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Case Number 238,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEE LEVINE and CHESTER COUNTY EMPLOYEES' RETIREMENT FUND,

Plaintiffs-Below, Appellants,

v.

ENERGY TRANSFER L.P., LE GP, LLC, KELCY L. WARREN, JOHN W. MCREYNOLDS, MARSHALL S. MCCREA III, MATTHEW S. RAMSEY, K. RICK TURNER, WILLIAM P. WILLIAMS, RAY DAVIS, and RICHARD D. BRANNON,

Defendants-Below, Appellees.

No. 238, 2019

Court Below:
The Court of Chancery of the State of Delaware

Cons. C.A. No. 12197-VCG

APPELLEES' ANSWERING BRIEF

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Dated: August 21, 2019

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NATURE OF PROCEEDINGS

Plaintiffs ask this Court to overturn the Court of Chancery's May 2018 post-trial Opinion and cancel convertible preferred units ("CPUs") that converted into freely-tradeable common units under their own terms shortly after the opinion. Plaintiffs' arguments are without merit. In addition, Plaintiffs disavowed the remedy they now seek and told the court such relief could not be granted post-conversion. Plaintiffs' appeal—filed more than a year after conversion—should be denied.

In early 2016, the energy industry was suffering from a historic downturn, Energy Transfer Equity, L.P. ("ETE") was facing mounting debt due to a pending merger, and the credit rating agencies made clear that a ratings downgrade was imminent unless ETE acted quickly. With limited options, ETE—guided by its financial advisors—determined its best option was to offer securities to all unitholders: the CPUs. Participating unitholders would forgo quarterly cash distributions for two years in exchange for additional common units. ETE was forced to pursue a private issuance of CPUs (the "Issuance") after the Williams Companies, Inc. ("Williams") blocked the public issuance.

Plaintiffs challenged the legality and fairness of the Issuance. After extensive discovery, motion practice, and a three-day trial, the Court of Chancery denied Plaintiffs' request for rescission of the CPUs, finding that neither Plaintiffs nor ETE suffered harm—a factual finding that should be left undisturbed. Rejecting most of Plaintiffs' arguments, the court found a single, yet harmless, breach of ETE's partnership agreement: Defendants established that the public offering's initial terms were fair but failed to satisfy their burden to demonstrate how one additional term was fair and reasonable to the partnership. The court found, however, that this term benefited ETE to the detriment of "insiders." The court's no-harm finding was further supported by Plaintiffs' expert, who testified that, at the time of the breach, ETE suffered $0 damages. Plaintiffs submitted no evidence of *ex ante* damages, instead advancing a hindsight-based damages model abandoned after trial, where harm occurred only (1) because ETE's unit price happened to increase in the two years after the Issuance and (2) due to a provision in the CPU offering that would have been the same in the public offering. Thus, the court's decision to deny rescission was well within its considerable discretion.

The court also correctly rejected Plaintiffs' tortured argument that the Issuance was a "distribution" under ETE's limited partnership agreement (the "LPA") rather than a sale. The plain and only workable meaning of "distribution" in the LPA is something *transferred to* unitholders as of right without mutual consideration (similar to a corporate dividend). "Distribution" is distinct from a securities offering, which each unitholder may accept (*in exchange for consideration*) or reject. As the court found, Plaintiffs' interpretation would not only defy the common and industry understandings of the term "distribution," but would also eviscerate ETE's ability to sell securities to its partners, as any such sale would be foreclosed by the *pro rata* requirements of the distribution provisions.[1]

While Plaintiffs' arguments on appeal are without merit, their appeal should also be dismissed as moot. Plaintiffs asserted throughout the matter that "equitable relief…to be meaningful must issue before" the CPUs converted into common units.[2] Yet, Plaintiffs sought neither a stay nor an injunction pending appeal. They also declined the court's post-opinion invitation "to present an argument that, given the findings in [its] opinion, there should be some further relief available" on the basis that such relief was impossible.[3] Instead, Plaintiffs pursued an award of attorney' fees on a non-expedited basis. Now, more than a year after conversion, the relief sought has been rendered impossible by Plaintiffs' inaction. Plaintiffs' attempt to evade the consequences of their choice by requesting "cancellation of common units issued to Affiliates" rather than CPUs is likewise infirm.[4] Plaintiffs disavowed below such partial relief providing the court with an all or nothing

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[1] B48.

[2] B3.

[3] A3352; A3355.

[4] Appellants' Opening Brief ("OB") 44.

proposition.[5] Whether the cancellation sought is partial or otherwise, it is precisely the relief Plaintiffs admitted below was "impossible."[6]

For these reasons, and the reasons further explained below, Plaintiffs' appeal fails.

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[5] A3238-39.

[6] A2962.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery acted well within its remedial discretion by denying Plaintiffs' request for rescission. Plaintiffs ignore the court's specific findings on why they failed to demonstrate the requirements for injunctive relief:

- Balance of equities: Plaintiffs offer no reason to reverse the court's findings that: (1) rescission "would not be proportional to any loss occasioned by the breach—there is none"; (2) rescission "would cause equitable problems of its own"; and (3) the Issuance "was not so one-sided" that rescission was appropriate.[7]
- *Status quo ante*: Plaintiffs also failed to demonstrate how rescission would restore the parties to their pre-Issuance positions. Rather, Plaintiffs repeatedly asserted that the Issuance *cannot* be unwound after the conversion (which occurred in May 2018).[8]
- Irreparable harm: Plaintiffs' expert conceded that damages were not particularly difficult to calculate and provided such a calculation (albeit a flawed one).

Unable to satisfy these "well worn" requirements (B75), Plaintiffs contend

[7] B77.

[8] B3.

that they are *automatically* entitled to rescission because the court found the Issuance breached the LPA. Rescission requires more than a breach of contract. When the Court of Chancery has evaluated other conflict transactions that breached similar agreements, it has awarded monetary damages and declined to unwind completed transactions, consistent with the general principle that damages are the usual breach of contract remedy. *E.g.*, *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 2015 WL 1815846, at *25-27 (Del. Ch. Apr. 20, 2015). Plaintiffs chose not to pursue monetary damages, and the court found that no damages resulted from Defendants' breach.[9] Thus, the court did not abuse its discretion in awarding only attorneys' fees.

2. Denied. The Court of Chancery correctly decided the term "distribution" in the LPA unambiguously means a one-way transfer, like a cash payment out of earnings, and "does not include an issuance of a security for value, as here."[10] The Issuance was a private offering of securities governed by §5.8(a), which gives the General Partner broad discretion to issue securities "for such consideration and on such terms and conditions as the General Partner shall determine."[11] Because Plaintiffs cannot argue that the Issuance violated §5.8, they

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[9] B76-77.

[10] B44.

[11] A162.

instead mischaracterize the Issuance as a distribution governed by §5.10(a). But the term "distribution" has one plain and unambiguous meaning: a one-way disbursement of cash or property *from* the partnership *to* the partners *as of right*, based solely on their status as partners. The court also correctly found that the Issuance was an "exchange for value."[12]

3. This Court lacks jurisdiction to consider Plaintiffs' request for equitable relief because Plaintiffs failed to seek (and obtain) a stay or injunction pending their appeal. Plaintiffs repeatedly stated that their requested relief would become "impossible" to obtain after the CPUs' conversion.[13] It is too late to afford Plaintiffs the relief they seek, as Plaintiffs repeatedly recognized, and thus, this Court should dismiss this appeal as moot.

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[12] B50.

[13] *E.g.*, A2962.

COUNTERSTATEMENT OF FACTS

I. ETE agreed to merge with Williams, which would result in ETE taking on significant debt.

ETE is a master limited partnership ("MLP") that owns and operates oil and gas pipelines.[14] In September 2015, ETE and Williams entered into a merger agreement (the "Merger").[15] After the Merger, ETE's standalone debt would increase by $10 billion, and its consolidated debt would increase by $20 billion.[16]

II. Energy industry conditions deteriorated in late 2015, threatening ETE's credit rating.

MLPs like ETE distribute available cash to unitholders and are thus heavily dependent on capital markets.[17] Because credit ratings determine access to credit and debt costs, maintenance of ETE's credit ratings was (as Plaintiffs' expert admitted) of the "utmost importance."[18]

Due to the late 2015/early 2016 energy downturn, credit markets for energy companies became increasingly stressed, sharply limiting available credit.[19] From September 2015 to early 2016, oil and gas prices plummeted 26.3% and 39.1%,

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[14] B4-5.

[15] B8.

[16] B8; B372, 404.

[17] B9; A3429 (Trial 229); A1923-97; B2569.

[18] B11 n.59; A3386 (Trial 59-60); B2569-70.

[19] B9; B2582-87, 2634-35.

respectively,[20] and ETE's unit price declined 65.5%.[21] The rating agencies "raised the bar for what's acceptable in terms of debt/EBITDA levels"[22] and took negative rating actions against numerous energy companies.[23]

Due to these market conditions, ETE's credit outlook deteriorated. Between September 2015 and February 2016, ETE and Williams slashed their EBITDA projections for 2016-2018 by 14-22%, increasing ETE's forecasted debt-to-EBITDA ratio.[24] Despite initially supporting the Merger,[25] the rating agencies warned ETE of a downgrade.[26] In January 2016, the agencies downgraded Williams and its subsidiary and lowered ETE's credit outlook.[27] The rating agencies made clear that ETE's debt-to-EBITDA ratio should be under 4.0x to avoid a downgrade.[28] Perella Weinberg Partners ("Perella"), ETE's financial

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[20] B9; B2580-81.

[21] B9; B2581.

[22] B9 (quoting B280).

[23] B9; B2570, B2582-87.

[24] B10; B2382-83; B2588; B243.

[25] B80-82; B90; A3428 (Trial 226).

[26] B10; A3429-30 (Trial 232-34); B117.

[27] B10; B95; B103; B109; A3430 (Trial 236).

[28] B10; B94; B100; A3429-30 (Trial 230-34).

advisor, predicted that ETE's debt-to-EBITDA ratio would reach 4.7x post-Merger.[29]

A rating downgrade would have had "catastrophic consequences" across the ETE family.[30] According to Plaintiffs' expert, it was "critical" for ETE to delever to avoid a downgrade, which should "be avoided for any reason that you could possibly do it."[31]

III. ETE approves and completes the Issuance.

As ETE's financial situation worsened, ETE evaluated deleveraging options.[32] ETE initially decided to hold distributions flat at $0.285/quarter and projected to continue doing so for several quarters.[33] ETE also evaluated other deleveraging options, most of which it rejected given market conditions.[34] Prior to

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[29] B10; A674.

[30] B62 (citing A3429-30 (Trial 230-34), B94, B100).

[31] A3379 (Trial 32), A3387-88 (Trial 64).

[32] B12; A3429 (Trial 232); B159.

[33] B12; A3433 (Trial 246); B261; B144.

[34] B12; B159, B167; A675, A677; A3406 (Trial 139); A3434 (Trial 250-52).

the Issuance, ETE never seriously considered cutting distributions,[35] which was an "option of last resort"[36] and "the nuclear option."[37]

Ultimately, a public offering of CPUs emerged as the superior option to conserve cash. Participating unitholders would forgo quarterly distributions payable on common units above $0.11/quarter, and under the initial terms, would receive accrual credit equal to the difference between $0.11 and the distribution ETE paid its common unitholders (the "Accrual Term").[38] Participating unitholders could not transfer their CPUs or associated common units during the plan period.[39] At the end of eight quarters, each CPU would convert into a fractional common unit equal to the accrual credit divided by the "Conversion Value," which was a 5% discount to ETE's unit price at the time of the offering, far more favorable for ETE than the median discount of other MLP offerings (7.7%) and the discount Perella suggested (10-15%).[40]

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[35] B14, B62; A3435-36 (Trial 253-54); A3439-40 (Trial 212, 218); A3510 (Trial 441); A3520 (Trial 481).

[36] A3513 (Trial 456).

[37] A3433 (Trial 247).

[38] B63.

[39] A689-90.

[40] B64; A689-90; A3587 (Trial 641); A1988; A667.

Although the public offering would conserve cash and reduce ETE's leverage, Williams refused to provide the information required to comply with public offering regulations.[41] Thus, ETE was forced to undertake the Issuance on March 8, 2016 as a private offering.[42]

Between the initial terms of the public offering and the private offering, the Accrual Term changed from a *floating* accrual to a *fixed* quarterly accrual of \$0.285, meaning the accrual value would increase by \$0.285 minus the cash distribution received by CPU holders, even if common unitholders received more or less than \$0.285.[43] The change in the Accrual Term was the only term that the court determined was not fair and reasonable to ETE.[44] Although there were other minor changes between the public and private plans, the court determined they "were either beneficial at the time (increase of the [plan period] from eight to nine quarters), or neutral to [ETE]."[45]

[41] B16, B65; B277; A3436-37 (Trial 260-61), A3495-96 (Trial 384-85); A3501 (Trial 406).

[42] A1821.

[43] B24, B65-66.

[44] B76-77. Plaintiffs have not appealed the court's factual findings, including that the Issuance's remaining terms were fair and reasonable to ETE.

[45] B76-77.

IV. The Issuance improved ETE's credit metrics and avoided a downgrade.

The ratings agencies responded positively to the Issuance, and ETE avoided a downgrade.[46] Fitch described the Issuance as "a proactive step in enhancing [ETE's] liquidity and managing acquisition leverage in a credit-neutral manner."[47] S&P and Moody's likewise praised the Issuance.[48]

The Issuance had no statistically significant impact on ETE's unit price, "indicat[ing] that the common unitholders did not suffer any harm" due to the Issuance.[49]

V. After financial projections worsen, the proxy discloses a potential post-closing distribution cut.

In April 2016, ETE received updated financial projections from Williams showing a worse financial outlook than previously thought,[50] and Merger synergies estimates also declined precipitously.[51] As a result, the Issuance was no

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[46] B40; A3427-28 (Trial 224-25).

[47] *Id.*; B731.

[48] A3427 (Trial 224); A3437 (Trial 262); A3499 (Trial 397-98).

[49] B40; A3576 (Trial 596), A3581 (Trial 618); B2780-82 ¶¶7-11.

[50] B40-41; A3440 (Trial 274); B1503-05; B1528; B3544-45 (McCrea Dep. 73-74).

[51] *Compare* B707, *with* B1532.

longer enough to stave off a downgrade, and ETE announced that it anticipated distribution cuts if the Merger closed.[52]

VI. The Merger does not close, and ETE increases distributions.

ETE terminated the Merger in June 2016 and did not incur any Merger-related debt.[53] ETE held its distributions flat for several quarters,[54] until increasing them to $0.295/quarter in October 2017[55] and $0.305/quarter in February 2018.[56] The CPUs converted in May 2018. Because the accrual value on the CPUs was fixed, CPU holders lost the benefit from the distribution increases.[57]

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[52] B40 (quoting B1626).

[53] B41; A2833.

[54] B41; A2833.

[55] B41; A2834.

[56] B41; B3478.

[57] B76.

ARGUMENT

I. The court did not abuse its discretion in denying equitable relief.

A. Question presented.

Did the Court of Chancery abuse its discretion in denying equitable relief because it determined that rescission "is not required in equity" and that Plaintiffs have "not shown that the breach caused damage to ETE"?[58]

B. Scope of review.

Contrary to Plaintiffs' request for *de novo* review (OB 15), the court's factual findings are reviewed for clear error, and its fashioning of remedies, including the denial of equitable relief, is reviewed for abuse of discretion. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002); *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000).

C. Merits of argument.

The court found that (1) cancellation of the CPUs was "not required in equity,"[59] and (2) Plaintiffs did not seek—and were not entitled to—any other relief (aside from attorneys' fees) because, among other reasons, the breach of the LPA did "not…cause[] damage to ETE."[60]

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[58] B77-78. Preserved at A3037-3042.

[59] B77.

[60] B78.

1. Plaintiffs did not prove they were entitled to permanent injunctive relief and cannot sidestep that obligation.

Plaintiffs failed to meet their burden to establish that cancellation of the Issuance was "clearly warranted." *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at *14 (Del. Ch. Jan. 5, 2010). "Rescission is not given for every serious mistake and it is neither given nor withheld automatically, but is awarded as a matter of judgment." *Gotham Partners*, 817 A.2d at 174. This Court has made clear that the Court of Chancery has "broad discretion" to decide "whether to impose an equitable remedy tailored to address the harm caused by the breach" of a partnership agreement, *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 247 (Del. 2017), and this Court will not "substitute our own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason," *SIGA Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015). Here, the court properly used—and certainly did not abuse—its discretion in determining that Plaintiffs "failed to establish that equity should so act here;"[61] indeed, Plaintiffs failed to satisfy at least three requirements for rescissory relief.

a. The court properly exercised its discretion in finding that the balance of equities did not support rescission.

The court did not abuse its discretion in denying equitable relief after considering "the overall balanc[e] of the equities." *N. River Ins. Co. v. Mine Safety*

[61] B4, B77-78.

Appliances Co., 105 A.3d 369, 382 (Del. 2014). First, modifying the Accrual Term—the only unfair term of the Issuance—benefitted ETE to the detriment of participating unitholders.[62] The court considered the effect that rescission would have on each party and concluded that rescission "would not be proportional to any loss occasioned by the breach—there is none."[63] This finding is in accord with Delaware precedent and was properly grounded in reason. *E.g.*, *Zimmerman v. Crothall*, 62 A.3d 676, 713 (Del. Ch. 2013) (denying equitable relief where the directors' breach caused no damages).

The court also recognized that rescission was not warranted because "employing equity to cancel the securities would cause equitable problems of its own."[64] *Meeker v. Bryant*, 1981 WL 7616, at *7 (Del. Ch. May 12, 1981); *Strassburger v. Earley*, 752 A.2d 557, 578 (Del. Ch. 2000) (denying rescission when a transaction counterparty was not a party to the lawsuit). On appeal, Plaintiffs suggest, for the first time, that the court erroneously "adopte[d] an 'all or nothing' approach" and failed to consider cancellation of only the CPUs that were held by Defendants.[65] The court rejected rescission regardless of who owned the

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[62] B4, B76-78.

[63] B77.

[64] B77 (recognizing that "[s]ome subscribers were outsiders, and some were friends and relatives who had no hand in the addition of the problematic accrual term").

[65] OB 28-29.

CPUs. It determined that rescission was "not required in equity" because "the unfair term has caused the Partnership no damages."[66] The court's recognition that cancellation of the CPUs would also affect non-parties merely bolsters its conclusion.[67]

Further, Plaintiffs never advanced a partial-rescission theory below, instead arguing that all of the CPUs were void *ab initio*. A2905, A2961-62 (arguing that the "non-party holders of CPUs may have claims against Defendants because the CPUs are void, [but that fact] does not preclude cancellation"); A3238-39 (acknowledging that Plaintiffs' decision to pursue only *in toto* rescission of the CPUs "built [the court] into a straightjacket").[68] After conversion of the CPUs, the court allowed Plaintiffs the opportunity to submit additional briefing if Plaintiffs believed they were entitled to any equitable relief following its opinion, despite recognizing the procedural hurdle of such a request "because of the positions the

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[66] B76-77.

[67] B77.

[68] Plaintiffs argue that they "agreed with the [court]'s suggestion of the possibility of 'some middle relief.'" OB 28. Prior to this appeal, Plaintiffs always maintained that the CPUs are "a void security and that the appropriate relief is cancellation." A3239. Indeed, Plaintiffs do not—because they cannot—cite to a single pleading or brief in which they advanced a partial-rescission theory of relief, and thus, are precluded from advocating for such relief now. *Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) ("[W]e consider the…arguments waived for failure to raise them first in the Court of Chancery.").

plaintiffs have taken in this litigation."[69] Recognizing such relief had been foreclosed, Plaintiffs declined to do so.[70]

Finally, the court found that even though Defendants did not meet their burden, the Issuance "was not so one-sided" that rescission was appropriate.[71] In fact, some of ETE's largest institutional investors, Tortoise and Kayne Anderson, each of which manages approximately $20 billion in assets and specializes in energy investing, declined to participate.[72] Kayne's analysis reflected that the CPUs had an expected return only 3.8% higher than common units, which was insufficient to justify the costs of participating.[73] Plaintiffs and their expert conceded that "reasonable minds could differ" as to whether the CPUs constituted an attractive investment at the time.[74]

b. Plaintiffs failed to demonstrate how the parties could be restored to their pre-Issuance positions.

Plaintiffs also failed to demonstrate how "all parties to the transaction" can "be restored to the *status quo ante*, *i.e.*, to the position they occupied before the

[69] B78; A3349-52.

[70] B3609-10.

[71] B77.

[72] B3494-95 (McCarthy Dep. 57-59), B3504-05 (McCarthy Dep. 95-97); A3439 (Trial 270).

[73] B674; B3505-06 (McCarthy Dep. 100-102); A3439 (Trial 270); B2454.

[74] A3374 (Trial 12); A3404 (Trial 131-32).

challenged transaction." *Strassburger*, 752 A.2d at 578; *Brinckerhoff v. Enbridge Energy Co.*, 2012 WL 1931242, at *4 (Del. Ch. May 25, 2012), *aff'd*, 210 A.3d 705 (Del. 2013). Nor could they. Doing so would require a court to account for the myriad of benefits created by the CPUs for ETE and its unitholders. Furthermore, Plaintiffs have conceded that the Issuance cannot be unwound now that the CPUs have converted into common units and do not explain how cancellation of millions of fungible, transferrable common units could be accomplished.[75] *Ravenswood Inv. Co., L.P. v. Estate of Winmill*, 2018 WL 1410860, at *22 (Del. Ch. Mar. 21, 2018) (denying cancellation of a stock issuance, despite finding it was not entirely fair, where "the Court cannot restore the parties substantially to the position which they occupied before the options grants were made"), *aff'd*, 2019 WL 1975942 (Del. 2019).

Additionally, Plaintiffs failed to provide the court with any *ex ante* basis from which to fashion an "appropriate remedy as of the time of the breach, 26 months earlier."[76] Rather than craft a remedy that would put the parties in their *status quo ante* positions, Plaintiffs' expert proffered a hindsight-based damages model that used future ETE unit prices to measure damages upon conversion,

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[75] *See infra* §I.C.1.b; A2962 (arguing conversion of CPUs into "freely transferrable Common Units will make it impossible to undo Defendants' breach").

[76] OB 4.

which failed to account for the benefits created by the Issuance for all unitholders (*i.e.*, avoiding a downgrade).

c. Plaintiffs did not establish irreparable harm.

Nor did Plaintiffs demonstrate that they have no adequate remedy at law. *Sierra Club v. Del. Dep't Nat. Res. & Envtl. Control*, 919 A.2d 547, 551-52 (Del. 2007). As the court recognized, Plaintiffs sponsored an expert who "purported to show damages[.]"[77] Furthermore, Plaintiffs' breach-of-contract claims represent the kind of harm that is adequately addressed with money damages. *Levinson v. Cont'l Ins. Servs., Inc.*, 1991 WL 50145, at *2 (Del. Ch. Apr. 4, 1991); *Base Optics Inc. v. Liu*, 2015 WL 3491495, at *16 (Del. Ch. May 29, 2015) ("The standard remedy for breach of contract is…the amount of money that would put the promisee in the same position as if the promisor had performed the contract.").

On appeal, Plaintiffs argue that the proper remedy for their breach-of-contract claims must be "based on the reasonable expectations of the parties *ex ante*," and due to the existence of an exculpation clause in the LPA, the parties' "reasonable expectation[s] could not have been an award of damages."[78] That ETE—like nearly every Delaware company—has indemnification obligations (and exculpatory provisions) says nothing about whether Plaintiffs suffered harm that

[77] B73; B2935 (Beach Dep. 172) (admitting that "[i]t shouldn't be…particularly difficult for the Court to calculate damages"); B2762 ¶111 & B2775.

[78] OB 26.

cannot be compensated with money.[79] *Brinckerhoff*, 159 A.3d at 247 (directing plaintiffs to first pursue damages for breach of a similar LPA, and only then allowing consideration of equitable remedies). Furthermore, Plaintiffs' asserted (but abandoned) allegations that Defendants' breaches amounted to bad faith, which (if proven) would have vitiated the LPA's indemnification provisions.[80]

d. Plaintiffs cannot ignore these requirements.

Unable to satisfy these "well worn" requirements for injunctive relief (B75), Plaintiffs assert they were automatically entitled to permanent injunctive relief once they established a breach of §7.6(f).[81] Plaintiffs argue that §7.6(f) is "prohibitive," and "not merely a permissive safe harbor," and so "[c]ancellation of CPUs (or now the common units into which they have converted) is the appropriate remedy."[82] No case law supports Plaintiffs' theory that the requirements for injunctive relief change if a contract provision is "prohibitive." This is unsurprising given that *any* contract provision that can be breached is by definition "prohibitive." The maxim that "equity will not suffer a wrong without a

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[79] Furthermore, even if Plaintiffs were correct, they failed to provide the court with a basis from which it could "order equitable relief tailored to the harm caused by a breach of the LPA." *Brinckerhoff*, 159 A.3d at 262; *supra* §I.C.1.a.

[80] A171.

[81] OB 15-16, 26-27.

[82] OB 15-16.

remedy" does not aid Plaintiffs.[83] The "wrong" here was *beneficial* to ETE.[84] Furthermore, this maxim does not suggest that injunctive relief—let alone rescission—is required in the event of every breach.[85] In other cases where the Court of Chancery found that a conflicted transaction breached a partnership agreement, the court awarded monetary damages and did *not* unwind the completed transaction. *El Paso*, 2015 WL 1815846, at *25-27; *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1061-62, 1084 (Del. Ch.) (awarding damages rather than rescission despite finding that the challenged transaction breached the partnership agreement's entire fairness standard), *aff'd*, 840 A.2d 641 (Del. 2003); *Zimmerman*, 62 A.3d at 697, 713 (granting nominal damages rather than equitable relief despite holding that the challenged transactions breached the company's LLC Agreement). Plaintiffs' own cases are in accord. *Gotham Partners*, 840 A.2d at *1 (affirming award of

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[83] OB 16 (quoting *Weinberger v. UOP, Inc.*, 1985 WL 11546, at *9 (Del. Ch. Jan. 30, 1985)). Both cases cited by Plaintiffs are distinguishable because in this case, unlike *Weinberger* and *Nash* (OB 16 & nn.80-81), Plaintiffs were not harmed by Defendants' breach. *Weinberger*, 1985 WL 11546, at *9 (holding defendants forced the plaintiff to cast an uninformed vote); *Nash v. Schock*, 1998 WL 474161, at *2 (Del. Ch. July 23, 1998) (holding defendants were unjustly enriched at plaintiffs' expense).

[84] B76 ("Adding the unfair term…has actually mildly reduced the cost [of the Issuance] to ETE.").

[85] Plaintiffs incorrectly argue that "the court below awarded absolutely no relief," which ignores the attorneys' fee award. OB 15-16.

monetary damages rather than equitable relief); *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1216, 1221 (Del. 2012) (awarding monetary damages for breach of contractually-imposed fiduciary duties).

2. The court did not abuse its discretion in only awarding attorneys' fees.

Because the court did not clearly err in determining that the Issuance's only unfair term—the Accrual Term—resulted in no harm,[86] the court did not abuse its discretion in only awarding attorneys' fees. *SIGA*, 132 A.3d at 1128. Under Plaintiffs' theory, the Issuance injured ETE and the class because the CPUs converted into common units based on a price of $6.56, which was a 5% discount to ETE's price at the time of the Issuance (the "Conversion Value").[87] Due to this provision (which the court determined was "fair")[88] and the increase in ETE's price during the nine quarters between the Issuance and the conversion date, CPU holders received common units with a higher market price than the amount of foregone distributions.[89] The fixed Accrual Term undisputedly did not cause any of this injury.[90]

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[86] B76-78.

[87] A1907-09, A1922.

[88] B73; B64.

[89] B73-75.

[90] B73-75.

a. The court did not clearly err in concluding that the Accrual Term did not harm ETE.

Without support, Plaintiffs argue that the court "adopted the financially and legally erroneous assumption that the accrual term must be viewed in isolation from the 5% discount in the conversion price."[91] This argument fails for several reasons.

First, while a court "has broad discretion in fashioning…remedies, it cannot create what does not exist in the evidentiary record, and cannot reach beyond that record when it finds the evidence lacking. Equity is not a license to make stuff up." *Ravenswood*, 2018 WL 1410860, at *2. The court was not required to hypothesize about how the Accrual Term "should have resulted in a change to the 5% discount or other financial terms" of the CPUs (OB 24), particularly when (1) Plaintiffs proffered no evidence on this point at trial, which they raise for the first time on appeal,[92] and (2) Plaintiffs' expert report showed that the Issuance caused no harm on the date of the breach.[93]

Second, the court acted well within its discretion in refusing to grant relief due to a lack of causation.[94] "[D]amages must be logically and reasonably related

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[91] OB 21.

[92] Plaintiffs have not appealed any of the court's factual findings.

[93] *Infra* §I.C.2.b.

[94] B76.

to the harm or injury for which compensation is being awarded." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006); *In re PLX Tech. Inc. Stockholders Litig.*, 2018 WL 5018535, at *47, *56 (Del. Ch. Oct. 16, 2018) (denying monetary damages where "plaintiffs failed to show causally related damages" despite finding directors breached their fiduciary duties), *aff'd*, 2019 WL 2144476 (Del. May 16, 2019); *Brinckerhoff*, 159 A.3d at 262 ("Whether an equitable remedy should be ordered will depend on…the ability to order equitable relief tailored to the harm caused by a breach of the LPA.").

Here, the court determined that Defendants' sole breach of the LPA—fixing the Accrual Term at $0.285/quarter—"caused the partnership no damages" and "actually mildly reduced the cost [of the Issuance] to ETE."[95] Because Plaintiffs failed to submit any evidence that "damages flowed from the defendant's violation of the contract," let alone damages flowing at the time of the breach, they are not entitled to anything more than nominal damages and attorneys' fees. *El Paso*, 2015 WL 1815846, at *25; *accord Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC*, 2014 WL 4374261, at *1 (Del. Ch. Sept. 4, 2014) (finding a company's reorganization was not entirely fair but declining to award damages because "plaintiffs were not damaged…as the value of their units nominally increased").

Third, the history of the CPUs' terms allowed the court to conclude that

[95] B41, B66, B76.

Plaintiffs occupied the same position they would have occupied but for the breach. As Plaintiffs explain, the "remedy for a breach should seek to give the nonbreaching [] party the benefit of its bargain by putting that party in the position it would have been but for the breach."[96] The court found, and Plaintiffs do not appeal, that the terms of the public offering—including the Conversion Value—were fair.[97] It was only the subsequent modification to a fixed Accrual Term that breached the LPA.[98] Because Plaintiffs' calculated harm, which turned solely on the Conversion Value and *not* the Accrual Term, would have been the same in the "breach" world as the "but for" world, the court acted within its discretion in finding that no remedy was required to return Plaintiffs to "the position [they] would have [occupied] but for the breach." *Genencor*, 766 A.2d at 11.

b. Plaintiffs advanced an improper hindsight-based damages model.

Plaintiffs argue that the court erroneously relied upon a "hindsight assessment of lack of 'damages' at the time of [the] CPU conversion in May 2018" in support of its decision not to award any equitable relief.[99] However, it is

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[96] OB 25-26 (quoting *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000)).

[97] B64-65, B71; B22 (Plaintiffs concede they "would not have suffered any harm if ETE had consummated the public offering").

[98] B73, B75-77.

[99] OB 4.

Plaintiffs—not the court—who rely on hindsight.

Defendants agree that the "remedy for the breach should be based on the parties' expectations at the time of the breach." OB 25; *SIGA*, 132 A.3d at 1130. But Plaintiffs' expert submitted a damages model which demonstrated that damages were $0 as of the date of breach; he found harm only by calculating damages using the price of ETE common units *at the time of conversion*, over two years after the breach.[100] As Plaintiffs now concede, damages cannot be based on the increase in ETE's unit price in the two years after the breach.[101] Because Plaintiffs failed to submit any evidence—let alone prove—that the Issuance harmed ETE (or the class) at the time of the Issuance, the court's denial of equitable relief was not an abuse of its discretion. *Ravenswood*, 2018 WL 1410860, at *19 (holding issuance to be a breach of fiduciary duties yet finding "no legal or evidentiary basis to grant a remedy…beyond nominal damages").

c. The court's denial of equitable relief was not premised on inconsistent determinations concerning the public offering.

Plaintiffs' argument that the court's denial of equitable relief was inconsistent with the court's denial of full discovery regarding the public offering

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[100] A1922; OB 26 n.125 (Plaintiffs' expert "calculated the wealth transfer that would occur upon conversion of the CPUs").

[101] OB 25.

is specious.[102] The court denied discovery into *privileged* documents concerning the public offering, not (as Plaintiffs suggest) *all* documents concerning the public offering.[103] Further, any ambiguity in the record regarding how and why the Accrual Term changed between the public and private offering inured to Plaintiffs' benefit because Defendants bore the burden of proving fairness of the Issuance.[104] While it is unclear what relief Plaintiffs request from this Court based on these misconstrued discovery rulings, it should be denied.

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[102] In fact, 143 of the trial exhibits pertained to the public offering.

[103] B2387; OB, Ex. C at 13, 15; B2425.

[104] B53, B66-69.

II. The Issuance was not a distribution subject to §5.10(a).

A. Question presented.

Did the Court of Chancery err by determining that the Issuance was not a "distribution" subject to §5.10(a)?[105]

B. Scope of review.

Contrary to Plaintiffs' assertion, the court's decision that the Issuance was not a distribution is a mixed question of law and fact. The court's interpretation of the LPA is reviewed *de novo*, *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998), and its factual findings are reviewed for clear error, *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. 2005).

C. Merits argument.

1. A "distribution" unambiguously means a one-way transfer of partnership property to the partners as of right, not an exchange for value.

In "common English usage," a distribution "doesn't mean sale."[106] That common understanding of "distribution" carries forward into the LPA, Delaware law, and the MLP industry. Plaintiffs ask this Court to ignore these sources and conclude that the Issuance was a "distribution" and breached an LPA provision

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[105] Preserved at A3026-37.

[106] A3235 ("The local Ford dealership doesn't have a Presidents Day distribution….").

requiring distributions to be made *pro rata* to all unitholders.[107] As the court correctly recognized, Plaintiffs' interpretation (to the extent it can be deciphered) would "do[] damage" to the LPA[108] and is inconsistent with the expectations of a reasonable investor.[109]

a. The LPA establishes that distributions are given by the partnership to partners as of rights, not for consideration.

This Court, like the Court of Chancery, should begin its analysis with the plain language of the LPA, which demonstrates that a distribution is a one-way transfer from the partnership to the partners as of right and not a value-for-value exchange that partners may accept or reject. Words used in a limited partnership agreement must be given their "plain meaning unless it appears that the parties intended a special meaning." *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 104 (Del. 2013). The parties' disagreement over the construction of a term does not render the term ambiguous. *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013). "Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). "The true test

[107] OB 34-38.

[108] B48.

[109] B49-50.

is…what a reasonable person in the position of the parties would have thought [the term] meant." *Id.*

Although the LPA does not define the term "distribution,"[110] it is well settled that "[a] term is not ambiguous simply because it is not defined." *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 468 n.86 (Del. Ch. 2008); *see also Allen*, 72 A.3d at 104; *Lorillard*, 903 A.2d at 738-40. The LPA "refers to distributions in several locations,"[111] each of which supports the conclusion that distributions are one-way transfers that partners receive as of right, and not as part of a bargained-for exchange with ETE.

- §6.3—titled "Requirement and Characterization of Distributions"—provides that the partnership "shall…distribute[]" all available cash "to the Partners in accordance with their respective Percentage Interests," A167, and §5.10(b) notes that "a distribution" is something "declared" by the partnership, A163. Neither §5.10 nor §6.3 suggests

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[110] B43-44. Plaintiffs take inconsistent positions on whether the LPA defines the term "distribution," stating that "defendants did not define 'distribution'" in the LPA, OB 33, while also suggesting that §5.10(a) defines a distribution as an "issuance of Partnership Securities to Partners in their capacity as Partners," OB 34-35. §5.10(a), by its terms, provides guidelines for transactions that are distributions; it does not answer the threshold question of what is a "distribution." As the court recognized, by starting from the premise that §5.10(a) governs, without actually defining what a distribution is under the LPA, Plaintiffs' textual argument is "completely circular." A2546-47.

[111] B44.

that a partner must provide additional consideration to receive a distribution.[112]

- In authorizing the General Partner to "issue" partnership securities, §5.8(b) provides that such securities have, among other privileges, "the right to share in partnership distributions." A162; *accord* 6 *Del. C.* §17-101(15) (defining "[p]artnership interest" to include "the right to receive distributions").
- §1.1 draws a clear distinction between a unitholder's right "to *receive* any…*distribution*" and her ability "to *participate* in any *offer*." A150 (emphases added).

As a whole, the LPA demonstrates that the term "distribution" means "something *transferred* to the unitholders," and not "something that is *offered* to the unitholders for sale, which they may accept or reject."[113]

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[112] Plaintiffs argue that §5.10(c) "permits conditions" to be imposed on distributions. OB 37-38. The "conditions" referenced in §5.10(c) relate to conditions that may be imposed upon the issuance of certificates—a form that "evidence[s] ownership of … Partnership Securities"—and not distributions. A146; A155; A163. And like §5.10(a), §5.10(c) applies only after a transaction has been classified as a distribution. A163 ("Promptly following any such distribution…."). By authorizing the partnership and the General Partner to impose conditions on the issuance of certificates "following any…distribution," §5.10(c) does not show that conditions may be placed on ETE's distribution of securities.

[113] B47-50.

b. Delaware law treats distributions as one-way transfers.

The LPA's use of the term "distribution" is consistent with Delaware's default partnership rules—*i.e.*, the relevant industry "gloss."[114] The Delaware Revised Uniform Limited Partnership Act unambiguously treats distributions as an entitlement owed to the partner, and not a value-for-value exchange, *e.g.*:

- "Partnership interest means…the right to receive distributions of partnership assets." 6 *Del. C.* §17-101(15);
- "[A] partner is entitled to receive from a limited partnership distributions…." *Id.* §17-601;
- "[A] partner [is] entitled to receive a distribution…." *Id.* §17-606.

Plaintiffs cite the Delaware Revised Uniform Partnership Act, which defines a distribution as "a 'transfer of money or other property from a partnership…to a partner in the partner's capacity as a partner.'"[115] This definition contradicts Plaintiffs' claim for two reasons. First, it confirms the one-directional nature of a distribution "from" a partnership "to" a partner. Second, the Issuance was not made in the "the partner's capacity as a partner." When the partner is acting as a seller or a buyer in a transaction with the partnership, the partner is receiving

[114] OB 39.

[115] OB 39 (quoting 15 *Del. C.* §15-101(4)).

property "in another capacity."[116] *In re Young*, 384 B.R. 94, 101 (Bankr. D.N.J. 2008); *accord, e.g.*, 6 *Del. C.* §17-607(a) ("[T]he term 'distribution' shall not include amounts constituting reasonable compensation for present or past services."); *Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at *9 (Del. Ch. Jan. 24, 2005) (payment to partner under "a new contractual form of consideration" set forth in agreement was a payment made to "a party that had become a creditor by virtue of th[e] agreement").[117]

Unitholders who obtained CPUs ("Electing Unitholders") did so based on their individual investment decisions, and not simply their existing ownership of common units.[118] Further, ETE issued CPUs to Electing Unitholders in exchange for valuable consideration, *see infra* §II.C.3; thus, as Plaintiffs previously acknowledged, Electing Unitholders "participat[ed] in [their] capacity

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[116] Plaintiffs now concede that issuances of securities to partners are not distributions when they are "not made to partners in their capacity as such." OB 34 & n.158.

[117] Below, Plaintiffs argued that *ESG Capital Partners II, LP v. Passport Special Opportunities Master Fund, LP*, 2015 WL 9060982 (Del. Ch. Dec. 16, 2015), supported their position. A2933-34. But in *ESG Capital*, there was no consideration involved in the distribution, *id.* at *1-2, *4-5, and, perhaps more importantly, the definition of "distribution" was not at issue. Ostensibly recognizing these distinctions, Plaintiffs do note cite to *ESG* in their opening brief.

[118] A1707-08, A1715; A1724-26. For instance, although he owned 2.3 million common units, Mackie McCrea received only 1.1 million CPUs. B3544 (McCrea Dep. 71); *compare* B319, *with* B2466.

as…counterpart[ies],” and not as partners.[119] Accordingly, even under Plaintiffs' preferred interpretation, the Issuance was not a distribution.

c. MLP investors understand the term “distribution” to mean a one-way transfer.

The LPA's use of the term “distribution” also comports with the commonly accepted understanding of the term in the MLP industry as a one-way transfer of property from the partnership to the partners. Courts and investors both recognize distributions as the MLP equivalent of dividends,[120] that is, a disbursement of assets to unitholders.[121] *In re IAC/InterActive Corp.*, 948 A.2d 471, 511 (Del. Ch. 2008). Black's Law Dictionary further supports the one-directional principle, defining a “partnership distribution” to include “[a] partnership's payment of cash

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[119] A2655-56; A1930, A1950.

[120] *E.g.*, John Goodgame, *Master Limited Partnership Governance*, 60 BUS. LAW 471, 475 n.20 (2005) (stating that “corporations pay ‘dividends’ and partnerships make ‘distributions’”); *In re Kinder Morgan Inc. Corp. Reorganization Litig.*, 2015 WL 4975270, at *3 (Del. Ch. Aug. 20, 2015) (using “distributions” for a partnership and “dividends” for a corporation).

[121] Plaintiffs cite 6 *Del. C.* §17-604 in arguing that a dividend may be conditioned on an exchange of consideration. OB 41 & n.178. That provision, which relates to withdrawal of partners from privately owned partnerships, does not apply to ETE. A181. But even if it did, §17-604 confirms the one-directional, no-consideration nature of partnership distributions by providing that the withdrawing partner is “entitled to receive any distribution to which such partner is entitled…based upon such partner's right to share in distributions from the limited partnership.” 6 *Del. C*. §17-604.

or property to a partner out of earnings or as an advance against future earnings."[122] BLACK'S LAW DICTIONARY (11th ed. 2019).

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Whether the court applies the terms of the LPA, Delaware's default partnership rules, the relevant gloss from the MLP industry, or common English, each source treats a distribution as a one-way transaction in which the partnership gives cash or other property to the partner.

2. The LPA does not support Plaintiffs' convoluted interpretation of "distribution."

Plaintiffs' primary argument is that, under §5.8 and §5.10(a), "a distribution [of securities] is a type of issuance" that may be with or without consideration or conditions.[123] Plaintiffs' argument is difficult to comprehend,[124] and it finds no

[122] Plaintiffs claim that the court erred by relying on "a dictionary definition" of distribution. OB 4, 38-41. However, the court did not rely on "the ordinary dictionary meaning" of distribution; the court used Black's Law Dictionary definition for "partnership distribution." B47. Delaware courts routinely look to Black's Law Dictionary to interpret undefined terms in contracts, including limited partnership agreements. *E.g.*, *Allen*, 72 A.3d at 104; *Lorillard*, 903 A.2d at 738. Moreover, the court looked to this definition only *after* it had considered both "the common English meaning" of the term and "[t]he use of the term…in the LPA." B43-44, B46-48.

[123] OB 34-38.

[124] The court agreed. *See, e.g.*, B48 (stating that Plaintiffs' interpretation "do[es] damage" to the LPA); B49 (expressing confusion about Plaintiffs' "metaphysical" argument); A2546-47 (characterizing Plaintiffs' argument as "completely circular"); A3229 (concluding that Plaintiffs' argument is "nonsensical").

support in the LPA. Nothing in §5.8 and §5.10(a) changes the fact that an issuance of securities in exchange for consideration cannot be a distribution.

§5.8(a) gives ETE broad discretion to issue securities "for any Partnership purpose" and "for such consideration and on such terms and conditions as the General Partner shall determine, all without the approval of any Limited Partners."[125] As for distributions, §5.10(a) provides:

> Subject to Section 5.8(d), the Partnership may make a Pro Rata distribution of Partnership Securities to all Record Holders or may effect a subdivision or combination of Partnership Securities so long as, after any such event, each Partner shall have the same Percentage Interest in the Partnership as before such event . . . .

A163. §5.8(d) states that if "a distribution, subdivision or combination of Units pursuant to Section 5.8 would result in the issuance of fractional Units, each fractional Unit shall be rounded to the nearest whole Unit…."[126] Read together, these provisions prove nothing more than a partnership can issue securities and then sell them (in an offering) or give them to partners (in a distribution).[127] Contrary to Plaintiffs' theory, this does not prove that the Issuance was a distribution.

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[125] A162.

[126] A162.

[127] A unit split, for example, would be an issuance of securities that would be without consideration and provided to unitholders in their capacity as unitholders and, thus, would be a distribution under §5.10(a).

a. Plaintiffs' interpretation would eviscerate the distinction between an issuance and a distribution.

According to Plaintiffs, whenever ETE offers securities "to some Partners," the issuance must satisfy §5.10(a)'s pro-rata "Percentage Interest" requirement.[128] In a value-for-value exchange, however, §5.10(a)'s requirements could never be satisfied because ETE cannot force every single partner to pay the consideration required for the alleged "distribution." The court recognized the absurdity of Plaintiffs' interpretation:

> [t]he failure of a *single* partner to subscribe would result in a "distribution" which did not result in "each Partner having the same percentage interest in the Partnership as before such event." Under the Plaintiffs' view, such an issuance of securities would thus be *ultra vires*, and void. I cannot read the LPA thus without doing damage to its meaning.

B48 (quoting A163).

Plaintiffs confusingly attempt to rebut this analysis by arguing that "under the Vice Chancellor's reasoning," whether an issuance is a distribution would turn on an "after-the-fact decision of each individual Partner….If a single Partner declined the securities, the distribution would no longer be a distribution."[129] But the mere fact that a partner could "decline[] the securities" means that the issuance was not a distribution to begin with. Nor did the court "read a 'no conditions'

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[128] OB 34-35.

[129] OB 36.

requirement into Section 5.10(a)," *contra* OB 36-37; the no-condition element is inherent in the term "distribution," as used in the LPA, Delaware law, the MLP industry, and "common English."[130]

b. Plaintiffs' assumption that a distribution can be made with or without consideration or conditions results from flawed logic.

The basis for Plaintiffs' argument also rests upon a logical fallacy. Plaintiffs claim that because "a distribution [of securities] is a type of issuance" under §5.8(d), and an issuance can be in exchange for consideration under §5.8(a), then a distribution can be for consideration.[131] That *issuances* sometimes require consideration, per §5.8(a), does not mean that *distributions* sometimes require consideration. Rather, it is precisely the presence or absence of consideration that separates a distribution from another form of issuance (*e.g.*, an offering) authorized by §5.8(a).[132]

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"[A] reasonable investor, on reading the LPA,…would not conclude that the sale and issuance of equities as provided for in the LPA would result in a pro rata

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[130] B43-44, B47, B49-50.

[131] OB 34-37; B45.

[132] *Supra* §II.C.2.a.

‘distribution’ of those [equities]….”[133] Because the CPUs were “offered for sale, as the general partner is empowered to do under the LPA,” they were not distributions.[134]

3. The Issuance was an exchange for consideration.

The court correctly found that the Issuance was not a distribution. Whether the Issuance constitutes a distribution turns on whether the Issuance was a value-for-value exchange or a one-way transfer. After analyzing the Issuance, the court found that it was a value-for-value exchange.[135]

By choosing to participate in the Issuance, Electing Unitholders provided significant consideration, including giving up their right to full cash distributions for nine quarters, and the ability to reinvest those distributions and the right to trade and hedge both the CPUs and the participating units.[136] The cash savings associated with the forgone distributions prevented a ratings downgrade,[137] keeping “ETE and its distributions healthy.”[138] As the court put it, “[t]he $518 million in

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[133] B49-50.

[134] B49.

[135] B50.

[136] A1707-08; A3516 (Trial 465); A3594 (Trial 668); A1946.

[137] A3427-3428 (Trial 224-25).

[138] A3504 (Trial 420).

forgone distributions was useful to ETE. . . ."[139] The following chart describes the consideration exchanged between ETE and Electing Unitholders:

Consideration from the Electing Unitholder	**Consideration from ETE**
Electing Unitholders forwent any distribution in excess of $0.11/unit for nine quarters, other than Extraordinary Distributions. Based on projected distributions in March 2016, this equaled $1.575/unit in forgone distributions or $518,646,346 in the aggregate.	CPUs had a preference on the first $0.11/unit of quarterly distributions.
Electing Unitholders had to wait until the end of the ninth quarter for CPUs to convert into common units.	CPUs converted into common units based on a 5% discount to the 5-day VWAP at the time of the Private Placement Memorandum. 79,061,943 in converted common units at the end of nine quarters.
CPUs were capped at $0.285/unit in cash distributions and accretion to Conversion Value, even if common unit distributions are higher.	CPUs provided $0.285/unit in cash distributions and accretion to Conversion Value, even if common unit distributions are lower.
Electing Unitholders could not sell, hedge, or hypothecate ETE units or related securities for nine quarters without the prior written consent of the General Partner, rendering both the CPUs and the underlying common units illiquid.	

[139] B50.

Consideration from the Electing Unitholder	Consideration from ETE
Electing Unitholders allowed ETE to present a delevering plan to the credit rating agencies, preventing a near-term rating downgrade.	

Plaintiffs claim that the court erred because it failed to analyze consideration "when the CPU Issuance occurred."[140] Plaintiffs' argument misses the mark. Prior to the Issuance, Electing Unitholders had the right to receive the same cash distributions as all common unitholders and to sell ETE units freely.[141] At a time when distributions were projected to remain flat at $0.285/quarter,[142] Electing Unitholders agreed to forgo $0.175/quarter in cash distributions for nine quarters and lock up their units.[143] Far from representing a "hindsight based" calculation, *contra* OB 41, at the time of the Issuance, CPU holders expected to forgo more than $518 million in cash distributions over the plan period.[144] Further, ETE

[140] OB 41 (quoting B50).

[141] A3525 (Trial 501).

[142] B12; A1940; A3433 (Trial 246). The court found that, although ETE's advisors had analyzed distribution cuts, "[b]ecause distributions…were the reason for being of the MLP, ETE was reluctant to cut distributions, and viewed such cuts as detrimental to the Partnership, and a last resort." B13-15, 62.

[143] A1707-08.

[144] A3012; A3594 (Trial 668). As it turns out, ETE increased its distribution, rather than hold it flat as projected, meaning Electing Unitholders lost more than $535 million in distributions over the plan period. A3609 (Trial 728); B3478-79.

received cash savings each quarter but did not pay out the converted common units until the end of the plan period (a key benefit to ETE),[145] and if ETE's unit price had continued on its then-current trajectory, the common units would have been worth less than the value of the foregone distributions (even before taking the time value of money into account).[146] As the court correctly noted, Electing Unitholders "accepted the associated risk" of participating in the Issuance.[147]

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Because the court did not clearly err in finding that the Issuance was an "exchange for value,"[148] this Court should affirm.

4. Post-approval modifications did not invalidate the Issuance.

Plaintiffs also argue that post-approval revisions to documents needed to effectuate the Issuance invalidated the Board's approval of such documents. OB 42-43. But the court correctly determined that those modifications did not invalidate Defendants' approval of those documents. At the February 28th meeting, the Board "authorized and empowered" ETE management to take acts necessary to finalize the transaction documents on "substantially the terms set forth

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[145] A1707-08.

[146] B2820, B2843.

[147] B77.

[148] B50.

in the form previously provided to the Board."[149] ETE's advisors, acting pursuant to that mandate, made certain updates to those documents to effectuate the Board's decision.[150] In connection with its finding that "the Board unanimously approved the issuance, and amendment to the LPA ('Amendment 5'), a private placement memorandum, and related transactions,"[151] the court rejected the very same argument Plaintiffs now press on appeal, concluding that the "ministerial changes to the establishing documents" did not invalidate those documents.[152]

Plaintiffs' argument fares no better on appeal. None of the changes identified by Plaintiffs show that the modifications exceeded the mandate given to management and its advisors. Plaintiffs resort to counting the difference in page numbers between the Amendment's draft and final versions (OB 43), but nearly all of the Amendment's deletions were bracketed in the draft circulated to ETE's directors *before* they approved the Amendment, A1414-34; A1684-A1706,

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[149] A1454-55. The LPA provides the General Partner with broad authority to amend the LPA and "execute, swear to, acknowledge, deliver, file and record whatever documents may be required in connection therewith, to reflect…an amendment that the General Partner determines to be necessary or appropriate in connection with the authorization of issuance of any class or series of Partnership Securities pursuant to Section 5.8[.]" A183.

[150] A1458.

[151] B36.

[152] B36 & n.228, B72 n.365.

showing the Board anticipated those changes.[153] The other changes did not alter the substantive terms of the Issuance in any manner that required further Board approval; these changes merely (1) reinforced the known fact that the CPUs were nontransferable, A1568, A1576, A1589-90, A1605-06,[154] and (2) adjusted a tax accounting provision, A1589, A1605, A1638, A1641, which is precisely the type of technical matter boards delegate to advisors.[155]

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[153] The registration rights provision identified by Plaintiffs (OB 43) was one of the bracketed provisions. A1422-30.

[154] As the court noted, when it approved the public offering on February 15, the Board was aware that the CPUs "could not be transferred." B19 (citing A690).

[155] This change was made to make ETE's "preference for book gain/loss clear…to avoid confusion," A1275; B36 n.228, once again suggesting that the Board anticipated the change.

III. Plaintiffs' appeal should be dismissed as moot.

A. Question presented.

Did Plaintiffs' failure to pursue a stay or injunction pending appeal to prevent the conversion of the CPUs into common units render their appeal moot?[156]

B. Scope of review.

This Court lacks jurisdiction over this appeal if subsequent events render Plaintiffs' claims moot. *General Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 823-24 (Del. 1997); *cf. Appriva S'holder Litig. Co. v. EV3, Inc.*, 937 A.2d 1275, 1284 (Del. 2007) (noting that this Court has "an independent obligation" to satisfy itself of jurisdiction).

C. Merits of argument.

By failing to seek a stay or injunction pending appeal, Plaintiffs allowed the CPUs to convert into common units, mooting Plaintiffs' appeal. This Court's function "is to review and decide actual controversies"; it does "not answer questions that have become moot." *Gen. Motors*, 701 A.2d at 822-24. An appeal must be dismissed as moot if the action no longer presents a justiciable controversy. *Id.* at 823; *Stoltz v. Wilmington Trust Co.*, 610 A.2d 727, at *1 (Del. 1992).

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[156] Preserved at A2962-63.

This Court should take Plaintiffs at their word and dismiss this appeal as moot. Plaintiffs repeatedly represented to the court that "damages are unavailable" and "equitable relief…to be meaningful must issue before…[t]he nine-quarter life of the offering ends on May 18, 2018."[157] As Plaintiffs explained, the conversion of CPUs into "freely transferrable Common Units will make it impossible to undo Defendants' breach of their contractual obligations and effectively cause Plaintiffs to lose an important contract right."[158] Because the court relied on Plaintiffs' repeated representations that they needed equitable relief before the conversion date for that relief "to be meaningful" (B3), Plaintiffs are judicially estopped from asserting otherwise. *In re Rural/Metro Corp. Stockholders Litig.*, 102 A.3d 205, 246-47 (Del. Ch. 2014) (a party is judicially estopped if it "advances a position inconsistent with a position taken in the same…legal proceeding" and "the court 'relied' on the party's prior position").

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[157] B3-4.

[158] A2962; *accord* B1576; B2474 ("[T]he CPUs] will have converted in the spring of 2018. And at that, point [the permanent injunction] we seek…[o]f course, that remedy will be gone."); B2475 (arguing an expedited trial is "necessary in order to have a decision in time that if [plaintiffs are] entitled to relief, we'd be able to get it before those units convert."); B2456 ("Plaintiffs seek a fall 2017 trial date…to preserve their ability to obtain injunctive relief, including cancellation or rescission of the CPUs."); B2457-58 ("Scheduling a trial at [a later] date…would effectively preclude plaintiffs' ability to invalidate the CPUs or obtain injunctive relief against conversion of the CPUs and issuance of common units.").

This Court should reject Plaintiffs' attempt to recast their requested relief on appeal, in which they seek cancellation of the "common units into which [the CPUs] converted…held by the conflicted Affiliates of the General Partner…."[159] Seeking cancellation of common units rather than the CPUs does not salvage Plaintiffs' request for equitable relief. Indeed, cancelling "freely tradeable Common Units" is precisely the task that Plaintiffs said was "impossible" and necessitated a pre-conversion remedy.[160] And, Plaintiffs declined to seek a stay or an injunction pending appeal to prevent this conversion.

Unsurprisingly, Plaintiffs never requested this specific relief despite having multiple opportunities to do so. After the court issued its decision, and *after the conversion of the CPUs into common units*, the Vice Chancellor asked Plaintiffs "whether there was any equitable relief that the plaintiffs wished and were entitled procedurally to seek, given my decision," explaining "I didn't want to cut that off if there was something."[161] Plaintiffs responded that they "have focused on whether equitable relief would be possible here, given the Court's opinion and…that would likely not be the case."[162] Plaintiffs then filed a letter that limited

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[159] OB 29 & n.140, OB 44.

[160] A2962; *supra* n.**Error! Bookmark not defined.**.

[161] A3349, A3352.

[162] A3355.

Plaintiffs' requests to "a petition for attorneys' fees and expenses."[163] Thus, Plaintiffs have waived any claim to rescission. Supr. Ct. R. 8 (issues not "fairly presented to the trial court" are waived); *Gaffin v. Teledyne, Inc.*, 1990 WL 195914, at *18 (Del. Ch. Dec. 4, 1990) ("It is a well-established principle of equity that a plaintiff waives the right to rescission by excessive delay in seeking it."), *aff'd in part, rev'd in part on other grounds*, 611 A.2d 467 (Del. 1992); ; *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.* 48 F.3d 618, 622 (1st Cir. 1995) (rejecting a similarly shifting theory of relief because a "party who neglects to ask the trial court for relief that it might reasonably have thought would be available is not entitled to importune the court of appeals to grant that relief").

For Plaintiffs to seek rescissory relief of any kind at this late date is improper. Plaintiffs were correct that it is now far too late to afford relief, as plan participants may have sold, transferred, or otherwise encumbered their common units in transactions with third parties. Moreover, all participants have received quarterly cash distributions on their converted common units for several post-conversion quarters. Plaintiffs push for "cancellation of common units issued to Affiliates upon conversion of the CPUs" (OB 44), but do not explain how this Court or the Court of Chancery could undertake the "impossible" task of "unscrambl[ing] the eggs" over a year after the CPUs have converted into freely

[163] B3609-10.

tradeable common units. *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 728 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000); *accord, e.g.*, *Levco Alt. Fund Ltd. v. Reader's Digest Ass'n, Inc.*, 803 A.2d 428, 2002 WL 1859064, at *3 (Del. 2002) (Table Op.) (granting expedited injunction because "the issuance of the shares contemplated by the recapitalization may place a practical remedy beyond judicial reach"); *Joseph v. Shell Oil Co.*, 482 A.2d 335, 344-45 (Del. Ch. 1984) (tender offer); *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 961 (Del. Ch. 2001) (Strine, V.C.) (denying plaintiffs' request to rescind a completed reverse stock split because "[i]t would be highly unusual, if not *per se* improper, to undo that completed transaction").

CONCLUSION

For the foregoing reasons, the appeal should be dismissed, or the court's judgment should be affirmed.

Dated: August 21, 2019

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