is sufficient to preserve the issue for appeal, *see Reddy v. MBKS Co.*, 945 A.2d 1080, 1086 (Del. 2008) (issue preserved for appeal when trial court addressed it *sua sponte*); *Lawson v. Preston L. McIlvaine Constr. Co.*, 552 A.2d 858, at *2 (Del. 1988) (table) (same).

2. ETE Bears the Burden of Proving That Its Own Misconduct Did Not Materially Contribute to the Failure of the 721 Opinion Closing Condition.

ETE argues that "Williams bore the initial burden of proving that ETE's alleged breach contributed materially to the condition's failure, as part of Williams' overarching burden as the plaintiff in a breach-of-contract suit to prove that the alleged breach *caused* harm." (ETE Br. 39.) ETE's statement of the law is wrong. In fact, as the Court of Chancery held in *WaveDivision*, "once it has been determined that [a party] breached [an] [a]greement[], the burden of showing that that breach did not materially contribute to the [failure of a condition] is properly placed on [the breaching party]". 2010 WL 3706624, at *15.

ETE relies principally on *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606 (Del. 2003), a case that is inapplicable because it did not involve closing conditions or the prevention doctrine. *VLIW* states that, "[i]n order to survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must demonstrate . . . the breach of an obligation imposed by that contract[] and . . . the resultant damage to the plaintiff". *Id*. at 612. It is axiomatic that breach and damages are two elements of a breach of contract claim. But that has nothing to do with who bears the burden of proof as to whether the defendant's breach materially contributed to the failure of a condition precedent.

ETE next maintains that the Restatement (Second) of Contracts does not

mean what it says. (ETE Br. 39.) The Restatement could not be clearer:

> "[I]t is not necessary to show that [the condition] would have occurred but for the [defendant's] lack of cooperation. It is only required that the breach have contributed materially to the non-occurrence. Nevertheless, if it can be shown that the condition would not have occurred regardless of the lack of cooperation, the failure of performance did not contribute materially to its non-occurrence and the rule does not apply. The burden of showing this is properly thrown on the party in breach." Restatement (Second) of Contracts § 245 cmt. b (1981).

The Court of Chancery and leading commentators have consistently understood the Restatement to put the burden of proof on the party in breach.[10] Although ETE cites *Lesh v. ev3, Inc.*, 2013 WL 6040418, at *2 (Del. Super. Ct.), *rev'd*, 114 A.3d 527 (Del. 2014), for a contrary reading, *Lesh* applied the Restatement's "materially contributed" standard without addressing which party bears the burden of proof.

Faced with the cases holding that the burden shifts in these circumstances, ETE insists that the statements of the legal standard in *Hexion*, *WaveDivision* and *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979), were unnecessary *dicta* in each of those cases. (ETE Br. 40.) ETE misreads the cases. For example, in *WaveDivision*, the defendant made the same argument as ETE here, that the condition could not be satisfied (there, that the lenders "would not have consented to the sale under any circumstances") and therefore the defendant's breach

[10] *See WaveDivision*, 2010 WL 3706624, at *15 & n.113; Joseph M. Perillo, *Contracts* § 11.28, at 415 (7th ed. 2014); 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 8.6, at 458-59 (3d ed. 2004).

supposedly was moot. 2010 WL 3706624, at *14. Then-Vice Chancellor Strine rejected the argument on the basis that the burden of proof shifted to the defendant. *Id.* at *15. This holding was necessary to the result, as the opinion does not identify circumstances in which the lenders would have consented to the sale.[11]

The rule in all of these authorities—that the party seeking to excuse its performance under a contract must prove that it was entitled to excusal—makes good sense, particularly in the context of efforts obligations.[12] In these cases, the causation analysis involves not just the effects of actual conduct by a party, but the impact of that party's *not* having taken appropriate action. Shifting the burden is a common-sense measure to ensure that the party responsible through its breach for the speculative nature of the causation inquiry bears the burden of proof.[13]

Finally, this Court should give no deference to the trial court's statement that the outcome on causation would have been the same regardless of where the burden was placed. (Op. 47 n.130.) That conclusion was infected by the trial

[11] Similarly, in *Bloor*, Judge Friendly held that, once the plaintiff had established a breach of the best efforts obligation, the "[p]laintiff was not obliged to show just what steps [the defendant] could reasonably have taken" to accomplish the desired result (there, to maintain a high volume of beer sales). 601 F.2d at 614. The burden shift was necessary to the result in *Bloor*, as the opinion does not identify the particular steps the defendant could have taken. The same is true in *Hexion*, where Huntsman did not and "was not obligated to show that Hexion had viable options to avoid insolvency". 965 A.2d at 755-56.

[12] *See, e.g.*, *Hexion*, 965 A.2d at 739 ("[I]t seems the preferable view, and the one the court adopts, that absent clear language to the contrary, the burden of proof with respect to a material adverse effect rests on the party seeking to excuse its performance under the contract.").

[13] *See Shear v. Nat'l Rifle Ass'n*, 606 F.2d 1251, 1257 (D.C. Cir. 1979) (explaining that almost all prevention cases "will involve speculation as to what would have happened had the defendant's conduct not taken place").

court's legally erroneous (i) focus on ETE's obligation not to *obstruct* Latham, without considering ETE's affirmative obligation to "act like an enthusiastic partner in pursuit of consummation of the . . . Transaction" (Op. 49-50); and (ii) belief that Williams had to prove "a breach *leading to adverse consequences*" on Latham's ability to issue the 721 Opinion (*i.e.*, causation) before the burden shifted (*id.* at 47 n.130 (emphasis added); *see* Williams Br. at 37-38).

D. There Were Numerous Steps ETE Should Have Taken To Achieve a Different Result.

Finally, ETE argues that Williams has failed to identify actions that might have achieved a different result. (ETE Br. 40.) While that is not Williams' burden, it is wrong in any event. Williams has identified several steps ETE should have taken to obtain the 721 Opinion that might well have led to a different result. Accordingly, had the Court of Chancery correctly imposed the burden of proof of causation on ETE, ETE would not have been able to meet that burden, and Williams would have prevailed.

The Court of Chancery found that Latham's conclusion that it could not reach a "should" level of certainty was a close one and that Latham—in good faith—reasonably could have come to a range of different conclusions. (*See* Op. 41 ("This range of opinions indicates to me the closeness of the issue . . . .").) Because the Court of Chancery found that Latham's decision was so close (*id.*), none of the other tax lawyers involved shared Latham's precise views

(*id*.) and Latham had to achieve only a "should" level of certainty (*id*. at 32), even relatively minor actions by ETE in satisfaction of its efforts obligations could have moved the needle, resulting in Latham's delivery of the 721 Opinion.

Numerous actions by ETE might well have led to delivery of the opinion:

1. ETE should have directed Latham to discuss its views with Cravath before Latham reached its "conclusive[] determin[ation]"—rather than prohibiting such engagement.

ETE tries to justify its failure to involve Williams or Cravath in the discussions by making the remarkable assertion that the "efforts clauses did not require ETE to involve Cravath in Latham's analytical process". (ETE Br. 31.) The plain language of the Merger Agreement is to the contrary. ETE covenanted "*to assist and cooperate with the other parties* in doing[] all things necessary, proper or advisable" to consummate the deal. A671 § 5.03(a) (emphasis added).[14] Based on the trial court's factual findings (*see* Op. 20-21), it is indisputable that ETE breached this obligation. If ETE had cooperated before Latham closed its mind, Latham might have been open to persuasion that its view was wrong.

ETE also tries to excuse its failure to involve Williams by arguing that Cravath did not "constructively engage when Latham did call". (ETE Br. 32.) But

[14] ETE seeks to distinguish *Hexion* on the ground that there was an express provision in the merger agreement there requiring "prompt[]" notification of any potential issues with financing. (ETE Br. 35.) ETE's argument ignores the *Hexion* court's holding that "Hexion's utter failure to make any attempt to confer with Huntsman . . . constitutes a *failure to use reasonable best efforts* to consummate the merger". 965 A.2d at 755 (emphasis added).

the Court of Chancery made no such finding—stating instead that Cravath "strongly stated its belief" that the Transaction was tax free (Op. 22)—and the record shows that, when Latham finally called, Cravath devoted itself to analyzing the issue and did its best to engage with Latham, only to meet with stonewalling.[15]

2. ETE should have directed Wachtell—its own deal counsel with a well-regarded tax department—to analyze the Section 721 issue.

Knowing full well that Wachtell had "expressed skepticism on certain aspects of Latham's position" (Op. 19 n.65), ETE "didn't ask for [Wachtell's] opinion" (A2820/138:11-13 (Whitehurst)). This was a clear breach of ETE's efforts obligations. ETE's only response is to try to downplay Wachtell's skepticism, asserting that in fact Wachtell "did not disagree with Latham". (ETE Br. 31 n.14.) The Court of Chancery made no such finding, and ETE's argument is contradicted by the record. The evidence at trial was that Wachtell tax partner Eiko Stange was skeptical of Latham's position that a post-signing change in equity values could alter the tax treatment; aware of this skepticism, ETE never asked Wachtell "to do any analysis" of Section 721. (A2865/318:16-19, 319:21-320:3 (Preiss).)[16] If ETE instead had directed Wachtell—ETE's own deal

[15] A2874-75/355:11-357:4, A2876/361:6-363:23, A2878/368:13-370:12, A2880/376:23-379:5, A2883/388:14-390:4 (Needham); A2733/69:2-15 (McKee); B3572-73/169:19-172:22 (Gordon).

[16] Stange told ETE that "[l]ower price gives no party the right to renegotiate" and "gives no reason to recast transaction". (A2866/323:1-19 (Preiss); A899-902.) Wachtell's view was that "anytime w/ fixed subs[cription] agreement and non-simul[taneous] close, it is possible that

counsel—to analyze the issue and to continue to speak with Latham, Latham might well have been convinced that its reasoning was flawed, or Wachtell and Latham might have identified solutions.

3. ETE should have directed Latham to discuss its views with Morgan Lewis before Latham reached its "conclusive[] determin[ation]"—rather than prohibiting such engagement.

McKee "never understood Latham's 'perfect hedge' theory" (which made no sense to him) and believed that "the decline in the [ETE] unit price is not legally relevant". (Op. 21; A2935/597:6-15 (McKee).) In other words, he questioned the *entire* basis for Latham's position. Even if he had a separate reason (with which Latham in turn disagreed) for why he would not have delivered the 721 Opinion, McKee, as a respected tax practitioner retained by ETE, might have been able to convince Latham of the errors in its reasoning before Latham dug in its heels, or McKee and Latham might have identified solutions to their stated concerns.

4. ETE should have insisted that Latham do everything it could to try to find a fix for the purported tax concerns.

Stein testified that he does not recall direction from Whitehurst that "[y]ou guys need to find a way to fix this problem". (A2918-19/531:15-532:16.) If ETE had insisted, Latham might have found its way to a "should" level of confidence. Instead, when Latham came up with ideas for potential fixes, it did not pursue

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either p[ar]ty may win or lose", and "lower value today [is] no reason to revisit deal struck between 3rd parties". (A907; A899.) This is also how Williams and Cravath analyze the issue.

them because Fenn told Stein he was "[n]ot sure [Whitehurst] would be delighted with the suggestion" that they "might save the section 721". (A913.) If ETE had insisted on a solution, Latham might have found a way to deliver the 721 Opinion.

5. ETE should have directed Morgan Lewis to comprehensively analyze Williams' proposals—rather than prohibiting such inquiry.

McKee testified that "[Whitehurst] didn't think he needed to spend what would be very substantial amounts of money to have his tax lawyers chase down" whether Williams' proposals would work, and that he understood Whitehurst to be pleased with inaction because Whitehurst thought the trial court would not rule prior to the Merger Agreement's Outside Date. (*See* Williams Br. 14-16.) If ETE had permitted Morgan Lewis to analyze Williams' proposals, Morgan Lewis might have been able to persuade Latham that it could solve the purported tax issue.

6. ETE should have directed its tax counsel to explore whether Williams' proposals would work if ETE's efforts obligations required ETE to make non-economic amendments to the Merger Agreement.

McKee believed that Williams' Proposal A likely "works" if the Merger Agreement requires ETE to accept an amendment to the structure of the deal. (A2938/609:5-610:19, 613:16-614:12 (McKee).) ETE instructed its tax counsel, however, that the efforts provisions did not require ETE to make amendments (even a non-economic amendment, such as Williams' proposals) to the Merger Agreement. (A1028.) While the Court of Chancery did not reach the question of whether ETE was required to amend (Op. 48), Delaware efforts provisions should

be interpreted to require reasonable amendments,[17] and ETE cites no authority to the contrary (*see* ETE Br. 29 n.13). ETE discussed this issue internally with its corporate and tax counsel (A1028), but the record shows *no* communication by ETE or its counsel to Williams or its counsel. If ETE had raised this issue with Williams, as its covenant to cooperate required, the issue might have been solved.

7. ETE should have directed Latham to discuss Williams' proposals with Cravath before publicly disclosing Latham's views—rather than prohibiting such discussion.

ETE ignores Whitehurst's testimony that the public disclosure of Latham's opinion "poison[ed] the well. Once that genie gets out of the bottle, you can't put it back in." (A2433/238:19-21.) In defense of its decision to rush to disclose Latham's views, ETE argues that Latham's position was material under federal and Delaware disclosure laws. (ETE Br. 32.) Of course, Latham's position could only have been material because it was already final and conclusive—*before* ETE had given Williams any opportunity to "cooperate" on the issue and propose potential fixes, and *before* Latham had evaluated them.[18] ETE's insistence on immediate disclosure simply highlights the fact that it treated this all as a foregone conclusion.

[17] *See ADS*, 963 A.2d at 764 (to comply with "best efforts" clause, buyer agreed to restrictions that would have "limit[ed] [its parent's] return on investment"); *Carteret Bancorp, Inc. v. Home Grp., Inc.*, 1988 WL 3010, at *7 (Del. Ch.) (finding it "plausible, perhaps likely" that "best efforts" to consummate a transaction include an obligation to undertake economic changes); *cf. Houseman v. Sagerman*, 2015 WL 7307323, at *2 & n.20 (Del. Ch.) (noting amendment of merger agreement to avoid jeopardizing the merger).

[18] At the same time as ETE was pushing for public disclosure of Latham's position (B1392-93), Stein was telling Fenn internally that "[w]e all agree [Proposal B] helps . . . and I could see getting pushed that it 'helps enough' to get us over the line" (A928).

8. ETE should have directed its advisors to put their heads together to find a solution, and invited Williams' advisors to participate.

An open dialogue (which is typical practice among parties to merger agreements) might have resulted in a mutually agreed-upon solution, enabling Latham to deliver the 721 Opinion. Instead, ETE asserts that it was permitted "'to give reasonable consideration to its own interests'". (ETE Br. 34 (quoting *Bloor*, 601 F.2d at 614).) But the right to consider its own economic interests did not extend to placing them *ahead* of the obligation to use reasonable best efforts to consummate the Transaction.[19] ETE never argues—nor could it—that it gave the same priority to consummating the deal as it did to its own economic interests.[20]

* * *

Had ETE taken some or all of the above actions, the outcome might well have been different. The fact that we cannot now be certain of that is a result of ETE's breach, from which ETE should not be allowed to benefit. This is precisely why the burden shifts to ETE to prove that its failures did not contribute materially to the failure of the 721 Opinion condition. ETE did not carry that burden.

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[19] *See Bloor*, 601 F.2d at 614 ("It was sufficient [for the plaintiff to prove its efforts claim] to show that [the defendant] simply didn't care about" the plaintiff's economic interests "so long as that course was best for [the defendant's] overall profit picture . . . ."); *Hexion*, 965 A.2d at 755 ("[To prove its efforts claim, Huntsman] merely needed to show (which it succeeded in doing) that Hexion simply did not care whether its course of action was in Huntsman's best interests so long as that course of action was best for Hexion.").

[20] *See Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1125 (3d Cir. 1992) (Alito, J.) (describing efforts obligations as requiring the buyer "to consider the best interests of the seller and itself as if they were one firm").

II. ETE WAS ESTOPPED FROM TERMINATING ON GROUNDS INCONSISTENT WITH THE TAX REPRESENTATION.

In agreeing to ETE's Transaction structure and the 721 Opinion condition, Williams reasonably relied on ETE's Tax Representation that the facts in ETE's possession at signing could not "reasonably be expected to prevent" qualification under Section 721. That estopped ETE from terminating on a ground inconsistent with the representation—namely, on the ground that those *same pre-existing facts could* be expected to prevent such qualification. The trial court misunderstood this argument, which was presented to it,[21] and ETE's responses are meritless.

A. Williams Fairly Presented Its Estoppel Claim Below.

Although Williams did allege in the trial court that ETE "breached its representation and warranty", Williams also asserted a second theory—that, "[m]ore significantly, basic equitable principles preclude ETE from now repudiating the representation and warranty it made at the time." (A2660.)[22] Williams argued that ETE made the Tax Representation "and Williams relied on it.

[21] The appropriate standard of review on this claim is *de novo*. (Williams Br. 42.) Whether, accepting the facts found by the trial court, the Tax Representation equitably estopped ETE from terminating the Merger Agreement is a legal question. *See Bank of N.Y. Mellon Tr. Co. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011) ("Once the historical facts are established, the issue becomes whether the trial court properly concluded that a rule of law is or is not violated. Appellate courts review a trial court's legal conclusions *de novo*."); *Genencor*, 766 A.2d at 13 (reviewing *de novo* question of "whether the Court of Chancery correctly denied the estoppel remedy").

[22] *See also, e.g.*, A2660-61 ("Delaware has long recognized that a party may not change its position when it previously provided a contrary representation on which its counterparty relied."). Williams cited to several Delaware estoppel cases, including the *Genencor* case on which ETE relies on appeal. (*See id.*)

ETE is equitably estopped from now repudiating that representation." (A2662.) This clearly preserved the estoppel claim.[23]

B. Williams Proved All Three Elements of Its Estoppel Claim.

First, ETE's suggestion that Williams could have learned the truth of the matter at issue because Williams knew the 721 Opinion condition could fail (ETE Br. 46) is irrelevant. As Williams explained in its Opening Brief (at 47), "the relevant inquiry is whether Williams could have known that ETE would *rely* on [a new] tax theory to terminate the Transaction", where ETE knew all of the relevant facts at the time of signing. Williams could not have known that, and was induced by the Tax Representation to believe that ETE would not do so.[24]

Second, Williams' reliance was *per se* reasonable. A party is entitled to rely on a representation and warranty set forth in a contract. *See Genencor*, 766 A.2d at 12 ("Since Genencor bargained for the representation . . . , there is no need to

[23] "[T]his Court has held that the mere raising of the issue is sufficient to preserve it for appeal." *Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1020 (Del. 1989); *see also Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) (finding theory fairly presented even where it only "was implicitly raised below"). And there is no requirement that Williams have recited the elements of estoppel in order to preserve the issue. (ETE Br. 45.) In *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678-79 (Del. 2013), the only authority cited by ETE on this point, the appellant did not argue in the trial court for the legal standard it argued on appeal, and instead "repeatedly cited" to a case with a different standard (the one the trial court adopted). Williams did nothing of the sort.

[24] As Williams explained in its Opening Brief (at 46-47), the trial court's conclusions (i) that a theory of tax liability is not a "fact" and (ii) that ETE did not have Latham's theory in mind in September 2015, are irrelevant to Williams' estoppel claim, which is based not on ETE's failure to tell the truth at signing, but on ETE's representation to Williams, upon which Williams relied to its detriment, and ETE's subsequent, inconsistent action to terminate the Transaction.

look for detrimental reliance as a 'consideration substitute.'"). Moreover, the trial evidence established that Williams justifiably relied. (*See* Williams Br. 7, 48.)

Third, ETE does not dispute that Williams, having lost this valuable deal, suffered prejudice as a result of its reliance. (*See id.* at 48-49.)

C. Williams' Estoppel Claim Is Consistent with the Merger Agreement.

ETE incorrectly asserts that Williams' estoppel claim conflicts with the language of the Merger Agreement. (ETE Br. 46-50.) Although unclear, ETE appears to make three arguments concerning the contract language. Each is wrong.

First, Williams is not "rewrit[ing] Agreement § 3.02(n)(i) by adding obligations". (ETE Br. 47-48.) Rather, Williams' argument draws directly from the plain language of the Tax Representation and case law interpreting such language, which holds that ETE was representing that the facts within its subjective knowledge would not objectively be expected to prevent Section 721 qualification. *See Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *33 & n.210 (Del. Ch.); (Williams Br. 46-47). There is no "rewrite".

Second, Williams' estoppel claim does not "convert Section 3.02(n)(i) into a guarantee that the 721 Opinion will be delivered". (ETE Br. 48-49.) There was no guarantee that Latham would deliver the opinion. But *ETE* was not free to terminate based on the same facts that it said did not cause a Section 721 problem.

Third, Williams' estoppel claim does not "obviate[] the Agreement's

remedy". (ETE Br. 49-50.) The fact that the Merger Agreement allowed Williams to terminate if ETE breached the Tax Representation says nothing about whether *ETE* should have been allowed to terminate on a basis that it had contractually disavowed. ETE cannot seriously maintain that Williams' only remedy relating to ETE's inconsistency in the Tax Representation was to give ETE exactly what it wanted (to get out of the deal) and thereby reward ETE for its bad behavior.[25]

CONCLUSION

For the foregoing reasons, the partial final judgment of the Court of Chancery should be reversed, or vacated and remanded for further proceedings.

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[25] ETE's authorities, *Brandywine Shoppe, Inc. v. State Farm Fire & Casualty Co.*, 307 A.2d 806 (Del. Super. Ct. 1973), and *Genencor* (ETE Br. 47-50), do not support its defense. In *Brandywine*, the Superior Court refused to estop a party based on an extrinsic oral statement in contradiction of clear contract terms. 307 A.2d at 809-10. Williams' estoppel claim is based on the specific language of the Tax Representation, not any extrinsic evidence. In *Genencor*, the Court of Chancery found that equitable estoppel did not apply, not because a condition precedent cannot be waived by estoppel, but because the defendant had taken no action as to which it needed to be estopped. 766 A.2d at 13. Here, ETE sought to terminate, and in fact did so.

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2016, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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