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Case No. 5816-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE INERGY L.P. UNITHOLDER LITIGATION	))	CONSOLIDATED CIVIL ACTION NO. 5816-VCP

MEMORANDUM OPINION

Submitted: October 22, 2010
Decided: October 29, 2010

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PARSONS, Vice Chancellor.

This matter involves an investor challenge to a transaction (the "Proposed Transaction" or "Transaction") in which a Delaware master limited partnership ("MLP") will, among other things, exchange various classes and amounts of its securities as consideration for taking private its general partner's parent, also a Delaware MLP. Plaintiffs allege that Defendants, the limited partnership's general partner and the directors that make up its board, breached their fiduciary duties under the governing limited partnership agreement in two ways: (1) by depriving the unitholders of the right to vote on the Transaction and (2) by using an unfair and unreasonable process to select an unfair and dilutive Transaction price. As to the latter allegation, Plaintiffs contend that the board created a biased one-man special committee that employed conflicted financial and legal advisors and essentially rubber-stamped management's self-dealing Transaction. Plaintiffs have moved for a preliminary injunction to prevent the Transaction from closing after an upcoming meeting of the security holders of the limited partnership's parent to vote on the Transaction.

For the reasons stated herein, I deny Plaintiffs' motion.

I. BACKGROUND

A. The Parties

Plaintiffs in this consolidated action,[1] G2 Trading LLC ("G2") and Joel A. Gerber, have been holders of common units of the Nominal Defendant at all relevant times.

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[1] This action is the result of a consolidation of two separate actions: *G2 Trading LLC v. Inergy GP, LLC*, C.A. No. 5816-VCP (Del. Ch. filed Sept. 14, 2010) and

Nominal Defendant Inergy L.P. ("Inergy" or the "Partnership") is a Delaware publicly traded MLP that operates a geographically diverse retail and wholesale propane supply, marketing, and distribution business with midstream pipeline and natural gas storage operations.[2] Defendant Inergy Holdings L.P. ("Holdings") is a publicly traded Delaware MLP whose principal business is "passing through distributable cash flow from Inergy to Holdings unitholders through ownership of partnership interests in Inergy."[3] Holdings has no independent operations but wholly owns Defendant Inergy GP, LLC ("Inergy GP"), a Delaware LLC, which is Inergy's managing general partner. Similarly, Holdings is controlled by its general partner, Holdings GP LLC ("Holdings GP"), which is not a party to this action but is relevant to several of Plaintiffs' claims. In this Memorandum Opinion, I refer to all of these entity Defendants and the individual Defendants identified below, collectively, as "Defendants."

Defendant John J. Sherman ("Sherman") is Inergy's founder, president, and CEO. He is also the President and CEO of Holdings, as well as a director of both Holdings GP and Inergy GP.[4] As of August 6, 2010, Sherman beneficially owned 4,865,829 Inergy

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Gerber v. Inergy GP, LLC, C.A. No. 5864-VCP (Del. Ch. filed Sept. 30, 2010). Docket Item ("D.I.") 39.

2 Inergy's units trade on the New York Stock Exchange ("NYSE") under the symbol "NRGY." Aff. of Elizabeth C. Brandon ("Brandon Aff.") Ex. 1, Inergy Form 424(B)(3) (the "Proxy Statement").

3 Holdings' units trade on the NYSE under the name "NRGP." *Id.*

4 Proxy Statement at 146. Information about each of the other individual Defendants also is taken from the Proxy Statement.

units and 23,817,361 or approximately 38.5% of the outstanding Holdings units. As of the same date, Sherman owned an approximate 61% interest in Holdings GP.

Defendant Phillip L. Elbert is an Inergy GP director and the President and COO of a subsidiary of Inergy, Inergy Propane, LLC. He beneficially owned 2,742,347 Holdings units and 70,000 Inergy units.[5] Defendant Warren H. Gfeller is a director of both Inergy GP and Holdings GP and he beneficially owned 73,143 Holdings units and 62,500 Inergy units. Defendant Arthur B. Krause is also a director of both Inergy GP and Holdings GP. He beneficially owned 80,961 Holdings units and 46,872 Inergy units. Defendant Robert D. Taylor is a director of Inergy GP and beneficially owned 36,127 Inergy units. He owns no Holdings units. Taylor is also the chairman of the Inergy Independent Special Committee ("ISC"). Defendant R. Brooks Sherman, Jr. ("Brooks") is the Executive Vice President and CFO of both Inergy GP and Holdings GP. He beneficially owned 1,199,693 Holdings units and 58,320 Inergy units. Defendant Andrew L. Atterbury is the Senior Vice President of Inergy GP and beneficially owned 3,041,907 Holdings units. Defendant William C. Gautreaux is President of Inergy Services, an Inergy subsidiary, and beneficially owned 2,830,330 Holdings units. Finally, Defendant Carl A. Hughes is the Senior Vice President of Inergy GP and beneficially owned 2,626,136 Holdings units and 17,942 Inergy units.

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[5] For Elbert and all of the other individual Defendants, except Sherman, the unit ownership figures recited are as of August 30, 2010.

B. Facts

1. Inergy's existing governance and capital structure

As is typical in MLPs, Inergy has a two-tiered capital structure with respect to limited partnership interests.[6] The first tier consists primarily of common units, which carry with them a right to receive a minimum distribution of $0.30 per quarter and increased distributions based on Inergy's performance.[7] The second tier consists of securities held by Holdings, primarily comprised of Incentive Distribution Rights ("IDRs"), which are non-voting securities subordinate to Inergy's common units. IDRs entitle Holdings to receive increasing percentages of distributions made by Inergy as target distribution levels are reached in excess of $0.33, $0.375, and $0.45, respectively, per Inergy unit in any quarter, with such a quarterly distribution in excess of $0.45 generating an IDR distribution of 48%.[8] While there are two sets of public unitholders, those who own Inergy units and those who own Holdings units, both sets of units derive their value from Inergy's operations. As Inergy generates cash flows, cash is acquired by Holdings primarily by virtue of its IDRs and is then passed on to Holdings unitholders.

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6 Proxy Statement at 15.

7 These units are currently traded on the NYSE.

8 Proxy Statement at 1. "The IDRs entitle Holdings to receive amounts equal to specified percentages of the incremental amount of cash distributed by Inergy to the holders of Inergy LP units when target distribution levels for each quarter are exceeded. The target distribution levels begin at $0.33 and increase in steps to the highest target distribution level of $0.45 per eligible Inergy LP unit. When Inergy makes quarterly distributions above $0.45 per eligible Inergy LP unit, the incentive distributions include an amount equal to 48% of the incremental cash distributed to each eligible Inergy unitholder for the quarter." Id.

Also typical for an MLP, the two tiers share a common management team and overlapping board members. In particular, Inergy's business and operations are controlled by the board of directors of its managing general partner, Inergy GP (the "Inergy Board" or "Board"). The current Board is comprised of five directors: Sherman, Gfeller, Krause, Taylor, and Elbert.[9] The latter four are non-employee outside directors. As of August 7, 2010, there were approximately 65,889,264 Inergy units issued and outstanding.[10] Over 90% of those units are held by public unitholders, with the remaining held by Holdings.[11]

While Holdings has far less than a majority position in Inergy units, it wholly owns Inergy GP. As such, Holdings, and not the public unitholders of Inergy, has the sole power to appoint the Inergy Board. Like Inergy, Holdings is governed by a partnership agreement and is managed by the board of its general partner, Holdings GP (the "Holdings Board"). The current Holdings Board is comprised of four directors, O'Brien, Sherman, Gfeller, and Krause, three of whom are also directors of Inergy GP.[12]

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[9] *Id*. at 146.

[10] *Id*. at A-17.

[11] Proxy Statement at 13, 15, 29, 84; Compl. ¶ 4. Plaintiff G2 Trading filed an amended complaint on September 22, 2010. Plaintiff Gerber filed his complaint on September 30, 2010. On October 5, 2010, I consolidated these two actions and deemed Gerber's complaint to be the operative complaint (the "Complaint"). *See* D.I. 29; Aff. of Lawrence Deutsch ("Deutsch Aff.") Ex. 1.

[12] *Id*. at 146. The three overlapping directors are Sherman, Gfeller, and Krause. *Id*. In addition, Sherman, Elbert, Brooks, Atterbury, and Gautreaux are executive officers of both Inergy GP and Holdings GP. *Id*.

The individual Defendants hold a majority of the Holdings units[13] and, thus, control Holdings' Inergy Assets, which include: (a) a direct 6% interest in Inergy; (b) a 100% ownership interest in Inergy GP; (c) a 100% ownership interest in Inergy's non-managing general partner, Inergy Partners, LLC; (d) an interest in an intermediary company, IPCH Acquisition Corp. ("IPCH"); and (e) all Inergy IDRs.[14]

As of August 6, 2010, Sherman, through various trusts, owned a majority voting interest in Holdings GP, which gives him majority control over the Holdings Board.[15] Thus, Sherman has majority control over the Holdings Board, which controls Holdings and, in turn, the Inergy Board and Inergy.

2. Inergy's continued growth and success prompt it to reevaluate its IDRs

Since its IPO in 2001, Inergy has performed well according to a variety of metrics, especially in terms of expanding its propane and midstream operations and increasing distributional cash flow to its investors.[16] As a result of Inergy's success, and its significant IDR obligations, Holdings currently is receiving IDR payments at the

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[13] *Id*. at 145-46.

[14] *Id*. at 84.

[15] Proxy Statement at 155; Compl. ¶ 8.

[16] Inergy sought to expand its operations through a high-volume acquisition strategy. For example, Inergy executed approximately $2.4 billion in acquisition and growth projects in the previous six years. Aff. of Brooks Sherman ("Brooks Aff.") ¶¶ 9-10.

maximum 48% level. This payment stream results in Holdings receiving approximately 32.3% of the aggregate amount of cash distributed by Inergy to its investors.[17]

Inergy's Board recognized that Holdings' IDRs present a potentially serious barrier to Inergy's continued growth and success because they cause Inergy to incur an increasingly higher cost of capital.[18] As Inergy sends more money to Holdings through the latter's IDRs, future acquisitions will become costlier and make Inergy less competitive. Thus, beginning in approximately 2010, Inergy's management began seriously to consider restructuring or eliminating its IDRs in order to remain competitive, especially considering Inergy's strategy of growth through acquisitions.[19]

3. The Inergy Board seeks a transaction to eliminate the IDRs

Beginning as early as February 2010, Sherman and the Inergy Board discussed ideas about how to eliminate Inergy's IDR problem.[20] On June 21, 2010, these discussions culminated in a special joint meeting between the Inergy and Holdings Boards to consider a transaction between the two partnerships to permanently improve

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[17] Proxy Statement at 28.

[18] As Inergy is required to issue new units to finance new acquisitions, it will be required to pay the IDRs a greater share of cash distributions based on the new units, unless Inergy cuts its quarterly cash distribution for all unit holders enough to offset the newly issued units. Brandon Aff. Ex. 4, Sherman Dep., 80.

[19] *Id*. at 80 ("we had thought that somewhere around 30% [of aggregate cash distributions going to Holdings through IDR payments], that's the point at which it would start to become more difficult to maintain our competitiveness down at [Inergy]."), 82.

[20] These talks included email correspondence with investment banker Curtis Goot. Deutsch Aff. Ex. 166.

Inergy's cost of capital.[21] The Inergy Board appointed Taylor to be the sole member of the ISC to represent the interests of Inergy and its unitholders in evaluating the Proposed Transaction.[22] The Board selected Taylor because they considered him to be independent of both Inergy and Holdings. Indeed, Taylor averred that he owns no Holdings units and, while he has been a director of Inergy since 2005, he has no outside business or material social relationships with any other member of Inergy management, nor any relationship or affiliation with Holdings.[23] In addition, the Inergy Board believed Taylor was competent for the position because he is a certified public accountant, the CEO of Executive Airshare Co., and a member of the boards of two other public companies.[24]

As the ISC, Taylor was tasked with the authority to:

> (1) review, evaluate, and, if deemed appropriate, negotiate the terms and conditions of any potential Restructuring or Merger or both; (2) determine the advisability of the Restructuring and/or Merger or any alternatives thereto on behalf of Inergy, L.P. and the Unaffiliated Limited Partners; and (3) make a recommendation to the Board of Directors as to what action, if any, should be taken by the Board of Directors with respect

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[21] Brandon Aff. Ex. 8, at INE 00021926.

[22] *Id.* at INE 00021928-29. The Holdings GP Board appointed O'Brien as the single member of a Conflicts Committee to represent the interests of Holdings and its unitholders in the same respects. *Id.* at INE 00021927.

[23] Aff. of Robert D. Taylor ("Taylor Aff.") ¶¶ 1-7. He does own 16,127 common units of Inergy and a unit option worth 20,000 additional common units. As of Friday, October 14, 2010, the value of the Inergy units Taylor owned was $663,626. *Id.* ¶ 5.

[24] Brandon Aff. Ex. 3, Taylor Dep., 11-12.

> to the Restructuring and/or Merger or any alternatives thereto.[25]

At the time the ISC was formed, Inergy Management was considering a potential merger with Company A, but neither Inergy nor the ISC ever received any information regarding this proposed merger so talks of this deal were called off shortly thereafter.[26] Taylor, therefore, understood his mandate as being to review a potential transaction to restructure Inergy's relationship with Holdings.[27]

A little over a week later, Bank of America/Merrill Lynch gave a presentation to Brooks and other Inergy management about "carried interest legislation" expected to become effective in 2011. They explained that the anticipated legislation would cause certain carried interest to be taxed as ordinary income, which would negatively impact those holding general partnership interests, which generate carried interest.[28]

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[25] Brandon Aff. Ex. 8, at INE 00021929.

[26] Taylor Aff. ¶ 10.

[27] Taylor explained his understanding of his role on the ISC as follows: "I viewed my role as to act in the best interests of Inergy and its Unaffiliated Limited Partners and to consider whether to do a Restructuring, and, if so, on what terms. I was fully prepared not to do a Restructuring unless I was fully satisfied that the terms of such Restructuring would be in the best interests of the Unaffiliated Limited Partners." *Id.* ¶ 11.

[28] Deutsch Aff. Ex. 104, at INE 00017274-77. Plaintiffs argue that the Court should infer from this that the Inergy Board perceived that a transaction to eliminate the Partnership's two-tier structure potentially could avoid huge adverse tax consequences from the proposed legislation. Pls.' Op. Br. ("POB") 12. Similarly, Defendants' Answering Brief and Plaintiffs' Reply Brief are referred to as "DAB" and "PRB," respectively.

Meanwhile, on July 2, 2010, Lisa Ozenberger, general counsel for both Inergy and Holdings, delivered a proposed transaction summary to the ISC, including a general outline of potential deal structure steps, that had been prepared by Vinson and Elkins LLP ("V&E").[29] Ozenberger's letter, however, noted that the materials were offered to the ISC as a helpful starting point and acknowledged that the transaction would take form based on Taylor's independent work.[30]

The ISC (*i.e.*, Taylor) met on July 6, 2010 to consider the selection of an independent legal advisor to assist it in carrying out its duties. It hired Husch Blackwell LLP ("HB LLP") as its outside counsel because Taylor had a high level of confidence in HB LLP based on prior dealings.[31] While Taylor considered HB LLP to be an independent advisor, Plaintiffs contend that HB LLP was conflicted because it had done extensive work for Inergy in the past, as evidenced by HB LLP's statement in the retention letter it sent to Taylor that "we have provided and continue to provide other legal services to Inergy."[32] According to Defendants, this work was relatively minor and

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29 Inergy Management selected Vinson & Elkins LLP as legal counsel for all parties to the Proposed Transaction. Proxy Statement at 37.

30 Deutsch Aff. Ex. 152 ("[w]hile the structure [of the Proposed Transaction] will inevitably evolve to the extent the transaction moves forward and as a result of your deliberations, we thought these materials could give you, as well as your legal and financial advisors, a [] starting point . . . .").

31 Taylor Aff. ¶ 12.

32 POB 11; Deutsch Aff. Ex. 149.

infrequent. Taylor also was not aware of any transactional work that HB LLP performed for Inergy in the past.[33]

The ISC met again on July 7 to choose an investment banking advisor who was qualified technically to advise on an MLP transaction and who was not currently working with Inergy or Holdings. Taylor requested and reviewed a proposal from Robert W. Baird & Co. ("Baird"), principally because they appeared to meet his criteria. Taylor did not believe that Inergy previously had retained Baird, but understood that Baird's lead energy sector financial advisor, Goot, previously had done work for Inergy.[34] Satisfied

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[33] DAB Ex. 1, at 4.

[34] Taylor Aff. ¶¶ 13-14. Plaintiffs characterize Goot as Sherman's hand-picked advisor for the ISC. Specifically, they assert that Goot was Inergy's primary financial advisor since Inergy's IPO in 2001, during which time Goot assisted Inergy in acquiring west coast liquid natural gas storage assets, Stagecoach, and other assets, as well as issuing several debt and equity offerings. POB 8-10 ("Mr. Goot served as an advisor to [Inergy] on numerous occasions, providing fairness opinions on multiple transactions, and carrying [Inergy] to no fewer than four investment banking firms.").

Defendants deny Plaintiffs' allegations, including that Goot was Inergy's primary financial advisor. They assert that Inergy has used over twenty-five investment and commercial banks since 2001, and of that total, entities employing Goot have accounted for only 11% of fees paid to such firms. DAB Ex. 1, at 1; Brooks Aff. ¶ 20. In the same vein, Defendants argue that any involvement by Goot in Inergy's securities offerings was minor and tangential. DAB Ex. 1, at 2. In addition, they aver that Inergy never employed Baird in a transactional sense before they advised Taylor. Sherman Dep. 81. Finally, they contend that Taylor did not discuss hiring Goot with Sherman; instead, he chose Goot from among a list of three potential advisors delivered to him from Ozenberger. Brandon Aff. Ex. 29.

with Goot and Baird's qualifications, Taylor hired Baird to advise the ISC and render a fairness opinion regarding the consideration to be paid by Inergy.[35]

The ISC then proceeded to negotiate a deal with the Holdings Conflicts Committee ("HCC"). In so doing, the ISC relied on a number of different materials and financial analyses. These include: (1) a transaction summary memo received from Ozenberger describing the way in which a transaction might be accomplished, including the July 1 Projections;[36] (2) Baird's due diligence, including meetings with Inergy management;[37] (3) and Baird's other financial analyses, including discounted cash flow ("DCF"), equity cost of capital analysis, and comparable public general partner analysis.[38] Between July 15 and 19, Baird presented its preliminary analysis. They found that a 5%-15% premium to Holdings common unit price would be viewed as fair given that the (1) current exchange ratio was at an all-time high and (2) the growth rate of Holdings was higher than comparable public general partners.[39]

On July 20, 2010, the ISC sent its first offer to the HCC. Two central features of this offer were a proposed 5% premium for each Holdings unit and the inclusion of a number of paid-in-kind ("PIK" or "Class B") units so Inergy could reduce its need to

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[35] *Id*. Ex. 14.

[36] Brandon Aff. Ex. 30.

[37] *Id*. Ex. 15.

[38] *Id*. Ex. 18.

[39] *Id*.

borrow funds to satisfy its anticipated need to make higher quarterly cash distributions in the year following the Proposed Transaction.[40] HCC rejected the ISC's proposal of a 5% premium based on the trailing average covering 20 days of Holdings trading[41] and, instead, suggested that the parties use a fixed exchange ratio. Baird advised Taylor that this was acceptable and, even, desirable. Goot explained that an exchange rate would make the ultimate price paid by Inergy less vulnerable to movements in Holdings unit price, which was especially important because the "reality [was Holdings'] stock price was moving."[42] The parties then negotiated the proposed exchange rate. On July 29, 2010, the HCC's and the ISC's respective opening bids were .8 and .75.[43] The ISC's starting point approximately equated to the 5% unit premium it originally proposed to the HCC.[44] In a back and forth exchange, Taylor proposed .765 in response to O'Brien's offer of .78.[45]

Ultimately, the parties agreed to a .77 exchange ratio, which represents an 8.9% premium to Holdings unitholders.[46] Before deciding upon that ratio, Taylor asked Baird

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[40] Brandon Aff. Ex. 32.

[41] Deutsch Aff. Ex. 2, at 39.

[42] Brandon Aff. Ex. 5, Goot Dep., 78.

[43] *See* Brandon Aff. Exs. 33-34.

[44] DAB 21; Goot Dep. 78.

[45] Taylor Dep. 72.

[46] Proxy Statement at 1.

to prepare additional analyses to compare the Proposed Transaction's accretive/dilutive impacts to distributable cash flow. During this time, Plaintiffs allege that Taylor met with Sherman at Sherman's residence without Taylor's ISC advisors. As a result of this meeting, they contend Taylor asked Baird the next day to change their analyses based on requests from Inergy management to increase Baird's wedge capital assumption by $150 to $300 million.[47] Defendants contend that this meeting took place only so that Taylor could confirm that Sherman was comfortable with a $375 million wedge capital projection.[48] Ultimately, Baird reported to Taylor that the distribution coverage ratio was negligible as between exchange ratios of .765 and .77, and that under all three exchange ratios (including .75) using the wedge capital assumption of $375 million, the Proposed Transaction would be accretive in 2015 and dilutive in each of the prior years.[49] The parties dispute the extent of the dilution in the earlier years, however.

4. Inergy and Holdings agree to the Proposed Transaction

On August 6, 2010, Baird made a presentation to the ISC regarding the Proposed Transaction. It discussed the need for Inergy to address its increasing cost of capital due to onerous IDR obligations as well as the benefit of a lower cost of capital that would

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[47] POB 14; Deutsch Aff. Ex. 7, at TAY00002321. Wedge capital is a "defined certain amount of additional capital to be spent above what was known by the company." Taylor Dep. 61. *See also* Tr. of Prelim. Inj. Hearing 10/22/10 ("Tr.") at 101 ("wedge capital is . . . just a shorthand way of saying 'expected and projected capital expenditures, but not yet identified.'"); POB 19 (wedge capital is "capital for undetermined deployment").

[48] DAB 20-21; Sherman Dep. 125-27; Taylor Dep. 74.

[49] Deutsch Aff. Ex. 9, at TAY00002310.

result by eliminating IDR rights.[50] Baird also presented a valuation summary that included: (1) analysis of selected public general partnerships; (2) analysis of the implied general partner value of selected general partner transactions; (3) analysis of premiums paid for selected general partner transactions; and (4) a DCF analysis.[51] Defendants contend that these analyses resulted in valuations for Holdings as high as $45.55 per unit whereas the .77 exchange rate called for in the Proposed Transaction results in Inergy paying approximately $33.43 per unit.[52]

Based on these Baird analyses and Baird's willingness to provide an opinion that the terms of the Transaction were fair to Inergy unitholders, Taylor recommended that the Inergy Board approve the transaction. On August 7, the Board held a special meeting, which included only Taylor, Gfeller, and Krause because Sherman and Elbert recused themselves and did not attend.[53] The Board considered: (1) Atterbury's presentation on growth strategies if IDRs were eliminated; (2) Taylor's summary of the work undertaken by the ISC; (3) Baird's analyses and fairness opinion, including a discussion with Goot about those subjects; and (4) a summary of the terms of the Transaction by Ozenberger.[54] Based on those inputs, the Inergy Board concluded that the Proposed Transaction is fair

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[50] Brandon Aff. Ex. 25.

[51] *Id*. Ex. 11.

[52] DAB 23.

[53] Brandon Aff. Ex. 9, at INE 00013472.

[54] *Id*. at INE 00013472-73.

and reasonable to and in the best interests of Inergy.[55] On August 9, 2010, the parties announced the Proposed Transaction.

5. The Proposed Transaction

a. Resulting structure

Inergy, Inergy GP, Holdings, Holdings GP, and MergerCo[56] all are parties to the First Amended and Restated Agreement and Plan of Merger (the "Merger Agreement").[57] Through multiple steps, MergerCo will merge with and into Holdings, the separate existence of MergerCo will cease, and Holdings will survive as a privately-held limited partnership.[58]

After the Merger, Holdings GP will continue to be the sole general partner of Holdings. As the sole member of Inergy GP, Holdings will continue to have the authority to appoint members of the Inergy Board.[59] The five current members of the Inergy Board, Sherman, Elbert, Gfeller, Krause, and Taylor, are expected to continue as

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55 *Id*. at INE 00013476.

56 MergerCo, also known as NRGP MS, LLC, is a wholly owned subsidiary of Holdings GP that was formed solely for the purpose of consummating the Proposed Transaction. Proxy Statement at 84.

57 Brandon Aff. Ex. 2, Proxy Statement, at Ann. A-1 ("Merger Agreement"). "New NRGP LP" is also a party. *See* Proxy Statement at vii.

58 *Id*. at 91.

59 *Id*. at 150

directors after the merger. O'Brien was offered a position as a director of Inergy GP after the merger, but reportedly has not decided whether to accept that position.[60]

b. Terms of the Transaction[61]

Although the Merger Agreement contains numerous and complex terms, I have summarized only those most relevant to this action. Holdings will exchange with Inergy (1) all of its IDRs and (2) all of its ownership interests in IPCH and Inergy Partners. The IDRs will be cancelled and have no further force or effect, and the Inergy units owned by IPCH, approximately 789,202, and Inergy Partners, approximately 2,837,034, will be converted into Class A units of Inergy of equivalent value.[62] In exchange, Inergy will deposit with an exchange agent approximately 35.2 million Inergy units and approximately 11.6 million PIK units, discussed further below, to be distributed to Holdings' unitholders. Inergy also will assume all of Holdings' debt under its credit agreements. Each Holdings unitholder will be entitled to receive .77 Inergy units per Holdings common unit.

Approximately 24% of the nearly 47 million units to be issued by Inergy to Holdings' unitholders in the Proposed Transaction will be in the form of PIK units.

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60 *Id.* In addition, Brooks, Ozenberger, Atterbury, and certain other officers are expected to continue as executive officers of Inergy GP. *Id.*

61 *See* Proxy Statement at 91-92.

62 Class A units have the same rights and obligations as Inergy units except that Class A units will (1) have no voting rights and (2) not participate in the distributions or allocations from Inergy that are attributable to Inergy's interests in IPCH and Inergy partners. *Id.* at 160-61.

These units will be paid to PIK Recipients[63] as a portion of the merger consideration in lieu of Inergy units. PIK units will convert into Inergy units automatically on a one-for-one basis, with 50% of the outstanding PIK units converting into Inergy units following the payment date of the fourth quarterly distribution following the closing of the Transaction and the remaining PIK units converting into Inergy units following the payment date of the eighth quarterly distribution after the closing.[64] Any distributions owed to Class B unitholders prior to the conversion dates noted above will be paid with additional PIK units following the consummation of the Transaction.[65] Furthermore, anyone owed fractional PIK units will be paid with cash. Finally, PIK units have no voting rights and cannot be sold or traded until they convert into Inergy units.

The effect of these terms is that existing public Inergy unitholders will continue to own their existing Inergy units after the Transaction, but their ownership percentage will be reduced from approximately 92% of outstanding Inergy units to approximately 60.4%. The former Holdings unitholders will own the other approximately 39.6%.[66]

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63 The Proxy Statement defines PIK Recipients as "certain members of senior management and directors of Holdings GP and other beneficial owners of Holdings common units," namely, Sherman, Elbert, Brooks, Hughes, Gautreaux, Atterbury, and Paul E. McLaughlin. *See id*. at v & A-7.

64 *Id*. at 91, 161.

65 Proxy Statement at 161.

66 Brandon Aff. Ex. 1, Introductory Letter from Sherman re: Proxy Statement.

c. Voting

Under the terms of the Merger Agreement, Inergy unitholders are not entitled to vote on the Proposed Transaction.[67] Holdings unitholders, on the other hand, are scheduled to vote on the Transaction at a special meeting on November 2, 2010.[68] This vote is likely to be a mere formality as affiliated unitholders of Holdings, who collectively beneficially own approximately 58.1% of the outstanding Holdings units, have entered into a voting agreement that requires them, among other things, to vote all of their units in favor of the Proposed Transaction.[69]

6. The Partnership Agreement

A key document necessary to evaluate Plaintiffs' challenges to the validity of the Transaction is Inergy's Second Amended and Restated Agreement of Limited Partnership ("Partnership Agreement" or the "Agreement").[70] Several provisions of that Agreement are relevant to this litigation.

a. Modification of fiduciary duties

Section 7.10(d) purports to broadly limit the nature and extent of fiduciary duties owed by Inergy GP to Inergy under various provisions of the Agreement. It states:

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67 In this regard, Taylor relied on the advice of the ISC's counsel that an Inergy unitholder vote was not necessary. Taylor Dep. 103-04.

68 Proxy Statement at 5, 86.

69 *Id.* at A-1; Deutsch Aff. Ex. 171, at 13.

70 Brandon Aff. Ex. 2, P'ship Agreement.

> Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited to the extent permitted by law, as required to permit the General Partners to act under this Agreement or any other agreement contemplated by this Agreement and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by the Managing General Partner to be in, or not inconsistent with, the best interests of the Partnership.[71]

b. Standards governing conflict of interest transactions

The Agreement also has several provisions that prescribe standards of care for Inergy GP when it is confronted with a potential conflict of interest. First, § 7.9(a) states:

> [u]nless otherwise expressly provided in [the Agreement], whenever a potential conflict of interest exists or arises between a General Partner or any of its Affiliates, on the one hand, and [Inergy] . . . on the other, any resolution or course of action by a General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of [the] Agreement . . . or of any duty stated or implied by law or equity, if the resolution or course of action is, or by operation of this Agreement is deemed to be, fair and reasonable to the Partnership.[72]

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[71] *Id*. § 7.10(d). The Agreement defines Delaware Act as the "Delaware Revised Uniform Limited Partnership Act, 6 *Del C.* § 17-101, et seq., as amended, supplemented or restated from time to time, and any successor to such statute." *Id*. § 1.1.

[72] *Id*. § 7.9(a) (emphasis added). Under the Agreement, an "affiliate" is, "with respect to any Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with, the Person in question. As used herein, the term "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise." *Id*. § 1.1.

In taking action to determine whether a conflicted transaction is fair and reasonable to Inergy, Inergy GP is authorized to consider:

> (A) the relative interests of any party to such conflict, agreement, transaction or situation and the benefits and burdens relating to such interest; (B) any customary or accepted industry practices and any customary or historical dealings with a particular Person; (C) any applicable generally accepted accounting practices or principles; and (D) such additional factors as [Inergy GP] . . . determines in its **sole discretion** to be relevant, reasonable or appropriate under the circumstances.[73]

This section contains a proviso, however, stating that in resolving or executing a conflicted transaction, Inergy GP shall not be deemed to have breached the Partnership Agreement or "any standard of care or duty imposed herein or therein or, to the extent permitted by law, under the Delaware Act or any other law, rule or regulation" as long as it acts in the "absence of bad faith."[74]

In addition, § 7.6(e) prescribes standards of conduct for Inergy GP in the more specific context of an exchange of assets between Inergy, on the one hand, and Inergy GP, or the latter's affiliates, on the other. This section states: "Neither [Inergy GP] nor any of [its] Affiliates shall sell, transfer or convey any property to, or purchase any

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[73] *Id*. § 7.9(a) (emphasis added). The Agreement provides further that whenever the parties agree that Inergy GP is permitted to make a decision in its "sole discretion," Inergy GP "shall be entitled to consider only such interests and factors as it desires and shall have no duty or obligation to give any consideration to any interest of, or factors affecting, the Partnership, the Operating Company, any Limited Partner or any Assignee . . ." *Id*. § 7.9(b)(i).

[74] *Id*. § 7.9(a).

property from, [Inergy], directly or indirectly, except pursuant to transactions that are **fair and reasonable to [Inergy]** . . . ."[75] Unlike § 7.9(a), however, § 7.6(e) does not contain a proviso insulating Inergy GP from liability for breaching the Partnership Agreement or any other standard of care if it acts in the absence of bad faith.

c. Standards governing unitholder voting rights in the context of a merger

Section 14.1 of the Agreement permits Inergy to merge or consolidate with another entity, including a limited partnership.[76] Sections 14.3(a) and (b) provide that a proposed merger will be approved only after Inergy GP obtains the consent "of the holders of a Unit Majority."[77]

C. Procedural History

Plaintiffs' Complaint asserts seven direct counts on behalf of Inergy's common unitholders and one derivative count on behalf of Inergy. On September 29, 2010, I granted Plaintiffs motion for expedited proceedings for a preliminary injunction to prevent Defendants from consummating the Proposed Transaction and amending the Partnership Agreement. After expedited discovery, the parties now have briefed and

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[75] P'ship Agreement § 7.6(e) (emphasis added).

[76] *Id.* § 14.1.

[77] *Id.* § 14.3(a) & (b). Unit Majority "means, during the Subordination Period, at least a majority of the Outstanding Common Units (excluding Common Units owned by the General Partners and their Affiliates), voting as a class, and at least a majority of the Outstanding Senior Subordinated Units and Junior Subordinated Units, voting together as a single class, and thereafter, at least a majority of the Outstanding Common Units." *Id.* § 1.1.

argued Plaintiffs' motion for a preliminary injunction. This Memorandum Opinion reflects my ruling on that motion.

D. Parties' Contentions

Plaintiffs' myriad contentions can be broken down into two general claims. First, Plaintiffs accuse Defendants of violating § 14.3 of the Partnership Agreement by proceeding to consummate the Proposed Transaction without obtaining approval of a Unit Majority of Inergy common unitholders. Defendants argue that no vote of Inergy unitholders is necessary under § 14.3 because Inergy is not a constituent entity to the merger between MergerCo and Holdings and its involvement is limited to providing consideration for the Transaction.

Second, Plaintiffs contend that Defendants breached the Partnership Agreement by failing to treat Inergy unitholders fairly. They assert that the correct standard to apply to Inergy GP's conduct is the fair and reasonable standard provided in § 7.6(e) of the Agreement. Further, Plaintiffs argue that Inergy GP did not meet this standard because neither the sales process nor the sales price for the Proposed Transaction were fair to Inergy unitholders. Defendants dispute Plaintiffs' argument regarding the applicable standard of care. In any event, however, Defendants assert that both the process the ISC followed and the price on which Inergy GP ultimately settled satisfy any standard of care imposed by the Partnership Agreement.

II. ANALYSIS

A. Standard for a Preliminary Injunction

Plaintiffs seek to preliminarily enjoin the Proposed Transaction and the related amendment to the Partnership Agreement. To succeed in that effort, they must demonstrate: (1) a reasonable probability of success on the merits; (2) that they will suffer irreparable injury if an injunction does not issue; and (3) that the balance of the equities favors the issuance of the injunction.[78]

B. Likelihood of Success on the Merits

1. Applicable principles of contract interpretation

As this motion turns, in part, on whether Defendants are likely to have breached standards set forth in the Partnership Agreement, I look to traditional principles of contract interpretation to aid in my analysis. When interpreting a contract, the court's ultimate goal is to determine the shared intent of the parties.[79] "As part of this review, the court ascribes to the words their common or ordinary meaning and interprets them as would an objectively reasonable third-party observer."[80] Moreover, the court must "interpret contractual provisions in a way that gives effect to every term of the

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78 *E.g.*, *Revlon v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 179 (Del. 1986); *In re Dollar Thrifty S'holder Litig.*, 2010 WL 3503471, at *17 (Del. Ch. Sept. 8, 2010).

79 *See, e.g.*, *Concord Steel, Inc. v. Wilm. Steel Process. Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009), *aff'd*, 2010 WL 4054492 (Del. Oct. 18, 2010); *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008).

80 *Sassano,* 948 A.2d at 462.

instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."[81] It is well settled that courts will not look behind the terms and provisions of a clear and unambiguous contract.[82]

2. Whether the Partnership Agreement required an Inergy unitholder vote?

Plaintiffs contend that § 14.3 of the Partnership Agreement gives Inergy's unitholders the right to vote on the Proposed Transaction.[83] They argue that Inergy is a constituent party to the Transaction because, among other reasons, Defendants have referred to the Transaction as a merger between Holdings and Inergy in a number of internal communications and SEC and press documents.[84] Plaintiffs urge the Court to disregard the form of the merger between Holdings and MergerCo, Holdings GP's subsidiary formed to effect the merger, and to find, instead, that the substance of the Transaction is that Inergy is merging with Holdings.[85] Defendants disagree and assert

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[81] *Frontier Oil v. Holly Corp.*, 2005 WL 1039027, at *26 (Del. Ch. Apr. 29, 2005) (internal quotation marks omitted).

[82] *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1228 (Del. Ch. 2000).

[83] At the October 22, 2010 preliminary injunction hearing, Plaintiffs advanced an alternative argument that if the Court finds a vote is not required under § 14.3, Plaintiffs still are entitled to a vote under § 13.1(d) regarding amendments to the Partnership Agreement. Because Plaintiffs did not mention this argument in either their opening or reply briefs, they have waived it as a potential ground for a preliminary injunction. *See, e.g.*, *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *King v. VeriFone Hldgs., Inc.*, 994 A.2d 354, 360 n.21 (Del. Ch. 2010). Accordingly, I have not addressed further Plaintiffs' argument under § 13.1(d).

[84] POB 24-25.

[85] PRB 9-11.

that § 14.3 does not provide for a unitholder vote because Inergy is not a constituent party of the merger between MergerCo and Holdings and Inergy's involvement in the Transaction consists solely of issuing securities and assuming some of Holdings' debt as part of the consideration for the deal.[86]

The Delaware Revised Uniform Limited Partnership Act ("DRULPA") § 17-211(b) provides that one or more domestic limited partnerships may merge with or into one or more business entities, including another limited partnership.[87] Under the statutory scheme, limited partners must approve such a transaction unless the relevant partnership agreement provides otherwise.[88] Here, Article XIV of the Partnership Agreement is directly on point and renders DRULPA's default rules inapplicable. Section 14.1 states that "[Inergy] may merge or consolidate with one or more . . . unincorporated businesses, including a . . . limited partnership . . . pursuant to a written agreement of merger or consolidation (" *Merger Agreement* ") in accordance with this Article XIV."[89] Section 14.3(a) and (b) mandate that Inergy put a proposed merger or consolidation to a vote of its unitholders and obtain approval of a Unit Majority, unless the terms of § 14.3(d) are satisfied.[90]

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86 DAB 35.

87 6 *Del. C.* § 17-211(b).

88 *Id.*

89 P'ship Agreement § 14.1.

90 To satisfy the § 14.3(d) exception, Inergy would need to prove that: "(i) the Managing General Partner has received an Opinion of Counsel that the merger or

In this case, the parties dispute whether Inergy merged with anyone within the meaning of the Partnership Agreement. In that regard, I find that § 14.1's use of the active verbs "merge" and "consolidate" unambiguously signifies that Inergy itself must be a constituent to a merger or consolidation for § 14.1 to apply. Thus, whether Inergy unitholders are entitled to vote on the Transaction turns on whether Inergy is actively "merging" or "consolidating" with another entity so that it is a constituent party to such merger or consolidation. Though Plaintiffs make much of the fact that Inergy has characterized the Proposed Transaction as a "merger" between Inergy and Holdings in various public statements,[91] the parties' use of such labels is not dispositive. Rather, this Court independently must examine the form and the substance of the Transaction to determine whether Inergy is merging with Holdings within the meaning of § 14.3 of the Partnership Agreement.[92]

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conveyance . . . would not result in the loss of the limited liability of any Limited Partner . . . or cause the Partnership . . . to be treated as an association taxable as a corporation or otherwise to be taxed as an entity for federal income tax purposes . . . (ii) the sole purpose of such merger or conveyance is to effect a mere change in the legal form of the Partnership into another limited liability entity and (iii) the governing instruments of the new entity provide the Limited Partners and the General Partners with the same rights and obligations as are herein contained." Here, because neither party has relied upon § 14.3(d), I assume it is not relevant.

[91] See POB 25.

[92] *See EDIX Media Gp., Inc. v. Mahani*, 2006 WL 3742595, at *9 n.40 (Del. Ch. Dec. 12, 2006) ("[w]hatever the industry terminology . . . this Court looks to the substance of the transaction, not its label.").

I begin with the form of the Transaction. The Merger Agreement makes clear that Inergy is a party to that Agreement but is not a constituent of the merger between Holdings and MergerCo. Section 2.1(a) states, in pertinent part:

> MergerCo shall merge with and into Holdings, the separate existence of MergerCo shall cease and Holdings shall survive and continue to exist as a Delaware limited partnership . . . such that immediately following the Merger, Holdings GP will continue to be the sole general partner of Holdings and Holdings GP and New NRGP LP will remain as the only holders of limited partner interests in Holdings in proportion to their respective NRGP Nonparticipating Limited Partner Units.

Thus, the constituent parties to the merger are Holdings and MergerCo, and not Inergy. Inergy's role is to provide consideration, including issuing to Holdings approximately 35 million new common units of Inergy and 11.6 million PIK units, providing cash in lieu of fractional units, and assuming Holdings' debts under certain credit agreements.[93]

That MergerCo is an intermediary vessel in this transaction where significant consideration passes between Holdings and Inergy does not make Inergy a constituent to the merger between Holdings and MergerCo. In the corporate context, a parent corporation can acquire a target corporation by setting up a subsidiary to merge with the target – a practice frequently referred to as a triangular merger. The subsidiary usually has no assets other than the merger consideration to be paid to the target. The effect of this arrangement is that the parent does not become a constituent to the merger between

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[93] *Id.* § 3.1(b).

the target and the subsidiary.[94] More importantly, Delaware law recognizes that stockholders of the parent corporation in this arrangement generally are not entitled to vote on the merger.[95] The Proposed Transaction, though structured slightly differently because it involves two limited partnerships, is similar in form to a triangular merger in the corporate context. Inergy is acquiring Holdings' assets, namely its IDRs, without having to merge with Holdings. Inergy is not a constituent to the merger between MergerCo and Holdings because its involvement is limited to that of a third party to the Merger Agreement whose obligations are to transfer consideration for the Transaction.[96]

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[94] *See, e.g.*, 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 9.7, at 9-11 (3d ed. 1998); 2 David A. Drexler, Lewis S. Black & A. Gilchrist Sparks, *Delaware Corporation Law and Practice* § 35.04[1], at 35-9 (2002) (explaining that in a triangular merger, the parent is a third party to the merger agreement, but not a constituent, and agrees to issue the securities or cash necessary to complete the transaction).

[95] *See, e.g.*, *Lewis v. Ward*, 2003 WL 22461894, at *4 n.18 (Del. Ch. Oct. 29, 2003) ("In a triangular merger, the acquiror's stockholders generally do not have the right to vote on the merger, nor are they entitled to appraisal."), *aff'd*, 852 A.2d 896 (Del. 2004); Balotti & Finklestein, *supra* note 94, at § 9.7 (noting that stockholders of the parent do not have a right to vote because the parent is not a constituent corporation to the merger in a triangular merger); *see also* Drexler, Black & Sparks, *supra* note 94, at § 35.04[2] (noting that Delaware General Corporation Law "DGCL" § 251(c) requires a vote of each constituent's stockholders entitled to vote).

[96] While the conceptual underpinnings of Delaware's corporation and limited partnership laws are different, *see Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *19 (Del. Ch. Sept. 14, 2007), it is sometimes useful in analyzing a limited partnership issue to consider the corporate analogue, if one exists. DRULPA grants parties "tremendous flexibility in structuring a merger or consolidation pursuant to the terms of the parties' business understanding." *Id.* at *17. Because DRULPA generally affords limited partnerships more contractual flexibility than does the DGCL, it is reasonable, in the absence of a clear

Inergy itself could have merged with Holdings and provided its unitholders with a vote but, instead, it chose to provide consideration for a merger between Holdings and MergerCo, a form of merger that has a "myriad of legitimate justifications."[97] This flexibility is explicitly sanctioned under DRULPA § 17-1101(h), which recognizes the applicability in the limited partnership context of the settled Delaware corporation law principle of independent legal significance.[98] This principle recognizes that an action taken pursuant to one section of DRULPA is legally independent of and its validity does not depend on other unrelated sections under which the same final result could be reached by different means.[99] That Inergy could have effected a transaction with Holdings in such a way as to confer the authority to vote on its unitholders does not mean it had to do so.

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contractual provision to the contrary, to infer that if the DGCL recognizes that stockholders of a parent in a triangular merger are not entitled to a vote, unitholders of an equivalent non-constituent MLP similarly are not entitled to vote on a merger between an MLP's general partner and a merger sub.

[97] *See Lewis*, 2003 WL 22461894, at *4.

[98] Del. H.B. 142 syn., 145th Gen. Assem. (2009) ("This section amends § 17-1101 of [DRULPA] to clarify that the doctrine of independent legal significance, as developed in Delaware corporation law, applies in the context of Delaware limited partnerships. The amendment is not intended to limit development or application, with respect to Delaware limited partnerships, of the doctrine of independent legal significance as developed in cases arising under Delaware corporation law."). This section states: "Action validly taken pursuant to 1 provision of this chapter shall not be deemed invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to some other provision of this chapter but fails to satisfy 1 or more requirements prescribed by such other provision." 6 *Del. C.* § 17-1101(h).

[99] *See id.*; Balotti & Finklestein, *supra* note 94, at § 9.4.

In addition, nothing about the substance of the transaction persuades me to disregard the parties' chosen form and the attendant voting consequences of that choice. Inergy unitholders will be Inergy unitholders after consummation of the Proposed Transaction, just as they were before it. Moreover, while their percentage ownership will be less than it was before the Transaction closes, the purported class of Inergy unitholders still will hold a majority of Inergy's public units after its consummation. Thus, having considered the substance of the Transaction, I find no reason to disregard its form.

In summary, taking into account both the form and substance of the Proposed Transaction, I find that Inergy was not a constituent to the merger between Holdings and MergerCo and, as such, was not required to put the Merger Agreement to a vote of Inergy unitholders under § 14.3 of the Partnership Agreement. The record before me indicates that Inergy's role in effecting this quasi-triangular merger was to issue securities, in varying amounts and kinds, to Holdings unitholders and to assume certain of Holdings' debts. Under §§ 5.6(a) and 7.1(a)(i), Inergy GP has the authority to take these actions without an Inergy unitholder vote.[100] Therefore, Plaintiffs are unlikely to prevail on the merits of their claim that Inergy unitholders are entitled to vote on the Proposed Transaction.

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[100] Section 5.6(a) permits Inergy to issue additional "Partnership Securities" for any purpose at any time in its sole discretion without the approval of Inergy unitholders. P'ship Agreement § 5.6(a). Similarly, § 7.1(a)(i) expressly authorizes Inergy to assume "indebtedness" if it deems it necessary or appropriate in its sole discretion to do so. Under this authority, Inergy could contract to assume Holdings' debt as part of the consideration paid to Holdings to cancel the latter's IDRs without requiring an Inergy unitholder vote. *Id.* § 7.1(a)(i).

3. Does the Proposed Transaction breach of the Partnership Agreement's standards of care?

a. MLPs and the freedom of contract

MLPs are creatures of Delaware limited partnership law, as specifically codified in DRULPA. DRULPA explicitly acknowledges that its provisions seek "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."[101] One of the most important examples of this principle is § 1101(d), which permits an MLP agreement to expressly "restrict[] or eliminate[]" any duties, including fiduciary duties, a partner may owe to the MLP or other limited partners.[102] While the DGCL generally forbids a corporate board of directors from contractually modifying or restricting their fiduciary duties (except the duty of care),[103] § 1101(d) allows MLPs to eliminate completely a general partner's fiduciary duties to common unitholders, subject only to the limited protections of the covenant of good faith and fair dealing.[104]

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[101] 6 *Del. C.* § 17-1101(c).

[102] *Id*. § 17-1101(d). This provision states: "To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the partnership agreement; provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing." *Id.*

[103] *See* 8 *Del. C.* § 102(b)(7); *see also* John Goodgame, *Master Limited Partnership Governance*, 60 Bus. Law. 471, 486 (2005).

[104] *See* 6 *Del. C.* § 1101(d); *Lonergan v. EPE Hldgs., LLC*, 2010 WL 3987173, at *7-8 (Del. Ch. Oct. 11, 2010).

Because DRULPA affords an MLP this freedom, Delaware courts look to the MLP agreement for the standard of review it should apply in evaluating whether a general partner has breached the MLP agreement or any duty related to it. In particular,

> DRULPA's basic approach is to permit partners to have the broadest possible discretion in drafting their partnership agreements and to furnish answers only in situations where the partners have not expressly made provisions in their partnership agreement' or 'where the agreement is inconsistent with mandatory statutory provisions.' In those situations, a court will 'look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence. But, if the limited partnership agreement unambiguously provides for fiduciary duties, **any claim of a breach of a fiduciary duty must be analyzed generally in terms of the partnership agreement**.[105]

Thus, in construing an MLP agreement, "principles of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain."[106]

b. What standard of care governs the Proposed Transaction?

Here, the Partnership Agreement expressly replaces common law fiduciary duties and other standards of care with specific standards set forth in the Agreement.[107] Indeed,

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[105] *Gotham P'rs, L.P. v. Hallwood Realty Pr's, L.P.*, 817 A.2d 160, 170-71 (Del. 2002) (internal quotation marks omitted) (emphasis added).

[106] *See, e.g.*, *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *12 (Del. Ch. Sept. 14, 2007) ("Only 'if the partners have not expressly made provisions in their partnership agreement or if the agreement is inconsistent with mandatory statutory provisions . . . will [a court] look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence.'"); *Brickell P'rs v. Wise*, 794 A.2d 1, 4 (Del. Ch. 2001).

[107] *See generally* P'ship Agreement Art. VII.

Article VII of the Agreement contains a number of standards of care that arguably relate to this litigation. First, § 7.1(a) broadly grants Inergy GP the power to manage the business and affairs of Inergy in its "sole discretion."[108] Next, § 7.6(e) provides that Inergy GP and its affiliates may not sell, transfer, or convey any property to, or purchase any property from, Inergy unless pursuant to transactions that are "fair and reasonable."[109] Another provision, § 7.9(a), states that, unless specified elsewhere in the Agreement, any action or resolution of a conflict of interest that arises between Inergy GP (or its affiliates) and Inergy will not breach the Agreement if it is or is deemed to be "fair and reasonable" to Inergy. But, a proviso to § 7.9(a) states that actions taken by Inergy GP will not breach the Agreement if Inergy GP acted in the "absence of bad faith." Finally, § 7.10(d) states that "[a]ny standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited to the extent permitted by law, as required to permit the General Partners to act under this Agreement . . . **so long as such action is reasonably believed by the Managing General Partner to be in, or not inconsistent with, the best interests of the Partnership.**"[110]

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108 *Id.* § 7.1(a); *see also supra* note 73.

109 P'ship Agreement § 7.6(e). Section 7.6(e) identifies at least four safe harbors which Inergy GP could use to have a covered transaction deemed to be fair and reasonable. There is no dispute, however, that in this case Inergy GP did not qualify for safe-harbor treatment under § 7.6(e) or the similar safe harbors specified in § 7.9(a).

110 *Id.* § 7.10(d) (emphasis added).

Preliminarily, I note that the general grant of authority to Inergy GP to manage the business of Inergy in § 7.1(a) does not provide the applicable standard. Neither party seriously advances that provision as the governing standard and other, more specific sections of Article VII apply more directly to this case.[111]

The parties dispute, however, which of the more specific provisions applies. Plaintiffs argue that because the Proposed Transaction involves the exchange of IDRs and other property between Inergy and Inergy GP's affiliate, Holdings, this case is governed by § 7.6(e)'s fair and reasonable standard, which Plaintiffs argue is objective and akin to entire fairness.[112] Defendants contend that § 7.6(e) is irrelevant to this action because the securities to be exchanged in the Transaction are personal property of the unitholders and not property of Inergy or Holdings. Instead, they argue that § 7.9(a) governs the "conflict of interest existing in the [Proposed Transaction]."[113] In the alternative, Defendants assert that even if the Court applies § 7.6(e), it must do so in light of § 7.10(d)'s "reasonable belief" standard.

As to this last point, I agree with Defendants. Section 7.10(d) expressly and unambiguously modifies, waives, and limits *any* standard of care and duty imposed by

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111 *See Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370, 387-88 (Del. Ch. 2010) (noting that a similar interpretation of an analogous provision concerning a general partner's authority "comports with the interpretative principle that a more specific provision prevails over a more general one").

112 POB 25-27 & n.13.

113 DAB 38.

the Agreement, including § 7.6(e). Because § 7.6(e) provides a standard of care,[114] I must read it in light of § 7.10(d) or risk violating the settled principle of contract interpretation that a court must give effect to every provision of the contract and, if possible, reconcile all of the provisions as a whole.[115] Thus, under the standard of review imposed by § 7.6(e), any transaction that comes within its ambit must be "fair and reasonable" subject to the proviso that such transaction will not constitute a breach of the Agreement so long as Inergy GP reasonably believed it was in or not inconsistent with the best interests of Inergy. Together, §§ 7.6(e) and 7.10(d) do not permit the Court to substitute its own judgment of what is "fair and reasonable" for Defendants', but rather authorize the Court to conduct a review of whether Inergy GP and its ISC believed their actions in approving the Proposed Transaction were in the best interests of Inergy and whether that belief was reasonable.

At this preliminary stage of this action, I do not need to decide as a matter of law which of these two standards, § 7.9(a) or § 7.6(e) in light of § 7.10(d), applies because I find that Plaintiffs have not shown a reasonable likelihood of success under even the plaintiff-friendlier standard of §§ 7.6(e) and 7.10(d).[116] Thus, for purposes of Plaintiffs'

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[114] *See Brinckerhoff*, 986 A.2d at 389 (noting that a substantially identical provision in the MLP agreement at issue there was "an 'express standard' that replaces default fiduciary rules").

[115] *See Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *26 (Del. Ch. Apr. 29, 2005).

[116] According to Defendants, actions taken by Inergy GP would not breach the Partnership Agreement under § 7.9(a) as long as it acted in an absence of bad

motion for a preliminary injunction, I assume that the Transaction is governed by § 7.6(e) and will evaluate Defendants' actions in light of § 7.10(d) (the "Governing Standard" or the "Standard") to determine whether Inergy GP and its ISC reasonably believed the actions they took were in the best interests of Inergy.

c. Did the Proposed Transaction meet the Governing Standard?

1. The Transaction process

Having carefully considered the record, I find that none of Plaintiffs' arguments, alone or cumulatively, demonstrate a likelihood that they will succeed in showing that Inergy GP and the ISC did not reasonably believe their actions in negotiating and approving the Proposed Transaction were in the best interests of Inergy. Plaintiff first argues that Inergy GP's decision to appoint a one-man ISC shows a bad faith attempt to eschew proper procedural safeguards.[117] This Court's entire fairness cases in the corporate context have recognized that it is often preferable to create a special committee with more than one director, but that doing so is not required to find that the special committee properly carried out its duties.[118] For most of the transactions Inergy enters

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faith. This "absence of bad faith" standard arguably is more lenient than §§ 7.6(e) and 7.10(d)'s requirement that Inergy GP had to have reasonably believed its actions were in the best interest of Inergy. In the circumstances of this case, however, I need not decide whether § 7.6(e) applies to this type of transaction and whether it, in conjunction with § 7.10(d), trumps § 7.9(a) as the applicable standard of review.

117 POB 25.

118 *See Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006) ("The court necessarily places more trust in a multiple-member committee than in a committee

into, its Board is independent because four out of its five directors are non-employee outside directors. The Proposed Transaction, however, represents an exception and the reason is readily apparent. Only one director, Taylor, arguably was independent in the Transaction because he was the only director who owned no Holdings units and had no material professional or social relationship with Holdings. Therefore, I find nothing suspicious about Inergy GP's decision to appoint a one-man ISC.

Next, Plaintiffs argue that Taylor did not properly understand the ISC's broad mandate and failed to consider alternatives to the Proposed Transaction.[119] Generally, a special committee should be given a clear mandate and members of the committee should be able to articulate the extent of their authority to demonstrate that they understand the committee's powers.[120] Moreover, this Court accords more weight to special committees that are given the power to say "no" to a potential transaction.[121] Here, Plaintiffs have not shown a likelihood that Taylor failed to understand the ISC's broad authority[122] or failed meaningfully to consider alternatives. Taylor understood that he represented

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where a single member works free of the oversight provided by at least one colleague.").

[119] POB 27.

[120] *See, e.g.*, *Gesoff*, 902 A.2d at 1146-47; *In re Tele-Commc'ns, Inc. S'holders Litig.*, 2005 WL 3642727, at *9 (Del. Ch. Dec. 21, 2005).

[121] *See Gesoff*, 902 A.2d at 1146-47.

[122] The Inergy Board granted the ISC relatively broad authority as regards a possible transaction. This authority expressly included the power to recommend to the Inergy Board not to enter into the Proposed Transaction. *See* Brandon Aff. Ex. 8, at INE 00021929.

Inergy and considered whether to enter into the Proposed Transaction and, if so, on what terms.[123] Moreover, while he apparently understood the ISC's mandate to cover only strategies to eliminate IDRs, Taylor considered other methods of addressing Inergy's IDR problem, including potential IDR buybacks, but concluded the Proposed Transaction offered a solution that was in the best interest of Inergy unitholders.[124] In addition, although Taylor received a proposal term sheet from Inergy management, he initiated negotiations concerning several important features of the Transaction, including PIK units and the exchange ratio, that were not developed in the draft term sheet.[125]

Plaintiffs also argue Taylor selected financial and legal advisors who were conflicted and unable to render independent advice.[126] Plaintiffs focus on Taylor's financial advisor, Goot, arguing that Goot's longstanding relationship with Sherman prevented him from rendering a fair assessment of the Proposed Transaction. Plaintiffs' criticisms are, to an extent, understandable. Goot had prior dealings with Sherman and Inergy GP, including having discussed with Sherman a similarly structured transaction as

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[123] Taylor Aff. ¶ 11 ("I was fully prepared not to do [the Proposed Transaction] unless I was fully satisfied that the terms of such [deal] would be in the best interests of the Unaffiliated Limited Partners.").

[124] Taylor Dep. 65-66. Plaintiffs also argue that Taylor failed to consider an alternative transaction with Company A. *See* Brandon Aff. Ex. 59. But, Taylor confirmed that the ISC never received a proposal from Company A so he did not have reason to consider any such offer. Taylor Aff. ¶ 10.

[125] Brandon Aff. Ex. 32.

[126] POB 28. Plaintiffs do not challenge the competence or qualifications of the advisors Taylor selected to work on the Proposed Transaction.

recently as February 2010.[127] Moreover, Goot was on a short list of advisors that management suggested to the ISC, and Taylor, in turn, hired him without interviewing any other investment banker.[128] Yet, these facts do not show that Taylor's decision to retain Goot and his firm, Baird, to advise the ISC was unreasonable or not in the best interests of Inergy. There is no indication in the record that Goot, or Baird for that matter, was engaged actively at the time with Inergy or Sherman on any other transaction. Taylor did not believe that Baird had previously worked with Inergy. Moreover, while he knew Goot had done work for Inergy in the past, Taylor selected him because he regarded Goot's work on a 2005 ISC regarding another MLP transaction to have been "stellar" and believed Goot again could focus solely on the interests of Inergy unitholders.[129] In view of the highly complex and unique nature of MLPs, Plaintiffs have not shown that it was unreasonable for Taylor to believe he needed a financial advisor with Goot's expertise in the field relevant to the transaction.

Similarly, Plaintiffs failed to cast doubt on the reasonableness and good faith nature of Taylor's decision to retain HB LLP. While HB LLP had done some work for Inergy in the past, Taylor knew this and determined that such work was immaterial and not likely to render HB LLP biased in favor of management.[130] Taylor also thought

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[127] Deutsch Aff. Ex. 166.

[128] Brandon Aff. Ex. 29.

[129] Taylor Aff. ¶ 13

[130] *Id.* ¶ 12.

highly of HB LLP based on their work for him on a prior ISC and, as with Baird, he decided to retain counsel experienced in the MLP world. Ideally, Taylor might have retained more independent advisors, but Plaintiffs have not shown that they are likely to succeed in proving that the ISC's advisors lacked independence or that Taylor did not act in good faith or have a reasonable belief that hiring Baird and HB LLP was in Inergy's best interests.

Plaintiffs also attempt to demonstrate Taylor's bad faith by pointing to talks he had with Sherman during the ISC's negotiating process. The record reflects, however, that Taylor sought out a meeting with Sherman in late July so that, without divulging the specifics of the negotiating process, Taylor could determine whether the ISC's wedge capital assumptions were something management could achieve.[131] Taylor did not rely on Sherman's input for these assumptions as they already had been certified by Baird and the ISC.

Finally, Plaintiffs point to Taylor's decision to avoid a unitholder vote on the Proposed Transaction as evidence of his bad faith.[132] As discussed *supra*, Plaintiffs are not likely to succeed in showing that an Inergy unitholder vote is required. Moreover, Taylor was advised by competent counsel that no vote is legally required.[133] Because

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[131] Sherman Dep. 125-27; Taylor Dep. 74.

[132] POB 30.

[133] Taylor Dep. 103.

Taylor reasonably believed his legal counsel was competent, his reliance on their opinion is conclusively presumed to be in good faith under the Partnership Agreement.[134]

Taylor, relying on competent financial and legal advisors, understood his role and authority as the ISC and conducted approximately thirteen ISC meetings before the Inergy Board approved the Transaction.[135] In so doing, he considered Baird's analyses and possible alternatives to entering into the Transaction.[136] After considering the ISC's work, Baird's analyses, and a host of other factors, three outside Inergy directors unanimously approved the Transaction, with Sherman and Elbert having recused themselves.[137] Although Taylor and the Inergy Board apparently pursued a less-than-perfect process, Plaintiffs have not shown they are likely to succeed in establishing that Taylor and the Inergy Board did not reasonably believe their actions were in Inergy's best interests.

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[134] P'ship Agreement § 7.10(b) ("A General Partner may consult with legal counsel . . . and other consultants and advisers selected by it, and any act taken or omitted to be taken in reliance upon the opinion (including an Opinion of Counsel) of such Persons as to matters that such General Partner reasonably believes to be within such Person's professional or expert competence shall be conclusively presumed to have been done or omitted in good faith and in accordance with such opinion.").

[135] *See* Brandon Aff. Exs. 13-25.

[136] *Id*. Ex. 25.

[137] *Id*. Ex. 9.

2. The transaction price

Plaintiffs also attack the Transaction's price in a number of respects. First, they argue that the Transaction calls for Inergy to pay an excessive exchange premium, when, in fact, there should not be any premium at all.[138] I disagree with the latter contention and find that Taylor reasonably could have believed an exchange premium was appropriate under the circumstances. Both parties acknowledged that a primary purpose of the Transaction was to eliminate Inergy's burdensome IDRs.[139] As Vice Chancellor Laster recently noted, IDRs are often a helpful means of aligning the general partner's interest with public unitholders, but they also may have significant disadvantages.[140] As the Court explained in *Lonergan*, IDRs limit cash flow available to common unitholders, which reduces the attractiveness of common units, and, in turn, results in a lower trading price and a less attractive source of "acquisition currency."[141] Thus, Inergy reasonably could have believed that it would benefit[142] from the elimination of IDRs which, like synergies in a corporate merger, can justify a premium. In addition, O'Brien, Taylor's counterpart on the HCC, indicated that from Holdings' perspective any deal realistically

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[138] POB 31.

[139] Tr. at 116.

[140] *Lonergan v. EPE Hldgs., LLC*, 2010 WL 3987173, at *2 (Del. Ch. Oct. 11, 2010).

[141] *Id*.

[142] The potential benefits include a lower cost of capital and a higher growth rate over time. Sherman Dep. 125-26.

would need to include a premium.[143] Thus, Inergy probably would have to pay a premium in order to eliminate the IDRs held by Holdings.

Turning to whether the ISC reasonably believed the Proposed Transaction's .77 exchange ratio was in Inergy's best interests, Plaintiffs argue that Baird's financial analyses are flawed and, if properly conducted, would have demonstrated that a .61-.69 range is fair.[144] In support of this proposition, Plaintiffs rely on the analysis of their own expert, Gilbert E. Matthews. Matthews, however, did not independently value Inergy. Instead, he merely evaluated the work done by Baird and Tudor, Pickering, Holt & Co. Securities, Inc. ("Tudor"), the HCC's financial advisor.[145] Matthews also conducted his review of Baird's work in a somewhat rushed fashion and admitted that he did not have the time to conduct as comprehensive a review as he would have liked.[146] In addition, based on the other evidence of record, Matthews' decision to discount the value of eliminating IDRs in connection with his analysis of a fair exchange ratio[147] seems questionable.

Moreover, Matthews' criticisms of Baird's analyses appear to stem from differences in opinion as to the relative merits of certain valuation methods rather than

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[143] Dep. of Richard T. O'Brien ("O'Brien Dep.") 103; Taylor Dep. 69-70.

[144] POB 31; Deutsch Aff. Ex. 170, at 1.

[145] *Id.*; Matthews Dep. 67.

[146] Matthews Dep. 67, 85.

[147] *Id.* at 28, 46.

flaws in Baird's calculations. Baird performed numerous analyses, including analyses based on DCF, equity cost of capital, a comparison of selected general partner acquisitions, comparable general partners, premiums paid, and accretion/dilution.[148] Rather than point out material flaws in these analyses, Matthews' report highlights minor quibbles with them. For example, Matthews claims that Baird should have compared the DCF values it calculated for Inergy with those of Holdings and should have chosen different terminal values to do so.[149] Matthews also claims that Baird should have calculated the mean of its EBITDA multiples for its selected acquisitions analysis using a harmonic mean, rather than an arithmetic mean.[150] Furthermore, Matthews criticized Baird for conducting a premiums paid analysis because that is a "conceptually unsound and statistically flawed" type of analysis, which is less informative than a contribution analysis.[151]

Plaintiffs have not adduced, however, convincing evidence that Baird employed methods that are not generally accepted in the valuation field.[152] Indeed, none of

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[148] Brandon Aff. Ex. 18, at 2.

[149] Deutsch Aff. Ex.170, at 9-11.

[150] *Id.* at 11. Matthews also alleges that Baird should not have used Buckeye GP Holdings LP in its comparable general partner analysis because data related to this LP was tainted by the announcement of a merger. *Id.*

[151] Deutsch Aff. Ex. 170, at 11, 16.

[152] *Cf. In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) ("There are limitless opportunities for disagreement on the appropriate valuation methodologies to employ, as well as the appropriate inputs to deploy within those

Matthews' criticisms of Baird's work lead me to believe that Plaintiffs are likely to prove that Taylor did not reasonably rely on Baird's opinions. As such, I accord Matthews' report limited weight in assessing whether Taylor formed a reasonable belief that .77 was a rate in the best interests of Inergy's unitholders.

The record reflects that Taylor and O'Brien engaged in serious, arms-length negotiations over a number of weeks. They exchanged multiple offers and counteroffers of exchange rates ranging from .75 to .8, eventually settling on .77, which Taylor's financial advisor certified was a fair rate. As Plaintiffs noted at the preliminary injunction hearing, the size of the Transaction makes even a slight change in the exchange rate significant.[153] Taylor successfully negotiated with O'Brien a decrease in that rate from .8 to .77, which represented a meaningful reduction in the premium for Inergy's benefit. Having considered these facts, I find that Plaintiffs are not likely to succeed in showing Taylor and Inergy GP did not reasonably believe the price Taylor negotiated with O'Brien was in the best interest of Inergy.

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methodologies. Considering this reality, quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.").

[153] Tr. at 57.

C. Irreparable Harm

A preliminary injunction is an extraordinary remedy that should not be issued in the absence of a clear showing of imminent irreparable harm to the plaintiff.[154] To make such a showing, a plaintiff must demonstrate harm for which he has no adequate remedy at law and that a refusal to issue an injunction would be a denial of justice.[155] The alleged harm must be imminent and genuine, as opposed to speculative.[156] For example, this Court has found a threat of irreparable harm "in cases where an after-the-fact attempt to quantify damages would 'involve [a] costly exercise[ ] in imprecision' and would not provide full, fair, and complete relief for the alleged wrong."[157]

Plaintiffs allege two sources of irreparable harm. First, they claim that Inergy unitholders would be irreparably harmed if they are deprived of a vote on the Proposed Transaction to which they are entitled. In the corporate context, the stockholder franchise is a central tenant of corporate governance[158] and this Court routinely has found irreparable harm in instances where stockholders were afforded a vote subject to

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[154] *See Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *4 (Del. Ch. Mar. 11, 1999) (noting that a preliminary injunction should be issued only with the full conviction on the part of the court of its urgent necessity).

[155] *See Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002).

[156] *See id.*

[157] *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010).

[158] *See Blasius Indus., Inc. v. Atlas Corp.,* 564 A.2d 651, 659 (Del. Ch. 1988) (noting that the "shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests").

insufficient disclosures because a tainted voting process would render the vote uninformed and meaningless.[159] Thus, by extension, if stockholders were wholly deprived of a rightful vote, irreparable harm would result. Here, however, I have found that Plaintiffs are unlikely to succeed on their claim that they are entitled to vote on the Proposed Transaction under § 14.3 of the Partnership Agreement. Thus, Plaintiffs cannot establish irreparable harm under this theory.

Plaintiffs also allege that because the Transaction price is not fair and reasonable, it would be impossible to award money damages to make Inergy unitholders whole.[160] In particular, they argue that since distributions to current Inergy unitholders may be affected by the issuance of additional units, "[u]nscrambling" the distribution allocations would be a near impossible task.[161] Plaintiffs' claims regarding an unfair exchange rate and price, however, essentially relate to value. No evidence has been presented suggesting that Defendants will be difficult to find or unable to respond to a judgment or

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[159] *See, e.g.*, *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1262 (Del. Ch. 2003) ("The threat of an uniformed stockholder vote constitutes irreparable harm."); *In re IXC Commc'ns, Inc. v. Cincinnati Bell, Inc.*, 1999 WL 1009174, at *10 (Del. Ch. Oct. 27, 1999) ("Certainly the irreversible nature of a shareholder vote on a merger supports the argument that any possible harm caused by a tainted voting process would be irreparable.").

[160] PRB 33. Among other things, Plaintiffs argue that if this Court later determines that the Transaction was invalid, it will be difficult to ascertain which Inergy unitholders received their units at an excessive price and from whom a remedy should be sought by virtue of the fact that invalid Inergy units can be immediately sold on the open market. *Id*. at 34.

[161] *Id*. at 35.

even that they are unlikely to continue to be Inergy unitholders for at least a year or two. As such, it is likely that these claims can be adequately remedied by money damages or the issuance of additional stock if Plaintiffs ultimately succeed on the merits of their claims at trial.[162]

D. Balance of the Equities

In addition to considering the relevant showings of a reasonable likelihood of success on the merits and an imminent threat of irreparable harm, a court will not issue a preliminary injunction unless the plaintiff proves that "this Court's failure to grant the injunction will cause [that party] greater harm than granting the injunction will cause [the other party]."[163] Thus, I also must engage in a pragmatic balancing of the equities, for which I have considerable discretion, based on the facts of this case.[164]

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[162] *See, e.g.*, *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *17 (Del. Ch. June 19, 2001) ("On the other hand, because of Fitzgerald's extensive argument about fair price and the entire fairness standard with an emphasis on the fair price component, it is reasonable to infer that the ultimate principal concern will be one of value. Damages can be awarded and, indeed, have been awarded after a trial that followed denial of a preliminary injunction application addressed to halting a tender offer."); *Chromalloy S'holders Litig.*, 1986 WL 14524, at *1064 (Del. Ch. Dec. 17, 1986) ("If the plaintiffs are ultimately able to show that the exchange ratio is unfair, Sun will be fully able to pay any money judgment entered or will be in a position to issue additional Sun stock to the former Chromalloy stockholders.").

[163] *See, e.g.*, *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2367669, at *5 (Del. Ch. June 7, 2010); *Braunschweiger v. Am. Home Shield Corp.*, 1989 WL 128571, at *1008 (Del. Ch. Oct. 26, 1989).

[164] *In re Holly Farms Corp. S'holders Litig.*, 564 A.2d 342, 348 (Del. Ch. 1989).

Here, the equities are essentially in equipoise. Plaintiffs argue that the equities favor their position because they will be diluted and their units will lose value and they will assume large debts of Holdings and face negative tax consequences. Yet, as explained *supra* Part II.C, these concerns can be ameliorated with money damages or another equitable remedy. Defendants contend that the equities favor their position because delaying the closing of the Transaction will cause them to lose the ability to engage in significant future strategic acquisitions and they will lose a "certainty premium," which they describe as "the value the market has assigned to greater certainty regarding the [Proposed Transaction]."[165] These concerns are no more persuasive than those presented by Plaintiffs. Thus, the balance of the equities has little, if any, impact on my analysis.

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Having concluded that Plaintiffs have failed to show a reasonable likelihood of success on the merits of their claims or a likelihood that they will suffer imminent irreparable injury if a preliminary injunction is not granted and that the balance of the equities does not favor either Plaintiffs or Defendants, I hold that a preliminary injunction is not warranted in this matter.

III. CONCLUSION

For the reasons stated, I deny Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

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[165] DAB 63.