IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TELSTRA CORPORATION, LTD., and TELSTRA WHOLESALE INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 19369
DYNEGY, INC., DYNEGY CONNECT, L.P., DYNEGY CONNECT GP, INC., DYNEGY GLOBAL COMMUNICATIONS, INC., and MANTISS INFORMATION CORP.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Submitted: January 24, 2003
Decided: March 4, 2003

Arthur G. Connolly, Jr., Esquire, Arthur G. Connolly, III, Esquire, Christos T. Adamopoulos, Esquire, CONNOLLY BOVE LODGE & HUTZ, LLP, Wilmington, Delaware; and Paul Martin Wolff, Esquire, David C. Kiernan, Esquire, William J. Bachman, Esquire, WILLIAMS & CONNOLLY, LLP, Washington, D.C., *Attorneys for Plaintiffs*.

Allen M. Terrell, Jr., Esquire, Richard P. Rollo, Esquire, Brock Czeschin, Esquire, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware, *Attorneys for Defendants.*

LAMB, Vice Chancellor.

I.

This action arises out of differing interpretations of terms in a Delaware limited partnership agreement. Specifically, the partners agreed irrevocably to fund the partnership during its beginning stages. The agreement provided a specific mechanism for financing when additional capitalization was necessary. The partnership's managing board needed to formally resolve (by majority vote or unanimous written consent) that additional partner capital was necessary, and a formal notice was to be sent to each partner. Each partner was then allowed 90 days to make its additional capital contribution.

One of the partners also negotiated for a put option in the partnership agreement, whereby that partner could put its interest in the partnership to another partner (or the partnership). The put had two different pricing mechanisms, depending on when the put was exercised. If it was exercised during the first two years of the partnership's existence, the purchase price for the put equaled the value of the partner's capital account, calculated based on IRS tax regulations. If the put was exercised after the first two years of the partnership, the put's price was equal to the fair market value of the partner's partnership interest.

The put in this case was exercised during the first two years of the partnership's existence, and thus the partner is entitled to the value of its capital account, as calculated based on IRS regulations. The real disagreement in this case is whether this capital account can properly be reduced based on a decline in the fair market value of the partnership's assets. Such a "book down" can only occur upon certain triggering events. One such triggering event is a disparate capital contribution by the partners. The court concludes, for a variety of reasons, that no such disparate capital contribution occurred. Therefore, the partnership was not entitled to "book down" the value of the withdrawing partner's capital account. Nevertheless, a trial is still necessary because the court is unable to determine damages on the basis of the record presented.

There is also a claim for rescissory damages and attorneys' fees by the withdrawing partner (and that partner's parent company) based on breaches of fiduciary duty of the partnership's general partner (and various of its affiliates). The court concludes that an award of rescissory damages is not an appropriate remedy in this instance, as the plaintiffs' claims are essentially based in contract. Similarly, the court concludes that the behavior of the defendants is insufficient to award the plaintiffs their attorneys' fees.

II.

A. Background

Plaintiff Telstra Corporation, Ltd. ("Telstra") is an international telecommunications company organized under the laws of Australia and 50.1% owned by the Commonwealth of Australia. Defendant Dynegy, Inc. ("Dynegy") is a power generation and energy distribution company.

Telstra owned an interest in Extant, Inc., a company engaged in developing a data communication network that Dynegy wished to acquire. Dynegy initially offered to purchase Telstra's interest in Extant for cash. During the course of their negotiations, however, Dynegy and Telstra agreed that Telstra would continue with its investment through a 20% interest in a newly formed Delaware limited partnership, defendant Dynegy Connect, L.P. (the "Partnership"), between Telstra and three Dynegy-controlled entities.

The Partnership was formed pursuant to a Partnership Agreement (the "Agreement") on October 3, 2000. The general partner was defendant Dynegy Connect GP, Inc. ("Dynegy Connect"), a wholly owned subsidiary of Dynegy . Two of the three limited partners, defendant Dynegy Global Communications, Inc. (" Dynegy Global") and defendant Mantiss Information Corporation ("Mantiss"), were wholly owned subsidiaries of Dynegy. The other limited

partner was Telstra Wholesale, Inc. ("Telstra LP"), a wholly owned subsidiary of Telstra.

B. The Partnership Agreement

From the outset, Dynegy understood that Telstra wanted to be an active partner, and thus involved in the decision making of the partnership. The Agreement granted Telstra one of three seats on the Managing Board of the Partnership, and the right to participate in and vote on specific decisions.

- Section 4.1(a) of the Agreement "delegates to the Managing Board all rights, responsibilities and obligations to govern the strategy for the Partnership and for making certain decisions of the Partnership;"

- Section 4.1(b) provides that the Managing Board will consist of three members and that "one (1) Board Member will be appointed by Telstra, LP;"

- Section 4.1(c) states that "[e]ach Board Member shall vote, and shall take all other necessary or desirable actions . . . to ensure compliance with this Section 4.1; "

- Section 4.1(h) provides that, "[a]ction on any matter provided for in this Agreement where the approval of the Managing Board is required or contemplated, shall require the affirmative vote of at least a majority of the Board Members entitled to vote;"

- Section 4.1(i) requires "unanimous consent in writing" signed by all Board Members entitled to vote on the action" if there is no meeting or vote of the Managing Board; and

- Section 4.1 (j) provides that a quorum shall be present at a meeting of the Managing Board if the holders of at least a majority of all votes are represented by a person or by proxy *and* the Telstra LP Board Member is represented at the meeting in person or by proxy.

Managing Board approval was also required for "any request for Additional Capital Contributions. "[1] The Partnership could issue "Additional Units" based on additional capital contributions, but such units could only be issued "at the direction of the Managing Board. "[2]

Under Section 3.2 of the Agreement, additional capital contributions could not be accepted by the Partnership until a formal, and Managing Board authorized, notice is provided to each partner. Moreover, no dilution of a non-contributing partner in response to a request for additional capital contributions could occur until 90 days after the issuance of a notice under Section 3.2 of the Agreement.

Finally, the Agreement attached a "Development Plan" which set forth capital requirements for the Partnership from 2000 through 2002 of approximately $5 18 million. [3] Each partner "irrevocably" agreed to fund its pro

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[1] P'ship Agreement § 4.2(a)(3).

[2] *Id.* at § 3.2(a).

[3] The Development Plan was expressly incorporated into the Agreement by §§ 10.18 and 10.19.

rata share of the Partnership's capital requirements "as set forth in the Development Plan. "[4] Telstra's pro rata share during the development period (discussed below) was $103.6 million.

C. Telstra's "Initial Put Ontion"

Throughout negotiations leading up to formation of the Partnership, Telstra made it clear that it might want to exit the Partnership, possibly within the first two years.[5] Accordingly, the Agreement provided Telstra with two put options—an Initial Put Option that was exercisable during the first two years of the Partnership (the "Development Period"), and a Post-Development Put Option covering the remaining life of the Partnership. Each option gave Telstra the right to require Dynegy (or the Partnership) to purchase Telstra's interest in the Partnership.

The amount Telstra was entitled to receive upon exercise of its put options was calculated differently. The Initial Put Option price is equal to Telstra LP's "Capital Account" at the end of the month immediately preceding the exercise of the Initial Put Option. Specifically, the Agreement values the Initial Put Option as:

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[4] *Id.*

[5] Tarpley Dep. at 188.

> During the period commencing on the date hereof and ending on September 30, 2002 ("Initial Period"), Telstra LP shall have the right to require that Dynegy (or its designee, which may include the Partnership) purchase all, but not less than all, of the outstanding Partnership Interest owned by Telstra LP or its permitted assignee ("Initial Put Option") **for a purchase price equal to Telstra LP's *Capital Account* in the Partnership, as may be adjusted from time to time pursuant to the terms of this Agreement, determined as of the end of the month immediately preceding the date of the notice of the Initial Put Option.**[6]

The Post-Development Put Option price, in contrast, is priced at the "fair market value" of Telstra LP's Partnership interest. Thus, the value of the Initial Put Option could vary drastically from the value of the Post-Development Put Option. Telstra exercised its Initial Put Option on August 20, 2001.

D. The Canital Account

The Agreement defmes the term "Capital Account" as a capital account determined for each partner "in accordance with [Treasury] Regulations Section 1.704-1(b)(2)(iv)" and Partnership Agreement Sections 5 .2(c)(4)(i)-(iii).[7] The Partnership Capital Account "shall be debited . . . [for] such Partner's distributive share of Losses. "[8] The capital account maintenance rules allow, and

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[6] Id. at § 6.7(a) (emphasis added).

[7] *Id.* at § 5.2(c)(4). Nonetheless, the only capital account the Partnership have ever maintained is calculated based on Generally Accepted Accounting Principles ("GAAP"), not IRS regulations.

[8] *Id.* at § 5.2(c)(4)(ii).

Section 5.2(c)(6) of the Agreement requires, under specific circumstances, an increase or decrease in the partners' Capital Accounts to reflect appreciation or depreciation in the Partnership's asset values when certain requirements are satisfied-known as a "book up/book down" provision.[9] Among the requirements are:

> (i) the adjustments to the Capital Accounts must be based on the fair market values of the Partnership's assets on the date of the adjustment; and
> (ii) the adjustments must reflect the manner in which the unrealized gain or loss inherent in the assets would be allocated among the partners if there were a sale of the assets for their fair market values on the date of the adjustment. [10]

Here, the Agreement adopts that provision in the capital account maintenance regulations and expands upon those regulations, as follows:

> The Gross Asset Value of all Partnership assets shall be adjusted to equal their respective gross fair market values, as determined by the General Partner, and in accordance with Regulations Section 1.704-1(b)(2)(iv)(f) and 1.704-1(b)(2)(iv)(g), as of the following times: (a) the acquisition of an additional Partnership Interest by any new or existing Partner in exchange for more than a de minimis Capital Contribution . . . .[11]

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[9] Treas. Reg. 1.704-1(b)(2)(iv)(f).

[10] See Def. Ans. Br., Tab K at 3.

[11] P'ship Agreement § 5.2(c)(6)(ii).

E. The Capital Calls

On December 8, 2000, Sue Tinder, Senior Vice President of Finance for the Partnership, purported to issue a capital call notice requesting $44.7 million. This notice indicated that Telstra's 20% share of the capital call amounted to $8,940,000. Upon receiving the capital call notice, Telstra requested a formal resolution from the Managing Board, as required by the Agreement, before making its contribution. The three members of the Partnership's Managing Board then executed a unanimous consent resolution calling for additional capital contributions. Only then did Telstra make its requested contribution of $8,940,000. This brought Telstra's total capital contribution to $55,454,065.

On July 13, 2001, Sue Tinder sent another unauthorized capital call, this time in the amount of $30,576,395. Telstra responded by advising Dynegy Connect that the July 13 letter had been issued without Managing Board approval and that there had been no resolution by the Managing Board for a capital call. No such Managing Board resolution was ever obtained from the Managing Board for this alleged capital call. On July 16, Dynegy funded its pro rata portion of this request for funds. Telstra did not make any contribution before it exercised its Initial Put Option

F. Telstra Exercises Its Put Option

On or about August 15, 2001, Telstra telephoned Mark Stubbe and Larry McLernon at Dynegy to advise them that Telstra intended to exercise its Initial Put Option On August 20, 2001, Telstra gave the Partnership written notice that it was exercising its Initial Put Option. Under the express terms of the Agreement, Dynegy was required to pay Telstra for its partnership interest the value of Telstra's Capital Account as of the last day of the month preceding the put--i.e., July 31, 2001—no later than September 19, 2001.

G. Determination of the Put Option's Value

On September 14, 2001, Dynegy stated that it would accept Telstra's exercise of the Initial Put Option. Three days later, on September 17, 2001, the President and COO of the Partnership advised Telstra that the Partnership had "determined," based on work undertaken during the previous several weeks, that Telstra's Capital Account should be adjusted to $0.

III.

After mediation failed, Telstra filed suit in this court seeking the value of its Capital Account, or, in the alternative, the value of its entire investment. Telstra currently seeks summary judgment on two counts of its complaint. Count I alleges a breach of the Agreement. This is the basis for Telstra's claim that it is entitled to the value of its Capital Account. Count IV alleges breaches of

fiduciary duty by Dynegy Connect (or its affiliates) predicated on alleged breaches of the Agreement. Telstra seeks rescissory damages and attorneys' fees as a result thereof.

IV.

Summary judgment should be granted when the court determines that there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law.[12] "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. "[13] Moreover, when a party moves for summary judgment, the court may award summary judgment to the other party, regardless of whether the other party moves for summary judgment, when the undisputed material facts of record show that the other party is clearly entitled to such relief. [14]

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[12] Ch. Ct. R. 56(c).

[13] *Celotex* Corp. v. *Catrett*, *477* U.S. 317, 327 (1986) (quotations omitted); *In re Wade,* 1997 WL 846877, at *1 (Del. Ch. Dec. 15, 1997) ("This court has adopted the *Celotex* standard").

[14] ***See Continental Ins. Co. v. Rutledge Co., 2000*** WL 268297, at *1 & n.3 (Del. Ch. Feb. 15, 2000) ("Chancery Court Rule 56 gives that court the inherent authority to grant summary judgment *sua sponte* against a party seeking summary judgment . . . when the 'state of the record is such that the non-moving party is clearly entitled to such relief. '") (quoting ***Stroud v. Grace, 606*** A.2d 75, 81 (Del. 1992)).

V.

A. Telstra Is Entitled To Partial Summary Judgment On Its Breach Of Contract Claim

This case is essentially a dispute over whether Telstra is entitled to the fair market value of its proportionate share of the Partnership property or whether it is entitled to the value of its Capital Account without adjustments to that account to reflect a decline in the value of the Partnership's assets.

1. Telstra Validly Exercised Its Rights Under The Initial Put Option

On August 20, 2001, Telstra served notice that it was exercising its Initial Put Option. There is no dispute that Telstra properly exercised this right, and that Dynegy represented to Telstra at the time that it did not dispute the validity of the exercise of the Initial Put Option. Nor does Dynegy dispute that it is required to perform its obligations under the Initial Put Option. Under the Agreement, Dynegy (or its designee, which may include the Partnership), is required to purchase all of Telstra's outstanding Partnership interest for a purchase price equal to Telstra's Capital Account determined as of July 3 1, 2001.

2. Telstra Is Entitled To The Value Of Its Capital Account As Of July 31, 2001

Section 6.7(a) of the Agreement pegs the value of the Initial Put Option to "Telstra's Capital Account in the Partnership. " The Agreement then defines the term "Capital Account" as "the Capital Account maintained for such [partner] in

accordance with [Treasury] Regulations Section 1.704-1(b)(2)(iv)...."[15] No other capital accounts are defined in the Agreement. [16]

The defendants have acknowledged that, in the absence of a "triggering event" (here, a Managing Board authorized July 2001 capital call, a valid acceptance of a capital contribution by Dynegy in response to such a call, and, as a result, a valid acquisition by Dynegy in July of an additional Partnership interest), there would be no basis for calculating a "book down" of Telstra's Capital Account. A "book down" would permit the Partnership to revalue its Capital Accounts based on the market value of the Partnership's assets.

3. There Is No Basis To "Book Down" The Value Of Telstra's Capital Account

The sole issue related to whether a "book down" was proper in this case depends on whether Dynegy made a disparate capital contribution on July 16, 2001.

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[15] P'ship Agreement § 5.2(c)(4).

[16] Telstra argues that because the only capital account the Partnership maintained was calculated according to GAAP, that account should be deemed the Capital Account when determining the value of Telstra's Initial Put Option. The court cannot accept this argument. The Agreement unambiguously defines Capital Account based on IRS tax regulations.

a. The July 13 Capital Call Was Invalid

In clear and unambiguous terms, Section 4.2(a)(3) of the Agreement requires the Partnership's Managing Board to approve any request for additional capital contributions to the Partnership from the Partners. Section 4.2(a) provides in pertinent part: "The approval of the Managing Board *shall be required* in order for the Partnership to consummate any of the following actions: … (3) to approve or make any request for Additional Capital Contributions to the Partnership from the Partners pursuant to Section 3.2."[17] The undisputed facts confirm that no such Managing Board approval was ever obtained for the July 2001 request for capital.

The defendants claim, nonetheless, that the July 13 letter constitutes a valid capital call. The July 13 letter, the defendants contend, derives its authority from actions taken at a November 30, 2000 Managing Board meeting. Yet, a review of the written Managing Board minutes and resolutions of that meeting confirms that they contain no authorization or approval of the Managing Board for any future request for additional capital.[18] The minutes do refer to a discussion of the

[17] Emphasis added.

[18] See Connolly Supp. Aff. Ex. B.

possible need for future capital, but no specific amounts were discussed, no consensus was reached, and no Managing Board approval was granted.

Dynegy clearly understood that Managing Board approval was required for each request for additional capital, but that such approval was not obtained for the July 13 request for funds. First, the Agreement itself is quite explicit that such Managing Board approval is necessary. Second, Telstra rebuffed Dynegy's non-compliant request for additional capital contributions on December 8, 2000 until Dynegy followed the appropriate procedures. At no time did the defendants claim that Managing Board approval was not necessary for a valid capital call.

The July 13, 2001 request for capital mirrored the previous defective letter of December 8, 2000. Since the July 13 letter was identical in all material respects to the defendants' December 8 letter, Telstra immediately advised the Partnership's general partner that the July 13 letter had been issued without Managing Board approval for the capital call and that there had been no resolution by the Managing Board for a capital call. Telstra stated that a capital call requires a formal Managing Board resolution and must allow 90 days for Telstra to comply. Unlike in December 2000, however, the defendants never circulated a proposed written consent for Managing Board members to sign, and no Managing Board approval for the July 2001 capital call was ever obtained.

In the absence of a valid capital call, the Partnership was not permitted to accept the defendants' purported "capital contribution" of July 16, 2001. In other words, the defendants were not free under the terms of the Agreement to unilaterally make a disproportionate contribution of capital to the Partnership. Section 3.2 of the Agreement provides that "*[p]rior to accepting any Additional Capital Contributions* from any Person, the General Partner *(at the direction of the Managing Board)* shall send to all Limited Partners a Notice (the "Section 3.2 Notice") . . . ."[19] Because the July 13 letter was not issued at the direction of the Partnership's Managing Board, the Partnership was not authorized to accept the defendant's contribution on July 16, 2001.

The defendants suggest that Telstra waived any objections it had to defects in the July 13 request for capital. The defendants' assertions, however, are not supported by the facts. Telstra never approved the request nor did it waive the requirement under the Agreement that the Managing Board approve each request for additional capital. On the contrary, Telstra is on record as complaining and objecting to Dynegy's disregard of the Agreement's provisions. In addition, the express terms of the Agreement directly prohibit the defendants' waiver argument. Section 10.17 of the Agreement entitled "No Waiver" provides:

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[19] P'ship Agreement §3.2(a) (emphasis added).

> No waiver, express or implied, by any Partner of any breach or default by any other Partner in the performance by the other Partner of its obligations shall be deemed or construed to be a waiver of any other breach or default under this Agreement. Failure on the part of any Partner to complain of any act or omission of any other Partner, or to declare such other Partner in default irrespective of how long such failure continues, shall not constitute a waiver hereunder.

For all of these reasons, the court finds that the July 13 letter was not a valid capital call, and therefore the Partnership could not accept Dynegy's alleged capital contributions. Thus, there was no disparate capital contribution made on July 18 permitting or necessitating a "book down" of Telstra's Capital Account for purposes of calculating the value of Telstra's Initial Put Option.

b. Telstra Could Comply With A Capital Call After July 31

Even assuming that the July 13 letter was a valid capital call, there still was no basis for the Partnership to perform a "book down" of the Capital Accounts as of July 31, 2001. Assuming a valid capital call, Telstra was entitled to wait 90 days from the date of that capital call to make its own contribution. It is only when a partner fails to contribute its pro rata share of the capital contributions by the due date that the non-contributing partner's Partnership interest will be diluted. Here, the alleged capital call was made on July 13, and the defendants claim that because they made their payment on July 16 a disparate capital contribution took place at that time. This is simply an incorrect interpretation of the Agreement.

Section 3.2(b) of the Agreement provides that if all partners "elect to contribute their respective pro rata portion of the total amount of Capital Contributions described in the Section 3.2 Notice, no adjustment of Partnership Interests of the Limited Partners shall be necessary." Moreover, the defendants' own expert agreed that, if the contributions of the partners were pro rata, it would not be appropriate to engage in a "book down. "[20] This is so because Treasury Regulation §1.704-1(b)(2)(iv)(f)(5)(i), the Regulation on which the Partnership's Capital Accounts are based, does not apply to pro rata contributions since such a "book down" in that context could not be made "principally for a substantial non-tax business purpose. " Because the due date for Telstra's capital contribution extended into October, it could not have been determined until after that date whether there was a non-pro rata contribution. Thus, a revaluation of Capital Accounts before that time was not permitted by the Agreement.

Because Telstra validly exercised the Initial Put Option on August 2001, Dynegy was contractually obligated to purchase Telstra's partnership interest by September 19, 2001. Thus, Dynegy was obligated to purchase Telstra's Partnership interest well before any determination was possible about the need

[20] Turlington Dep. at 242.

for an asset revaluation.[21] In effect, the decision to exercise the' Put Option effectively "trumped" the capital call requirements, by virtue of their different timing mechanisms.

4. What Is The Value Of Telstra's Capital Account?

A question remains as to the value of Telstra's Capital Account on July 31, 2001 without accounting for the "book down. " Telstra has suggested a series of alternative answers, based on a variety of assumptions. For this and other reasons, the record is not sufficiently clear to permit entry of summary judgment on this issue. Therefore, a trial must be conducted to determine the proper value of Telstra's Capital Account.

B. The Defendants Are Entitled To Summary Judgment On Telstra's Fiduciary Duty Claims

Telstra alleges a breach of fiduciary duties against Dynegy Connect in an attempt to recover rescissory damages and attorneys' fees.** In order to claim a breach of fiduciary duties, one must be a person to whom fiduciary duties are

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[21] Had Telstra decided to fund its share of a valid capital call prior to July 31, 2001, it would have resulted in an increase in the value of Telstra's Capital Account. That funding would have subsequently been repaid to Telstra when Dynegy paid Telstra the value of its Initial Put Option.

[22] The award of rescissory damages and attorneys' fees rests in the court's sound discretion. See *Gotham Partners, L. P. v. Hallwood Realty Partners, L. P., 2002* WL 31303135, at *8-*9 (Del. Oct. 11, 2002) (rescissory damages are discretionary); *In re Infinity Broad. Corp. S'holder Litig.,* 802 A.2d 285, 293 (Del. 2002) (stating same for attorneys' fees).

owed.[23] Notably, Telstra does not allege that Dynegy Connect was anything other than a faithful fiduciary prior to August 15, 2001 when Telstra indicated an intent to exercise the Initial Put Option. Only after Telstra decided to exit the Partnership does Telstra claim that Dynegy Connect took steps contrary to the fiduciary duties it owed to Telstra.

It is unclear from the express language of the Agreement whether Telstra's exercise of its Initial Put Option-as opposed to the closing on that Put Option—ended Dynegy Connect's fiduciary relationship with Telstra. All of the acts complained of, however, relate to the performance of the Initial Put Option and the valuation of Telstra's Capital Account. Thus, the essential dispute is over Dynegy's performance of its contractual duties, and does not support an award of rescission or rescissory damages.

Rescission or rescissory damages can be an appropriate remedy, at law or equity, where a promise is fraudulently induced. But, Telstra makes no complaint about the formation of the Agreement--i. e., that it was fraudulently induced into making its initial investment.

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[23] ***See, e.g., Omnicare, Inc. v. NCS Healthcare, Inc., 809*** A.2d 1163, 1169 (Del. Ch. 2002) ("Indeed, under established Delaware law, a breach of fiduciary duty claim must be based on an actual, existing fiduciary relationship between the plaintiff and the defendants at the time of the alleged breach. ").

Nor is a purely equitable remedy of rescission available in this case. At equity, rescissory damages should only be awarded where the "equitable remedy of rescission is impractical" but otherwise warranted.[24] There are "two theoretical foundations for the rescissory damages remedy: (i) principles of restitution and (ii) principles of trust law that permit a damage award against a trustee, to compensate the beneficiary for the harm resulting from the trustee's beach of trust. "[25] Neither theory fits the situation found here.

"Under the restitutionary theory . . . rescissory damages may be awarded against a fiduciary who becomes unjustly enriched as a result of his wrongdoing. "[26] There is no allegation that Dynegy Connect enriched itself by virtue of the acts that allegedly breached its fiduciary duty, such as its attempt to dissolve the Partnership in August 2002. Dynegy and/or the Partnership remain liable in contract on the Initial Put Option. The mere fact that Dynegy attempted to avoid that result does not give rise to a right to rescind or rescissory damages in its place.

Based on the trust theory, courts have "held that only where the fiduciary has engaged in ***self dealing*** (or in the case of a trustee, has violated an express

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[24] ***Id.***

[25] ***Strassburger*** v. ***Earley***, ***752*** A.2d 557, 580 (Del. Ch. 2000).

[26] ***Id.*** at580-81.

term of the trust) would it be 'deemed equitable to impose upon the trustee the risk of future fluctuations in the market value of the asset.'"[27] Although, Telstra points to numerous interrelationships between Dynegy and the various partners in the Partnership, it fails to establish how any of these relationships resulted in unlawful "self-dealing. "[28] Specifically, Telstra does not allege that any of the Partnership's funds were used for Dynegy's benefit as opposed to the Partnership's benefit or that any Partnership funds were somehow improperly diverted out of the Partnership. In addition, this case does not involve some later fluctuation of value.

Similarly, the court concludes that an award of attorneys' fees is inappropriate in this instance. Delaware courts follow the traditional "American Rule" by which each party bears its own fees and costs.[29] Attorneys' fees are occasionally awarded in situations where litigation is brought in bad faith or a party's bad faith conduct increased the cost of litigation.[30] Here, Dynegy's view

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[27] *Id.* at 581 (quoting ***Cinerama, Inc. v. Technicolor, Inc., 663*** A.2d 1134, 1146 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995)) (emphasis added).

[28] ***See Continental Ins. Co. v. Rutledge & Co., 750*** A.2d 1219, 1237 (Del. Ch. 2000) (Defining "self dealing" as the general partner "us[ing] its position as general partner, and its ability to control the terms of transactions, to invest limited partnership funds for its own gain, as opposed to investing for the benefit of the limited partnership. ")

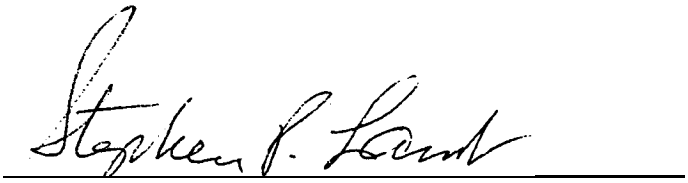
[29] ***See, e.g., Div. Of Child Support Enforcement v. Smallwood, 526*** A.2d 1353, 1355-***57*** (Del. Ch. 1987).

[30] ***See Arbitrium (Cayrnan Islands) Handels AG, 705*** A.2d 225, 23 1 (Del. Ch. 1997).

of the correct value of Telstra's Capital Account has proven incorrect in hindsight. But, there is no evidence here from which the court could reasonably conclude that Dynegy has done more than breach its contract. Therefore, the court will not award attorneys' fees in this instance.

VI.

For the foregoing reasons, summary judgment is granted in part in favor of Telstra on Count I of its complaint. Summary judgment is granted in favor of the defendants on Count IV of Telstra's complaint. **IT IS SO ORDERED.**



Vice Chancellor