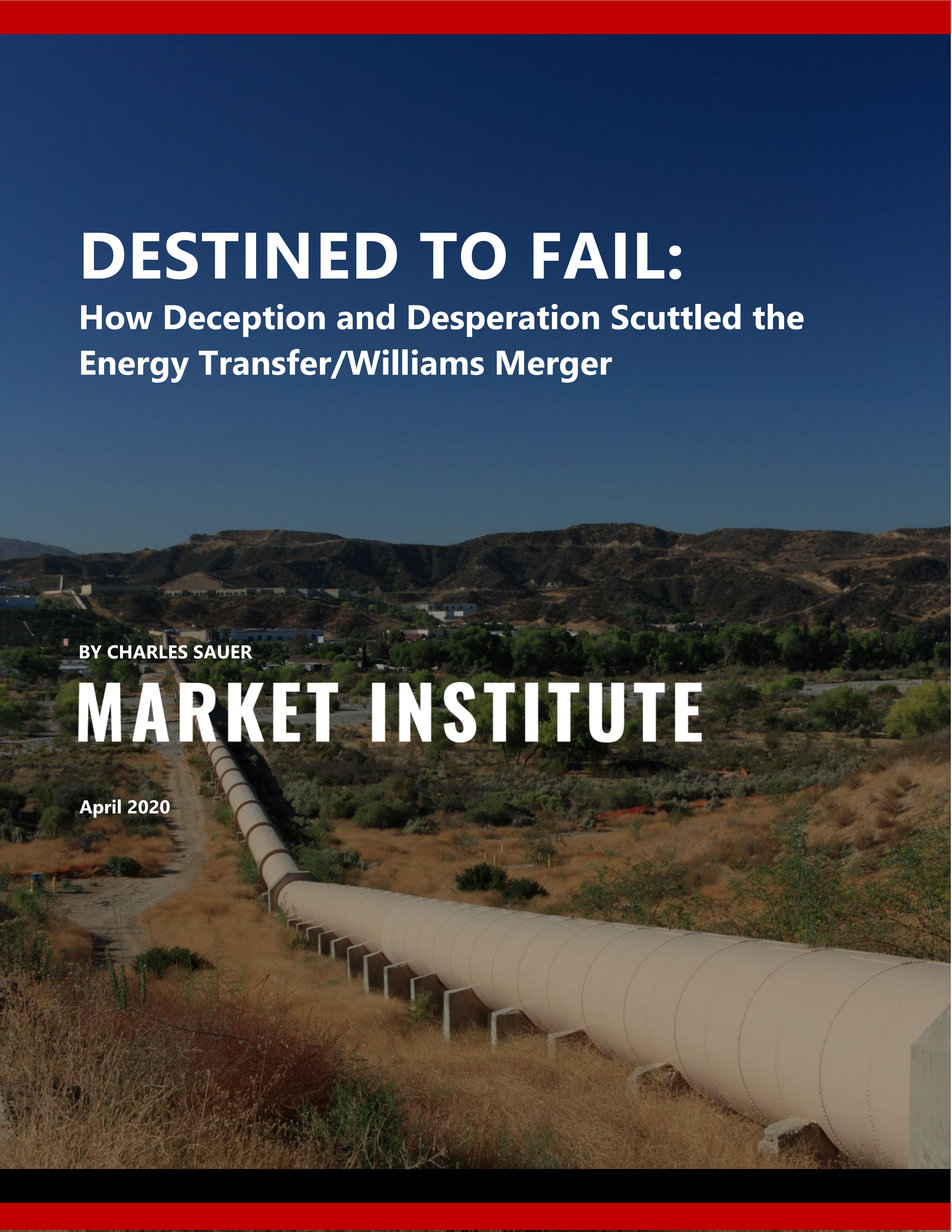

DESTINED TO FAIL:

How Deception and Desperation Scuttled the Energy Transfer/Williams Merger

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EXECUTIVE SUMMARY

Two of the country's largest energy pipeline companies failed to merge in 2016, and the underlying story illustrates the importance of competent leadership and good corporate governance. The doomed merger has been expensive for both companies and, because of the antics involved throughout the timeline, the saga reads more like an episode of the Kardashians than an example of good corporate governance.

The events underlying this dispute span more than two years, from early 2014 until June 2016, during which time Kelcy Warren – who had built and ran Energy Transfer Partners – proposed and began negotiating a merger with Williams Companies, despite the apparent opposition of Williams CEO Alan Armstrong.

These two giants are now in the final throes of a legal battle over the failure of a once-promising merger, each accusing the other of breaching the agreement governing the merger. At the center of the battle is a breakup fee of more than a billion dollars.

Armstrong said he opposed the deal because he saw it as a poor value proposition for his company's shareholders and for himself. After all, Williams was in the final stages and seeking shareholder approval of a major acquisition of its own - the acquisition of Williams Partners, an operating entity of Williams Companies, of which Armstrong was also CEO. Moving ahead with the Energy Transfer merger would necessitate unraveling the complex internal restructuring as Energy Transfer was not interested in acquiring the joint entity. It would also mean surrendering the Williams Companies' independence and, likely, Armstrong's role as chief executive.

The Williams board of directors scrutinized the deal closely and ultimately voted to approve the merger agreement with Energy Transfer on September 28, 2015.

With the finalized board vote and Armstrong appearing to accept his responsibility to execute it, Williams terminated its acquisition of Williams Partners, incurring a $410 million penalty per the agreement governing that transaction, and began the process of acquisition by Energy Transfer.

Over the next six months, falling natural gas and oil prices rocked the domestic energy market. Companies failed or were acquired by larger firms. Seeing how these changing market conditions could impact the merger, Energy Transfer reached out to Williams for information needed to make a public offer of shares in the entity that would be formed through the merger to help shore up the new entity's credit rating and preserve its ability to return profits to investors. Williams refused to cooperate, forcing Energy Transfer to conduct an internal stock issuance to help staunch the bleeding.

In April 2016, with just a few months to go before the scheduled deadline to consummate the deal, Williams sued Warren and Energy Transfer, alleging the special stock issuance was undertaken in bad faith and in breach of the merger agreement. Williams claimed it was done to

shield Warren and his inner circle from the downside of a deal that seemed doomed and would have been to the detriment of many of Williams's shareholders.

Further, the ongoing changes to market conditions altered other key understandings underlying the merger with Williams, including a condition of the deal: that the transaction be tax free. As the June 29, 2016, closing date neared, Energy Transfer announced its tax counsel could not issue the requisite "721 opinion" that the transaction would be considered non-taxable under IRS guidelines, thereby enabling it to exit the agreement. Williams was quick to allege that Energy Transfer's tax concerns were a façade to shield it from paying the $1.5 billion breakup fee Williams said it was due.

Fast forward to today – nearly four years since the failed merger – and Williams is still looking for a payout.

So far, so good. The merger and breakup wasn't pretty, but that's business.

However, it isn't the full story. During the course of the litigation, evidence came to light that Armstrong had been working behind the scenes to undermine the deal leading up to its approval by the Williams board and in the months that followed. Energy Transfer filed a counterclaim, arguing that Armstrong went so far as to coordinate with a former corporate officer and shareholder on a lawsuit to sabotage the deal. Energy Transfer also presented evidence that Armstrong funneled inside information to his co-conspirator through a now-deleted email account – information that eventually made its way to a Wall Street Journal reporter as part of a coordinated campaign to tank the merger.

KEY TAKEAWAYS

NORMAL BUSINESS

- The continuing slide in energy prices in 2015 and 2016 had important consequences. One was financial damage to the new entity to be created by the merger. Energy Transfer founder and CEO Kelcy Warren sought to raise cash to minimize the battering that could have been in store for Energy Transfer and Williams's investors by seeking to make a public stock offering. That was his right and his obligation as a CEO.

- Another consequence was the need to reexamine certain financial assumptions underlying the deal: It could not be closed per a formal agreement between the would-be merger partners unless tax counsel could opine that the deal would be non-taxable, which hinged in part on share prices.

- As the financial advantages of the merger diminished, Williams sued Energy Transfer and Warren over the special stock issuance.

- When Energy Transfer's outside tax counsel declared that they could not issue an opinion that the deal would be non-taxable in light of market changes, Williams sued Energy Transfer, claiming that Energy Transfer somehow manipulated their tax counsel to reach that conclusion and was therefore in breach of the merger agreement. The trial court found that Energy Transfer had, in fact, not acted in bad faith; a decision that was later affirmed on appeal.

POOR GOVERNANCE

- In 2015 and 2016, Williams Companies CEO Alan Armstrong set about to undermine the takeover of the Williams Companies by Energy Transfer. Even after a divided board decided to move ahead with the Energy Transfer merger, Armstrong acknowledged publicly his misgivings about ceding control to a rival.

- Armstrong withheld critical information from the Williams board regarding Energy Transfer's condition that the proposed Williams internal merger would not be completed should the ET merger move forward.

- A retired Williams's officer and investor, John Bumgarner, sued in federal court to stop the merger. The suit, filed on behalf of a proposed class of Williams's investors, alleged the two companies made false or misleading statements in describing the potential benefits of the

merger.[1] Bumgarner's legal arguments and his outreach to media to attempt to put the transaction in a bad light appear to have been based on information that Armstrong had secretly provided to him.

- In another class action suit, investor Michael Erber claimed he and fellow investors were misled when they purchased Williams stock in the spring of 2015. That suit said investors were not informed that a merger with Energy Transfer would cause the termination of an internal merger between Williams and Williams Partners, a violation of federal securities laws that caused them to lose money.[2]

ONGOING DRAMA

- The case remains in court, however, as Williams continues its attempts to extract money from Energy Transfer. Energy Transfer has filed a counterclaim, pointing to Armstrong's recently discovered secret email correspondence and coordination with Bumgarner as clear evidence of wrongdoing on Williams' behalf.

- In this legal saga, Williams has tried to prove Energy Transfer was at fault for the termination of a deal that Williams's own CEO had apparently worked to undermine for months, and subsequently sabotaged after receiving board approval.

- In the wreckage of the failed merger, the Williams's board attempted to oust him but Armstrong was able to survive by a single vote. Half of the board resigned in response, with some former directors using the occasion to deliver critical assessments of Armstrong's leadership.

- Armstrong retained control over Williams, with a compliant board of directors.

Note: Since October 2018, the combined entity of Energy Transfer Partners and Energy Transfer Equity has been known as Energy Transfer LP and is traded under the NYSE under the ticker symbol "ET." As of December 31, 2016, Williams Companies' interstate gas pipelines, midstream and olefins production interests were held through its investment in Williams Partners L.P. (WPZ). For readership ease, this review generally refers to the opposing parties as Energy Transfer and Williams, differentiating operating units and affiliated companies, as needed.

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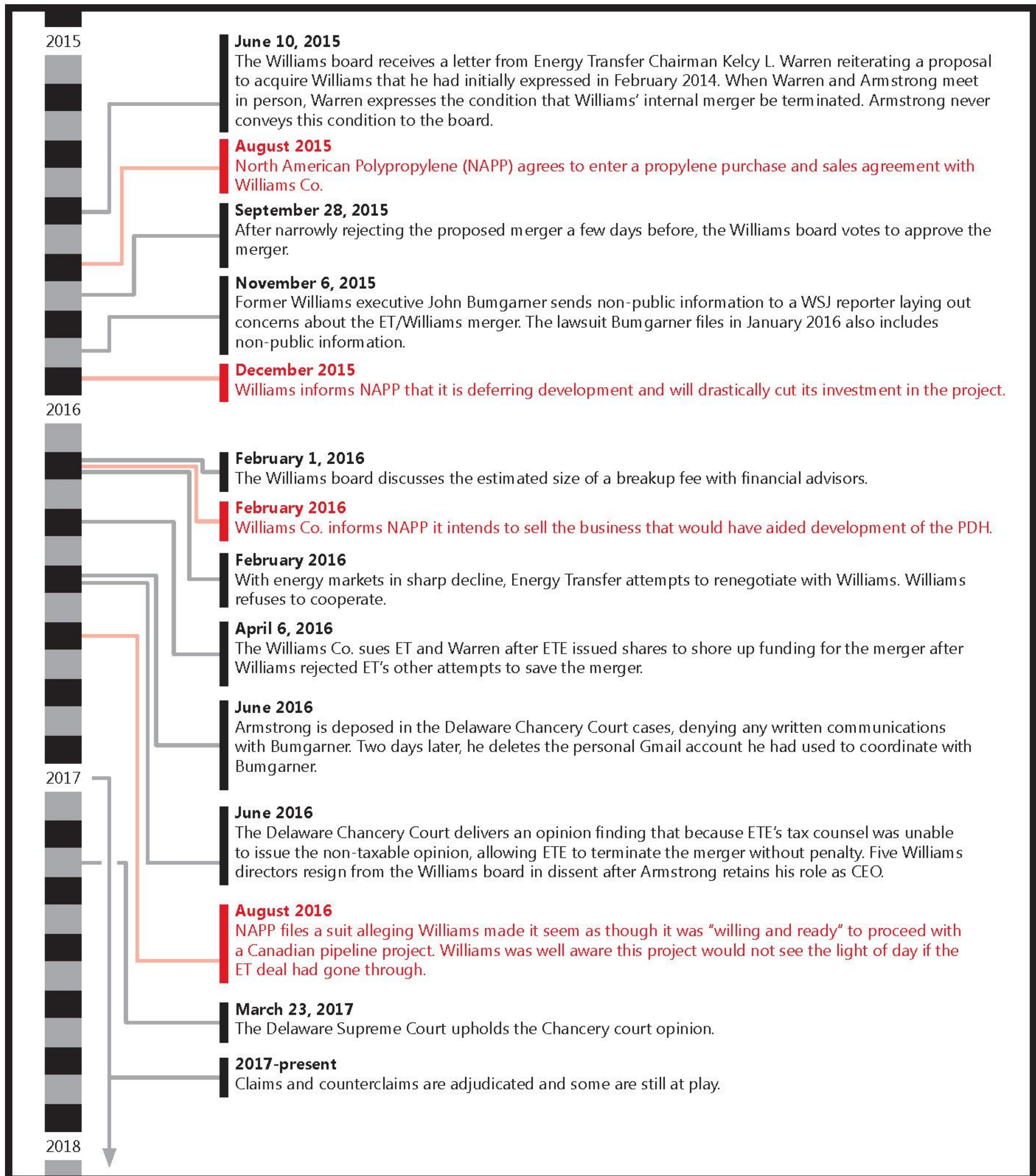
[1] https://www.law360.com/articles/802023

[2] https://www.cravath.com/The-Williams-Companies-Wins-Dismissal-of-Securities-Class-Action-Lawsuit-over-WPZ-Merger/

TIMELINE OF EVENTS



PART 1

A TENTATIVE COURTSHIP TINGED BY OMISSIONS

ENERGY TRANSFER'S WARREN REACHES OUT TO WILLIAMS CEO ARMSTRONG

In February 2014, Energy Transfer Partners, L.P., Chairman Kelcy Warren reached out to Alan Armstrong, president and CEO of the Williams Companies, to raise the idea of combining the capabilities of the vast energy pipeline companies they ran.[3]

At the time, Energy Transfer Partners, L.P., was a master limited partnership (MLP) that owned and operated one of the largest portfolios of energy assets in the United States, with some 35,000 miles of natural gas and natural gas liquids pipelines.[4]

Williams was then the fourth-largest U.S. pipeline company.[5] In the preceding years, both companies were active in mergers and acquisitions as hydraulic fracturing gave rise to a historic natural gas boom that transformed the domestic energy market helping to make the United States the largest energy producer in the world.[6]

A PIVOTAL MOMENT IN WILLIAMS GROWTH STRATEGY

Armstrong agreed to bring the proposal to the attention of the Williams board.[7] For the rest of 2014, not much came of Warren's outreach. The Williams Companies, Inc. was looking at taking a controlling interest in Access Midstream Partners, LP for around $6 billion. Williams had bought a stake in Access a few years earlier and then acquired the controlling interest from private equity fund Global Infrastructure Partners.[8] The Access Midstream deal would give Williams control over the industry's largest gathering and processing MLP.

"This is another big step toward our goal of becoming the leading natural gas infrastructure provider in North America," said an elated Alan Armstrong in the fall of 2014.[9] A subsequent

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[3] Complaint at 9, Erber v. The Williams Cos., Inc., et al., No. 16-CV-131-JEP-FHM (N. D. Ok. March 7, 2016).
[4] https://ir.energytransfer.com/news-releases/news-release-details/energy-transfer-partners-and-regency-energy-partners-merge-18-0
[5] https://www.reuters.com/article/williams-cos-access-midstream/williams-to-take-over-access-midstream-for-6-billion-idUSL2N0OW0HB20140615
[6] https://www.nasdaq.com/articles/energy-transfer-partners-launches-expansion-open-season-analyst-blog-2014-09-23
[7] https://www.law360.com/cases/56ddc8a578ae7e5059000001
[8] https://www.tulsaworld.com/business/williams-cos-completes-billion-mega-merger-of-williams-partners-access/article_3fa34a95-3ee3-5ef9-acae-045520cdd7c5.html
[9] https://www.businesswire.com/news/home/20141026005055/en/Williams-Williams-Partners-L.P.-Access-Midstream-Partners.

merger of Williams' MLP, Williams Partners LP, with Access, set for June 2015, would create one of the largest MLPs by enterprise value -- close to $100 billion.[10]

At the time, MLPs had become very popular. They were structured with looser corporate governance standards than those of corporations. Plus, they were exempt from federal income tax. It was an ideal arrangement for investors seeking higher yields.[11] Just a few years later, the changing fortunes of the shale oil industry made these arrangements less valuable to stockholders and many companies have consolidated operations in response.[12]

Recognition by Global Energy Awards, an industry group based in New York, who declared Williams' acquisition of Access Midstream the "the single biggest industry move of 2014,"[13] gave Armstrong some celebrity status in the tight-knit echelons of the Tulsa business community. In an interview with *Tulsa World* at the time, Armstrong summed up the company's strategy in uncomplicated terms: "From Williams' perspective, our strategy for quite some time is to be the premier provider of natural gas infrastructure in North America. No matter where we are, we wanted to be No. 1 or 2 [sic] in whatever market we are in."[14]

Even if prices for natural gas were to drop, Williams would be in a good position because, while it did own production operations, it also charged fees for moving natural gas. Lower prices could mean new opportunities for Williams. "Our business is about volumes; it's not about price," Armstrong said. "We felt the markets for natural gas will continue to grow because it is such a low-cost resource." In his assessment, his company's acquisitions put it in "offensive posture."

That fall, Warren's interest moved to the fore. In October 2014, Energy Transfer again communicated its interest in a possible deal with Williams, prompting the Williams' board of directors to ask its outside financial and legal advisors to prepare analyses of the risks and opportunities of such a venture. The board, however, decided to put on hold any additional conversations with Energy Transfer until after the Williams' deal with Access Partners was completed, then scheduled for February 2015.[15]

After the official announcement of the Access deal's completion that February, Warren renewed his expression of interest in acquiring Williams. The Williams board of directors had to reckon with the implications of combining the capabilities of the two energy pipeline giants. After a few days, Armstrong got back to Warren and again agreed to discuss the matter with the Williams

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[10] https://www.reuters.com/article/williams-cos-access-midstream/williams-to-take-over-access-midstream-for-6-billion-idUSL2N0OW0HB20140615
[11] https://www.pionline.com/private-equity/pipeline-funds-imperiled-end-mlps-sight
[12] https://seekingalpha.com/article/4329962-oil-gas-mlps-why-sell-off
[13] https://www.tulsaworld.com/business/williams-acquisition-of-access-midstream-named-deal-of-the-year/article_f9192ef4-8df7-5441-9a78-8058c3dc5cc2.html
[14] https://www.tulsaworld.com/business/williams-acquisition-of-access-midstream-named-deal-of-the-year/article_f9192ef4-8df7-5441-9a78-8058c3dc5cc2.html
[15] Complaint, Erber v. The Williams Cos., Inc., et al.

Board. After hearing about some projections about the feasibility from Williams's management and the company's outside financial consultant, Barclays, the board gave Armstrong the green light to meet with Warren to continue the discussion. The two men set May 6, 2015, for a meeting date. Joining Armstrong and Warren, were Energy Transfer's CFO Jamie Welch and his counterpart at Williams, Don Chappel.[16]

When the four met at Warren's Dallas home to discuss the promising deal, Warren revealed a significant qualification: his company's strategy utilized the MLP model as well, and was based on keeping the operating units as separately traded entities.[16] In other words, Armstrong's 'Deal of the Year', that would consolidate Williams' business under one corporate roof, would have to be undone if the board decided the Energy Transfer deal was a better prospect. Armstrong apparently withheld this critical information from his board, despite its implications for the Williams Companies' strategic planning.[17]

[16] Complaint, Erber v. The Williams Cos., Inc., et al.
[17] Complaint, Erber v. The Williams Cos., Inc., et al.

PART II

SABOTAGE AND BUYER'S REMORSE

A DIVIDED WILLIAMS BOARD AT A CROSSROADS

Over the next four months, the union of the two companies moved simultaneously closer to reality and failure. Under Armstrong's leadership, or in spite of it, Williams for a time faced two mutually exclusive transactions: completing an internal restructuring that would position the company as a major player in the energy business or merging with a formidable rival. It was a question of how to navigate and survive amid growing turbulence in the energy sector.

By the spring of 2015, the Williams board of directors was pivoting toward what seemed like a promising Energy Transfer acquisition, albeit with a considerable lack of harmony and trust between each other as well as complete information from CEO Alan Armstrong.

STRATEGIES ON A COLLISION COURSE

Just a week after the dinner at Warren's home, Williams Partners, LP (WMZ) announced on May 13 that its general partner and largest shareholder, the Williams Companies, Inc., (WMB) was acquiring the outstanding Williams Partners' units it did not currently own in a $13.8 billion stock-for-unit deal. In the announcement of this internal merger, there was no mention of Energy Transfer's interest in purchasing Williams Companies as structured prior to the internal merger.[18]

By simplifying its structure, as other companies in the energy sector had done, Williams's shareholders could be looking at double-digit increases in share values over time, according to some estimates, referenced in a subsequent lawsuit.[19] The day of the announcement Williams Partners, LP share price rose more than 20 percent.[20] Armstrong himself said, "We couldn't be more excited" about the internal merger.[21]

Despite Armstrong's upbeat characterization of the deal's positive impact on the company's growth prospects, the board, apparently still not fully aware of Energy Transfer's condition that Williams not acquire Williams Partners, was clearly divided. Based on what the board allegedly knew – or didn't - it made sense to stay committed to the internal acquisition-and-consolidation strategy. After all, it was the logical next step in a growth strategy for which Armstrong could

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[18] https://www.oilandgas360.com/williams-merges-with-lp-subsidiary-in-13-8-billion-deal/

[19] Complaint, Erber v. The Williams Cos., Inc., et al.

[20] https://www.fool.com/investing/general/2015/05/13/williams-companies-inc-acquires-williams-partners.aspx

[21] Complaint, Erber v. The Williams Cos., Inc., et al.

rightfully claim credit, but the Energy Transfer option represented a lucrative opportunity and perhaps a smart move if the shale boom went bust.

A few days after Williams announced its intentions to complete the acquisition of Williams Partners, Armstrong received a detailed merger offer from Warren: Energy Transfer would acquire WMB in an all-equity transaction at $64.00 per share of WMB common stock, which represented a 20% premium relative to the closing price of the shares of WMB common stock at that time.

As if to remind Armstrong what he had discussed with Warren over dinner just ten days earlier, Warren's communication further stipulated that the offer was conditioned on the termination of the WMB-WPZ merger. In a sign of Energy Transfer's eagerness to close the deal, it pledged a "hell or high water" approach, meaning Energy Transfer would do whatever was needed to avoid or overcome potential antitrust and securities hurdles.[22]

The next day, Armstrong presented the Williams Board with an offer that was shockingly incomplete.

INTERNAL MACHINATIONS AND INDECISION

The next day, Armstrong presented the Williams Board with an offer that was shockingly incomplete. Some members of the board said neither the condition about abrogating the internal merger nor had the enthusiasm of Energy Transfer's interest in the transaction been made clear before they voted to approve the acquisition of Williams Partners. In that final week of May 2015, some board members questioned whether they had all the information on the internal merger from the company's management. There had been no discussion of Warren's rather significant condition. Armstrong had conveniently kept this information to himself.[23]

In a class action lawsuit that would be filed nine months later, investor Michael Erber asserted Energy Transfer's interest should have been made clearer to the Williams board and the investing public prior to the May 13 announcement of the WMB-WMZ merger. These deliberate omissions on Armstrong's part constituted violations of securities laws, according to the suit.

[22] https://www.sec.gov/Archives/edgar/data/1648098/000119312515386887/d80568ds4.htm
[23] Complaint, Erber v. The Williams Cos., Inc., et al.

Erber contended the market's reaction to a possible Williams-Energy Transfer merger would have been the death knell for the internal merger and, had this been known, he and others would have not bought stock in the consolidated Williams enterprise at the inflated price. While the suit was eventually dismissed, it brought to light Armstrong's machinations and raised eyebrows.

These troubling omissions came up during a May 30, 2015, conference call with Williams's board chairman Frank MacInnis, Armstrong, and WMB legal advisors.[24] Two days later, the board discussed their concerns about inadequate information when they met with members of Williams's management and legal representatives.[25]

Over the next three weeks, Energy Transfer communicated its offer, including conditions, directly to MacInnis and members of the Williams board. Energy Transfer also set a deadline of June 22 for a response. Under increasing pressure to choose a course, on June 20, the board signed off on a public announcement that it was exploring "strategic alternatives" and directed Armstrong to tell Warren the bid was too low but that the board would consider additional discussions regarding a merger transaction.[26] Finally, it issued a press release on June 21 acknowledging its rejection of Energy Transfer's offer.

ENERGY TRANSFER'S UNSOLICITED BID

On June 22, 2015, Energy Transfer signaled that its interest in Williams remained strong even if its patience with the company's leadership might have been wearing thin. Energy Transfer made public a stock-for-stock bid for Williams valued at $53.1 billion when including debt. The offer reflected the downward spiral of gas and oil prices. Energy Transfer declared the merger would transform the pipeline sector and create a powerhouse that would rival Kinder Morgan, a major player in the midstream sector. It would also convert the combined company into a C-corporation, a move that Kinder Morgan made in late 2014 that had helped it weather an end-of-year rout in oil prices.

Energy Transfer was transparent in stating it had been making its interest known to Williams's senior management for the previous six months, but the May 13 announcement of the Williams Companies and Williams Partners, L.P. transaction had forced Energy Transfer to make an unsolicited acquisition bid for Williams. Perhaps the prospect of a hostile takeover would

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[24] Complaint, Erber v. The Williams Cos., Inc., et al.
[25] Complaint, Erber v. The Williams Cos., Inc., et al.
[26] Complaint, Erber v. The Williams Cos., Inc., et al.

expedite consensus on the Williams board and among shareholders that Energy Transfer's offer was more compelling than the proposed merger between Williams's entities.[27]

In a statement of extraordinary candor, Energy Transfer said,

> *ETE is disappointed that, despite the best of intentions and its efforts to reach a friendly, negotiated combination, it is forced into a position to publicly confirm its offer for Williams. Unfortunately, until Williams' announcement today, Williams' management has inexplicably ignored ETE's efforts to engage in a discussion with Williams regarding a transaction that presents a compelling value proposition for its stockholders. After the WPZ merger announcement, ETE believed that it had no other choice but to provide the detailed terms of its interest to the Williams Board. ETE did that[28] and, for the last five weeks, it has been waiting to commence a constructive and open dialogue. Now that Williams has finally responded, ETE intends to engage with Williams to the extent that Williams undertakes a fair and even-handed process.*[29]

In response, Williams, perhaps reflecting Armstrong's desire to keep his company independent, said, "Energy Transfer's bid 'significantly undervalues' the company and doesn't deliver the same value as its pending acquisition of Williams Partners and standalone growth prospects."

Some observers saw it differently. The day after unusual public statements by each company, *Investopedia* published an article stating,

> *Energy Transfer Equity has made an extremely generous buyout offer for Williams. In fact, stockholders should be slightly concerned that the company might overpay considering the valuation of several peers in the midstream space. It's hard to understand what Williams Cos. management sees when it says the offer undervalues its company. If Williams demands a higher premium for its shares, then Energy Transfer might want to consider walking away.*[30]

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[27] https://www.forbes.com/sites/antoinegara/2015/06/22/pipeline-giant-williams-rejects-64-a-share-takeover-bid-from-energy-transfer/#62d4e6945418

[28] https://www.businesswire.com/news/home/20150621005058/en/Energy-Transfer-Equity-Confirms-Proposal-Merge-Williams

[29] https://investor.williams.com/press-releases/press-release-details/2018/Williams-Completes-Acquisition-of-Williams-Partners/default.aspx

[30] Complaint, Erber v. The Williams Cos., Inc., et al.

Armstrong subsequently issued a statement saying,

> *Our Board and management team remain committed to acting in the best interests of shareholders, and in light of the unsolicited proposal, our Board believes it is in the best interest of shareholders to conduct a thorough evaluation of strategic alternatives.*[31]

The ambivalent messaging continued. A few weeks later, in July 2015, Williams affirmed it was opening itself up to "alternatives" that could include a sale or merger with Energy Transfer or it could just go through with its plans to purchase the remainder of its own master limited partnership, Williams Partners, LP, to fold it into a single company.

For its part, Energy Transfer indicated it would continue to bide its time but a hostile takeover was still very much on the table, according to *Motley Fool*.[32] In its vision, Energy Transfer would keep Williams separate and operate it as a controlled master limited partnership along with its other standalone assets such as Sunoco Logistics Partners.[33]

In the midst of this, the Houston Public Employees Pension System sensed there were elements of the Williams consolidation that did not make sense.

In the midst of this, the Houston Public Employees Pension System sensed there were elements of the Williams consolidation that did not make sense. The pension fund, which has investments in the Williams companies, became concerned that the board had not conducted itself in the best interests of shareholders. In a suit filed in July 2015, the pension fund stated Williams's failure to disclose Energy Transfer's offer and its simultaneous decision to complete the internal merger, despite the fact that it was a non-starter for Energy Transfer, raised a possibility that the board was not playing it straight with shareholders. The suit pointed to the $410 million termination fee in the merger agreement between Williams Companies and Williams Partners. For a deal that supposedly made eminent sense, such a huge termination fee made no sense.

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[31] https://www.forbes.com/sites/antoinegara/2015/06/22/pipeline-giant-williams-rejects-64-a-share-takeover-bid-from-energy-transfer/#62d4e6945418

[32] https://www.fool.com/investing/general/2015/07/10/williams-companies-could-soon-be-facing-a-hostile.aspx

[33] https://www.bizjournals.com/houston/morning_call/2015/07/energy-transfer-makes-next-move-in-bid-to-buy.html

The suit alleged there was really only one reason for the fee: To create a disincentive for Williams to sell itself and for Williams board members to entrench themselves.[34]

The suit noted there had been discussions between Williams's management and Energy Transfer since the start of 2015, but no public statements from Williams ever mentioned the possible Energy Transfer deal until the very public rebuff. The suit raised what seemed like an implausible explanation – that Armstrong had not told the board all the facts. Given what seemed to be a stunning omission on Armstrong's part, the suit suggested that the board went ahead on its plan to close the internal consolidation in order "to stop the ETE offer dead in its tracks."[35]

Finally, the suit noted that Energy Transfer itself must have been a little baffled about the announcement of the internal deal. Otherwise, Energy Transfer would not have felt compelled to take the unusual step of issuing a statement that raised questions as to why Williams was going through with a deal if the board knew that an even better prospect was on the table – that is, if this offer was fully known to the board.

That summer the natural gas boom was going bust in many places. Prices declined sharply. Between June and September, when Williams finally agreed to Energy Transfer's bid, energy companies' stock dropped, as natural-gas prices and oil prices remained low.[36]

THE DEAL STARTS TO UNRAVEL WITH AN INTERNAL ASSIST FROM ARMSTRONG

By September of 2015, the deal with Energy Transfer seemed inevitable even though the Williams board of directors was split almost down the middle on the proposal.

Two board members, Keith Meister and Eric Mandelblatt, were activist investors representing hedge funds with large stakes in the company. Meister, a former protégé of the billionaire investor Carl C. Icahn, ran Corvex Capital. Mandelblatt, a former Goldman Sachs energy trader, led Soroban Capital Partners. With a combined stake estimated at around $2.5 billion, they felt the company's performance under Armstrong was lackluster and wanted changes. To avoid a nasty proxy battle, Williams agreed to let them join the board in 2014, but with conditions meant to make them inside decision makers rather than outside agitators.[37]

That September, Meister and Mandelblatt, who would later have very sharp words for Armstrong's performance, indicated they might initiate a consent solicitation if a deal was not reached. In other words, they reserved the right to challenge or amend the deal. The Williams

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[34] Complaint, Houston Mun. Emp. Pension Sys. v. Armstrong, et al, C.A. No. 11236 (Del. Ch. Ct. July 1, 2015).
[35] The Williams Cos. Stockholder Litig., Consolidated C. A. No. 11236-VCN (Del. Ch. Ct. 2016).
[36] https://www.wsj.com/articles/energy-transfer-and-williams-cos-to-merge-in-32-6-billion-deal-1443441138.
[37] https://www.nytimes.com/2016/02/26/business/dealbook/once-a-coup-energy-transfer-deal-becomes-a-nightmare.html

board discussed this, but on September 24, the board held an informal vote that went 6-7 against the merger.[38]

Over separate dinners that evening, the different camps on the board discussed the tentative state of play.[39] The next day, a handful of board members abandoned their opposition. On September 25, 2015, the board formally voted to approve the merger, by an 8-5 vote. Two board members who were initially opposed to the merger, Joe Cleveland and Janice Stoney, decided to vote in favor of it, apparently to head off a potential proxy contest that Mandelblatt and Meister were threatening.[40]

On September 28, 2015, the Williams board approved the $37.7 billion merger. Energy Transfer would be acquiring Williams's shares at $43.50 a share. The combination would have created the third largest energy franchise in North America and one of the five largest in the world. Williams Partners, L.P. (WPZ) also announced it was terminating its merger agreement with the Williams Companies (WMB). The Williams Companies announced they would pay a termination fee of $428 million to the Williams Partners.[41]

Unsurprisingly, Armstrong was among the board members who had voted against the deal. On September 30, 2015, Armstrong revealed his true feelings in a town hall with Williams's employees, "As much as we may want to throw a pity party for ourselves, it is not going to do any good, so I can tell you that. As much as I'd love to just get out there and wallow in the pity with you, that's not my job as a leader, and it's not where we need to be. We need to show what we're made of and step up and be positive and move through this."

He added, "I will just tell you, you know, believe me, if anybody knows this is tough, it's me, and I'm not going to be able to hide that from any of you all that know me well, but I am very committed to getting my chin up and making the very best out of this."[42]

Two weeks later, on October 13, 2015, in a similar town hall meeting with Williams's employees, Warren also acknowledged Armstrong's disappointment over losing control of the company, stating, "Alan and I are more similar than you might think. We both come from engineering backgrounds, we both have engineering operations in our background. And we're both very, very competitive people. If someone had tried to take my company over, I would have fought

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[38] Williams Cos. v. Energy Transfer Equity, L.P., C.A. No. 12168-VCG (Del. Ch. Ct. 2016).
[39] https://www.nytimes.com/2016/02/26/business/dealbook/once-a-coup-energy-transfer-deal-becomes-a-nightmare.html
[40] Williams Cos. v. Energy Transfer Equity, L.P.
[41] https://investor.williams.com/press-releases/press-release-details/2015/Williams-Partners-Announces-Termination-of-its-Merger-Agreement-with-Williams-NYSEWMB/default.aspx
[42] Complaint, Erber v. The Williams Cos., Inc., et al.

tooth and nail. I mean, just you wouldn't believe what I'd have done. And if I had not prevailed, I don't know if I could conduct myself as — the way Alan Armstrong is."[43]

ARMSTRONG ENGINEERS A SECRET OPERATION TO SCUTTLE THE DEAL

Despite Armstrong's candor about his misgivings and his insistence that he would do the job he was hired to do, he apparently began engaging in communications to undermine the deal. His ally was John Bumgarner, scion of an old and very prosperous Tulsa family with oil and real estate holdings, who had served as a senior executive with the Williams Companies for 25 years before retiring in 2001.[44] During Williams's foray into the telecommunications world, Bumgarner, then an executive at Williams Communications, was accused of insider trading in the purchase of shares in an initial public stock offering of a communications company that netted Bumgarner and other Williams's executives a windfall of $40 million.[45] Where Armstrong was jealous with information he shared with his board that summer about Warren's communications to him, he was generous with information he shared with Bumgarner in the fall 2015.

Soon after the merger announcement, Bumgarner concluded it was not in the best interests of Williams's stockholders and began an earnest effort to undermine the deal. In a February 2020 filing in a Delaware Court of Chancery, Energy Transfer, detailed how Armstrong fed information to Bumgarner as part of a secret "public relations campaign" against the merger.

In November and December 2015, Armstrong and Bumgarner exchanged "numerous emails," often using Armstrong's personal Gmail account or a Cox Communications account that Armstrong shared with his wife. Armstrong deleted the Gmail account just a day after his deposition in subsequent litigation prompted by the doomed merger. When later confronted about the timing of his actions, he claimed he deleted the account because he was receiving a lot of spam messages. Deleting a Gmail account, however, is a multi-step process full of redundancies designed to prevent accidental deletion, while spam filtering and management, as well as removing one's email address from advertising and newsletter lists, is especially easy. Why, then, would Armstrong go through a lengthy and tedious process, cutting off a route of communication, when he could simply unsubscribe from lists or change spam filtering settings? Energy Transfer's skepticism about this course of action seems well-founded.[46]

On November 6, 2015, Bumgarner provided documents, some of which were not public information, to *Wall Street Journal* reporter Alison Sider, laying out his concerns and allegedly

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[43] Complaint, Erber v. The Williams Cos., Inc., et al.
[44] http://bamproperties.com/?_sm_au_=iVVKnrMFHvvjnQJ201TfKK3Qv3fc4
[45] https://www.tulsaworld.com/archives/williams-investors-sue-again/article_647895bd-b98c-500f-a856-dfc8310bcac7.html
[46] https://www.tulsaworld.com/business/court-filing-claims-willams-cos-ceo-undermined-multibillion-dollar-takeover/article_6f7dcec3-017e-59ef-b42a-c3052568c285.html

promising “board room stories to be told about threats.” The documents were “nearly identical” to notes taken by Armstrong.[47]

On December 6, Bumgarner emailed Armstrong asking for “edits and corrections” to a document listing allegations against Williams and Energy Transfer that would form the basis of a lawsuit he was preparing. In the body of the email, Bumgarner asserted, “the WMB directors and their advisors are vulnerable to a lawsuit.” The attached document did not mince words, asserting that the merger was undertaken with false information “in a deliberate attempt to deceive public investors,” constituting a violation of federal securities laws. The merger's “’$2 billion commercial synergies’ claimed in public statements were materially overstated.”

These were very serious allegations, but Armstrong, rather than immediately share these accusations with the board and Williams's attorneys, asked Bumgarner to “stop by at 5:15 tomorrow” to discuss. Armstrong apparently felt Bumgarner’s allegation had merit. He even told Bumgarner that one of Williams’s financial advisors had assumed only $200 million in synergies -- information not known to the public or even to ETE.[47]

On December 14, Bumgarner emailed Armstrong seeking data, statistics, and other information so that he could "get the ducks lined up" before Armstrong headed out for Christmas holiday. Three days later, on December 17, Bumgarner blind carbon copied Armstrong on an email he sent to his attorney about the lawsuit he was planning to file.[48]

Bumgarner filed his lawsuit against both the Williams Companies and Energy Transfer Equity, the company that would be created by the merger, in an Oklahoma federal court on January 14, 2016. That complaint asked the court to halt further action on the merger, claiming that press releases and other statements about the merger contained "material misrepresentations made by Williams and ETE."[49]

The Williams board, apparently in an effort to get ahead of the narrative, issued a press statement on January 17, affirming unanimous support for completing the merger with Energy Transfer. But this overstated the Williams board’s solidarity. One board member said that the statement was another sign of “trickery,” and Armstrong himself derided the idea of unanimity as “games and confusion.” Yet another Williams’s advisor raised concerns that making such a

[47] Defendant and Counterclaim Plaintiffs’ Response to Plaintiff’s Motion for Partial Summary Judgment at 7, The Williams Cos., Inc. v. Energy Transfer LP and LE GP, LLC, C.A. No. 12168-VCG; The Williams Cos., Inc. v. Energy Transfer LP, et al., C.A. No. 12337-VCG (Del. Ch. Ct. Feb. 18, 2020).
[48] Defendant and Counterclaim Plaintiffs’ Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.
[49] Class Action Complaint, Bumgarner v. The Williams Cos. and Energy Transfer Equity LP, Case No. 16-cv-26-GKF-TLW (N. D. Ok., Jan. 14, 2016).

public statement could serve to undermine confidence in the deal. If everything was going well then there would be no need for the board to make a point of declaring it.[50]

Like Erber's class action suit, Bumgarner's suit would also be dismissed.[51]

PART 3

FROM MERGER PARTNERS TO COURTROOM ADVERSARIES

FALLEN ENERGY PRICES CHANGE CALCULATIONS

By this time, in early 2016, the oil and gas market was experiencing even more financial distress as prices continued to fall. In February, shares of both companies had fallen more than 60 percent since the deal was announced, shedding a combined $37 billion in market cap. To further complicate the financial assumptions of the merger agreement, there was the chance one of Williams's biggest customers, Chesapeake Energy, could file for bankruptcy.[52] Energy Transfer would have to take on a lot more debt than originally expected to finance the acquisition. As such, they reached out to Williams possibly restructuring or even pulling the plug on the merger if that found to be in the best interest of both companies. Williams refused to cooperate, and court filings state that the board was already sizing up the breakup fee they could extract from Energy Transfer if the deal failed.[53]

Energy Transfer also sought to coordinate with Williams to reduce a post-merger credit rating downgrade of the post-merger company, Energy Transfer Equity (ETE) that might have resulted from the downward spiral in prices. However, the Williams board rebuffed the offer to work together for mutual benefit.[54]

Energy Transfer displayed a commitment to closing the deal with Williams as well as finding ways to minimize financial exposure that now appeared inevitable.

On March 9, 2016, after Williams refused to provide necessary documentation to conduct a public offering of shares, Energy Transfer conducted a special issuance of ETE units to certain "accredited investors," consistent with U.S. securities laws and as allowed by the merger

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[50] Defendant and Counterclaim Plaintiffs' Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.
[51] https://oklahoman.com/article/5495100/federal-judge-dismisses-tulsan-mans-suit-against-williams-ete-merger
[52] https://www.nytimes.com/2016/02/26/business/dealbook/once-a-coup-energy-transfer-deal-becomes-a-nightmare.html
[53] Defendant and Counterclaim Plaintiffs' Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.
[54] Defendant and Counterclaim Plaintiffs' Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.

agreement. The sale of these special shares could be used to repay debt that could be incurred in connection with the acquisition of The Williams Companies, Inc.

The statement explained:

> *The Plan reflects the Partnership's broader strategy to be proactive in maintaining its credit rating and enhancing its liquidity position. The Partnership has presented the Plan to the credit rating agencies and has received favorable reactions from the agencies for the Plan. The Plan, together with other actions available to the Partnership, is designed to place the Partnership in the strongest possible financial position for 2016 and 2017.*

The statement also made very clear that Energy Transfer was disclosing the stock issuance to honor its agreement with the Williams Companies.[55]

In other words, Energy Transfer was looking to avoid cuts in distributions to shareholders in the short term and to raise cash that could be needed to cover possible losses not originally expected when the two companies agreed to merge in September 2015. These actions were done with full disclosure, specifically to honor the merger agreement with Williams, and were also wholly consistent with a CEO's obligation to investors.

SEE YOU IN COURT

Armstrong seemingly predicted that the merger was not going to happen. On March 24, he emailed board members who had opposed the merger with Energy Transfer to argue against pushing forward and to consider having the board officially vote to oppose it.[56] His preference for stopping the merger moved a step closer to fulfillment on April 6, when Williams sued Energy Transfer and Warren over the private issuance of ETE units, broadly asserting it was a move motivated by buyers' remorse and designed to benefit Warren and a small cadre of Energy Transfer insiders. The complaint read:

"Williams has reviewed ETE's private offering of convertible preferred units and concluded it is a breach of the merger agreement. Among other things, the offering provides select ETE investors with preferential treatment on ETE distributions." It added, "Williams has commenced litigation to protect the interests of its stockholders. The litigation is intended to ensure that Williams's stockholders will receive the consideration to which they are entitled under the merger agreement."[57]

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[55] https://www.streetinsider.com/Corporate+News/Energy+Transfer+Equity+(ETE)+Completes+Private+Offering+of+Series+A+Convertible+Preferred+Units/11407780.html?_sm_au_=iVV6ZDtqjD04QQWF01TfKK3Qv3fc4

[56] Defendant and Counterclaim Plaintiffs' Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.

[57] Plaintiff's Original Petition and Requests for Disclosure, The Williams Cos., Inc. v. Kelcy Warren, (Dallas Co. District Ct., Apr. 4, 2016).

Even with Armstrong quietly working to get the Williams board to pull the plug, the company's public statements continued to assert it was committed to completing the struggling deal. The reason for the suit, as publicly explained by the Williams board, was to ensure "all ETE and Williams investors are treated fairly and equitably." It added that Williams "...looks forward to completing the transaction and delivering its benefits to the company's stockholders."[58] By now,

By now, the mega-deal had become what the Dallas Morning News termed a "mesmerizing corporate version of a contested Kardashian divorce: Plenty of bling at stake -- $38 billion."

the mega-deal had become what the *Dallas Morning News* termed a "mesmerizing corporate version of a contested Kardashian divorce: Plenty of bling at stake – $38 billion."[59]

In fact, the saga was about to take a turn more akin to an episode of "Billions." In March 2016, an accounting matter emerged as the focal point for what would become another round of high-stakes litigation. Energy Transfer's head of tax, Brad Whitehurst, ultimately realized that the way the transaction was structured would create a very large tax liability under the changed market conditions. He later testified about this realization, "It's your worst nightmare. Your heart stops."[60]

The merger agreement required each side to submit a so-called "721 opinion" that the transaction would be non-taxable for the deal to close. During the week that Williams filed suit against Energy Transfer over the special stock issuance, Whitehurst worked diligently to get additional outside opinions on his concerns about the taxability of the transaction, reaching out to both outside counsel, Latham & Watkins, and special consultant, Morgan Lewis, who

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[58] https://www.wsj.com/articles/williams-sues-merger-partner-energy-transfer-1459954984
[59] https://www.dallasnews.com/business/2016/04/06/update-details-emerge-in-new-suit-featuring-kelcy-warren-energy-transfer-and-williams-companies/
[60] https://www.wsj.com/articles/energy-transfer-can-escape-williams-takeover-judge-rules-1466801256

expressed that a 721 opinion was unlikely under the changed market conditions. On April 18, Latham & Watkins told Energy Transfer that they would no longer be able to deliver a 721 opinion by the June 29 closing date.[61]

On May 13, 2016, a year to the day when Williams Companies declared its commitment to the internal merger, the Williams Companies filed yet another lawsuit against Energy Transfer Equity in the Delaware Court of Chancery. This suit alleged that Energy Transfer had essentially created the tax liability obstacle to walk away from the deal with no obligation, meaning it would not be on the hook for the $1.5 billion breakup fee.[62]

Energy Transfer made a counterclaim, insisting Williams, not Energy Transfer was trying to terminate the deal.[63] Warren issued a statement expressing disappointment and pointing out that Williams's campaign of litigation was distracting both companies from working through an array of legal and accounting issues with the SEC so that the deal could be finalized and approved by shareholders.

"Before this suit was filed, we were making progress towards clearing all SEC comments and believe we were close to finalizing the proxy statement/prospectus for the Williams stockholder meeting to vote on the merger. We further believe that ETE's good faith efforts were reinforced by our recent agreement with Williams to amend the merger agreement to provide for a reduction of the time periods necessary for certain administrative matters. This amendment essentially provided nearly an additional month for the parties to finalize and mail the proxy statement/prospectus than was contemplated in the original merger agreement."[64]

Energy Transfer said its repeated attempts to reach out and come up with an approach that was in the best interests of each companies' shareholders was rebuffed. In fact, the statement, said, "Before this most recent suit was filed, we reached out to Williams requesting such discussions. Williams has unfortunately taken steps to limit our communications with members of its Board, and did not respond to our most recent request before filing its third lawsuit."[65] Energy Transfer also raised questions about whether the Williams board still wanted to proceed.

LITIGATION, DISCOVERY, AND SCRUTINY

In fact, during this flurry of lawsuits, a number of communications took place that bring to the fore the dysfunction and distrust within Williams that reflected Armstrong's poor leadership.

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[61] https://www.nytimes.com/2016/04/19/business/dealbook/already-troubled-pipeline-deal-gets-hung-up-onbasic-provision.html
[62] Complaint, Erber v. The Williams Cos., Inc., et al.
[63] https://www.nytimes.com/2016/06/25/business/dealbook/energy-transfer-williams-pipeline-merger-deal.html
[64] https://www.businesswire.com/news/home/20160515005040/en/Energy-Transfer-Equity-Responds-Williams-Lawsuit
[65] https://www.businesswire.com/news/home/20160515005040/en/Energy-Transfer-Equity-Responds-Williams-Lawsuit

For example, just three days after Williams filed its lawsuit against Energy Transfer and Warren over the special stock offering in May, Armstrong emailed Cleveland and Stoney, explaining that he did not know where they stood with respect to the merger. One week later, on May 24, 2016, Williams filed an amended S-4 to emphasize that some board members voted to oppose the merger and continued to disagree with moving forward with the deal.[66]

By June, many observers concluded it was now just a matter of how the deal would be voided. The suits and countersuits belied any public statements in support of the deal.[67]

COLLAPSE AND RECRIMINATION

By the final week of June, the once-promising alliance of two pipeline giants morphed into round after round of epic legal clashes. On June 24, 2016, the Delaware Court of Chancery ruled that Energy Transfer had the right to terminate its merger agreement with Williams because Energy Transfer's counsel Latham & Watkins was unable to deliver the required 721 opinion.[68] Vice Chancellor Sam Glasscock III observed with candor that even if the deal no longer made good business sense for Energy Transfer and the company wanted out, it acted in good faith and exhibited due diligence in exploring ways to get the 721 opinion completed in time.[69]

Williams responded to the June 24 decision acknowledging its disagreement but reiterating its desire for the deal to succeed. "The Williams Board continues to recommend that stockholders vote 'FOR' the merger agreement with ETE. The cash and stock transaction with ETE will provide Williams's stockholders a significant premium, meaningful participation in the upside of combined company and value certainty through the cash component."[70]

June 27, 2016, was a day of dizzying activity: At the special meeting, shareholders voted overwhelmingly in favor of the merger with Energy Transfer[71] and, separately, Williams filed papers commencing an appeal of the Delaware Court of Chancery's June 24 ruling.[72]

Energy Transfer had enough. Armed with a court decision that said it was entitled to terminate the merger, it issued a statement on June 29 saying, "Latham advised ETE that it was unable to deliver the opinion as of the outside date. Consistent with its rights and obligations under the

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[66] Defendant and Counterclaim Plaintiffs' Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.

[67] https://www.nytimes.com/2016/06/20/business/dealbook/reckoning-near-for-merger-of-energy-transfer-and-williams.html

[68] https://napipelines.com/energy-transfer-williams-non-merger/

[69] https://www.wsj.com/articles/energy-transfer-can-escape-williams-takeover-judge-rules-1466801256

[70] https://investor.williams.com/press-releases/press-release-details/2016/Williams-Committed-to-Closing-Will-Take-Appropriate-Actions-to-Enforce-Its-Rights-under-the-Merger-Agreement/default.aspx

[71] https://investor.williams.com/press-releases/press-release-details/2016/Williams-Stockholders-Approve-Merger-Transaction-with-ETE-and-Williams-Launches-Appeal-of-Merger-Ruling-in-Delaware-Supreme-Court/default.aspx

[72] https://investor.williams.com/press-releases/press-release-details/2016/Williams-Stockholders-Approve-Merger-Transaction-with-ETE-and-Williams-Laun

merger agreement, ETE subsequently provided written notice terminating the merger agreement due to failure of conditions under the merger agreement, including Latham's inability to deliver the required tax opinion, as well as the other bases detailed in ETE's filings in the Delaware lawsuit referenced above."[73]

Williams, in turn, issued a statement that day, saying it rejected the court's decision and affirmed its plans to press ahead with an appeal, adding, "Williams recognizes the practical fact that ETE has refused to close the merger. Williams has concluded that it is in the best interests of its stockholders to seek, among other remedies, monetary damages from ETE for its breaches. So, while taking appropriate actions to enforce its rights and deliver benefits of the Merger Agreement to its stockholders, Williams will renew its focus on connecting the best natural gas supplies to the best markets."[74] In other words, the deal was dead but the pursuit of the breakup fee was just beginning.

WILLIAMS FISSURES BREAK OPEN PUBLICLY

The next day, June 30, 2016, in a closed-door session, six of Williams's thirteen board members voted to remove Armstrong as CEO. The *Wall Street Journal* reported these directors felt Armstrong was "ill-suited to lead an independent Williams as it sets out a new course."[75] Being on the losing side of a momentous vote, these members quit. Among them were its Chairman Frank MacInnis (who claimed "personal reasons" for his departure according to Williams's disclosure), Keith Meister and Eric Mandelblatt. The others included Laura Sugg, a former executive at ConocoPhillips, Ralph Izzo, CEO of utility giant Public Service Enterprise Group Inc., and Steven Nance, president of a privately held oil and gas company. They had strongly favored the Energy Transfer deal even as Armstrong worked against it.

[73] https://www.streetinsider.com/Corporate+News/Energy+Transfer+Equity+%28ETE%29+Terminates+Williams+%28WMB%29+Merger/11783799.html
[74] https://www.oilandgas360.com/energy-transfer-terminates-williams-merger-williams-says-will-seek-damages/
[75] https://www.wsj.com/articles/nearly-half-of-williams-directors-resign-1467324568

Not surprisingly in such a high-level, high-stakes shakeout of corporate management, people had strong views. In separate resignation letters dated July 1, 2016, Mandelblatt and Meister pulled no punches in their assessment of Armstrong.

The next day, June 30, 2016, in a closed-door session, six of Williams' thirteen board members voted to remove Armstrong as CEO.

"There was discussion of the substantial business and operational failures that have occurred over the last five years on Alan's watch as CEO, many of which I, Eric Mandelblatt or other directors have often raised in the past," Meister said. "I did not hear a credible defense of Mr. Armstrong's track record of business performance…"

The letter also took a swipe at board members who sided with Armstrong, stating, "I can only conclude that those directors who were unwilling to support this change have acted more out of a personal loyalty to Alan Armstrong, rather than permitting the facts of his performance to take them to the correct answer."[76]

"I can only conclude that those directors who were unwilling to support this change have acted more out of a personal loyalty to Alan Armstrong, rather than permitting the facts of his performance to take them to the correct answer." – Eric Mandelblatt

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[76] https://www.sec.gov/Archives/edgar/data/107263/000119312516639789/d200592dex992.htm

In a separate letter filed with the SEC, Mandelblatt said Armstrong was "...incapable of maximizing shareholder value and, instead, is primarily focused on maintaining his role as CEO....I cannot serve on a board that continues to empower a CEO with an abysmal operational and financial track record, and who, in my opinion, lacks the necessary judgment and character to lead the company forward."[77]

These were certainly not their final words. Less than two months later, Meister was back, this time looking to replace the entire Williams board. In a tempered but candid interview on CNBC he said, "In sum, I'd say it's very much a 1970s board, where there are six directors whose qualifications I would question. They're not the best draft picks to be on the board and they've gotten on by being very loyal and supportive of a CEO whose record has failed to meet expectations."[78] This echoes recent sentiments about the broader role of boards of directors across corporations offered by Warren Buffet that CEOs look for board members who seek the CEO's approval, which may not necessarily align with shareholder interests. In his February letter to shareholders, Buffett said:

> *"The CEO of a company searching for board members will almost certainly check with the [Non-Wealthy Director's] current CEO as to whether NWD is a 'good' director. 'Good,' of course, is a code word. If the NWD has seriously challenged his/her present CEO's compensation or acquisition dreams, his or her candidacy will silently die. When seeking directors, CEOs don't look for pit bulls. It's the cocker spaniel that gets taken home."*[79]

In addition to Armstrong's inability to close a deal with Energy Transfer, Meister said the company had fallen short on financial expectations, had seen growth projects fail, and had a poor safety history in recent years.

Indeed, in 2013 and 2014, there were a spate of accidents at Williams's facilities. There were two fatalities and many injuries following an accident at a Williams's facility in Louisiana. That incident led to lawsuits and, eventually, a scathing report by a federal agency that highlighted poor safety practices.[80] A Williams Partners liquefied natural gas plant near the Washington-Oregon border was shut and people had to be evacuated after an explosion that injured an employee; a Williams gathering pipeline in West Virginia ruptured and caught fire, and in Wyoming, an explosion shut down natural gas transmission in the region and residents in Opal were forced to evacuate temporarily.[81]

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[77] https://www.sec.gov/Archives/edgar/data/107263/000119312516639789/d200592dex992.htm
[78] https://www.cnbc.com/2016/08/22/corvexs-keith-meister-will-seek-to-place-10-directors-on-williams-companies-board.html
[79] https://www.berkshirehathaway.com/letters/2019ltr.pdf
[80] https://www.theadvocate.com/baton_rouge/article_45c2840a-9609-11e6-b663-ebef6afd7f18.html?_sm_au_=iVVWRQMP5JTSCqSs01TfKK3Qv3fc4
[81] https://www.tulsaworld.com/business/williams-cos-reeling-from-four-explosions-at-facilities-in-less/article_1c96ab56-0128-5063-8789-e2bb0c5e8ef2.html

In addition, as litigation exposed more details about what was going on behind the scenes of the failed deal with Energy Transfer, North American Polypropylene (NAPP) filed suit against Williams in August 2016. NAPP alleged that Williams was making it seem as though it was "willing and ready" to proceed with a pipeline project in Canada which Williams knew would not come to fruition if the ET deal had gone through. According to NAPP's filings, had they known about this, the company would not have made the strategic investments it did, claiming that Williams's lack of transparency and honesty cost it $400 million. That case is still working its way through the courts.[82]

But the more unsettling revelations came to light as the Williams-Energy Transfer litigation was playing out. In a February 18, 2020 brief filed with the Delaware Chancery Court, Energy Transfer details Armstrong's behind-the-scenes efforts to scuttle the deal that only came to light when Energy Transfer subpoenaed Bumgarner. In that filing Energy Transfer asserted, "Armstrong's conduct is shocking and beyond the pale."[83] Indeed, the secret emails between the two, discussed above, strongly indicated that Armstrong had actively sought to scuttle the merger.

Energy Transfer's brief states that, "Litigation-focused communications between Armstrong and Bumgarner took place both before and after Bumgarner filed suit against Williams and ETE, and Armstrong never revealed the existence of these communications to the Williams Board, did not forward any of Bumgarner's communications to internal or outside counsel, and never informed ETE of these communication."

In an exceptional showing of hubris, just a week after the June 30 board meeting, Bumgarner followed up on a happy hour he and Armstrong shared with an email referring to their 'team' efforts during the past 6 months.[84]

Despite the existence of these emails, Armstrong said in his June 9 deposition that his communications with Bumgarner were "probably mostly oral." On June 11, Armstrong deleted the personal Gmail account from which he had communicated with Bumgarner about the merger. His implausible explanation was that he was being "heavily attacked with all kinds of spam."

Like Armstrong, Bumgarner dodged discussion of their common efforts to derail the deal. The day Energy Transfer filed suit in April, he told the *Dallas Morning News,* "I don't know what we were talking about. We worked together at the same company for a long time. I see him socially at the country club. I see him at United Way events. Tulsa is not a very big town." He said he

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[82] https://www.hcdistrictclerk.com/Common/Error.aspx

[83] Defendant and Counterclaim Plaintiffs' Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.

[84] https://www.dallasnews.com/business/energy/2020/02/21/energy-transfer-accuses-rival-ceo-of-undermining-massive-pipeline-deal-in-2016/

filed his suit in early 2016 on his own behalf and his only communication with Armstrong had to do with not including Williams as a plaintiff.[85]

When Armstrong's apparent collusion with Bumgarner came to light in a court filing, one of Williams's board members said these communications were clearly wrong and his behavior was "unbecoming an officer of a public corporation."[86]

PART IV: EPILOGUE

A FINAL DAY IN COURT

While the imbroglio with Energy Transfer blew up the internal merger, Armstrong got what he wanted: a compliant board and the eventual completion of an internal deal that had been the source of contention and sticking point in the merger with Energy Transfer. In August 2018, the company announced that Williams had closed the merger of Williams Partners with a subsidiary of Williams.

"We are pleased to close this important transaction following the strong support for the merger that was demonstrated by our shareholders in yesterday's overwhelming vote of approval," said Armstrong. "This transaction provides Williams with a simplified corporate structure and streamlined governance while maintaining investment-grade credit ratings and positions us well for long-term growth and enhanced shareholder value. As a fast-growing, investment grade C-Corp with the best natural gas infrastructure assets in the sector, we are confident this combined entity will provide a compelling investment opportunity to a broader range of investors."[87]

The companies are performing as well as can be expected as it becomes less possible to turn a profit in the shale business. An ill-timed scheme by OPEC and Russia to boost production just as the coronavirus was closing down the global economy did not help the domestic industry's fortunes but at this writing each company is well-positioned to survive the current storm.[88]

Williams's record of poor corporate governance and desire to fight off any acquisition attempts continues. In early April 2020, the *Wall Street Journal* reported that the influential proxy advisory firm Institutional Shareholder Services, Inc. (ISS) took the unusual step of urging a 'no' vote on Williams Chairman Stephen Bergstrom's reelection at the company's annual meeting April 28.

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[85] https://www.dallasnews.com/business/energy/2020/02/21/energy-transfer-accuses-rival-ceo-of-undermining-massive-pipeline-deal-in-2016/

[86] Defendant and Counterclaim Plaintiffs' Response, The Williams Cos., Inc. v. Energy Transfer LP and LE GP; The Williams Cos., Inc. v. Energy Transfer LP, et al.

[87] https://investor.williams.com/press-releases/press-release-details/2018/Williams-Completes-Acquisition-of-Williams-Partners/default.aspx

[88] https://finance.yahoo.com/news/energy-transfer-lp-et-gains-214509139.html

(ISS, however, did recommend a cautionary 'yes' vote for Armstrong's continued service as a director.[89]) The recommendation came in response to the board's adoption, without investor approval, of an aggressive "poison pill" that triggers a right for current investors to purchase additional shares at a significant discount whenever an unwanted investor acquires only five percent of outstanding shares. This measure floods the market with new shares, making it harder for a potential acquirer to purchase a controlling share of the company. According to ISS, poison pills are typically not triggered until the unwanted investor acquires two to three times the five percent adopted by Williams.

Energy Transfer remains one of the biggest players in the industry, even with its stock battered like other companies in the energy sector, including Williams. Energy Transfer continues to maintain a foothold in all major domestic oil and gas basins and remains active with mergers and partnerships such that market analysts generally favor hanging onto shares of the company.[90]

The final piece of unfinished business is the $1.5 billion breakup fee. The Delaware Chancery Court has already ruled that Energy Transfer was not in breach by re-examining the tax implications and the Delaware Supreme Court affirmed that ruling.

There are additional claims and counterclaims that are still in play. At a hearing in early March 2020, the Court heard Williams' argument that Energy Transfer should be required to reimburse Williams for the $410 million breakup fee incurred by Williams Companies when it terminated its acquisition of Williams Partners, a claim that hinges on the court finding that Energy Transfer acted in bad faith.

In an upcoming hearing, the Delaware Chancery Court will decide if Armstrong's communications with Bumgarner put Williams in breach of contract, which would release Energy Transfer from any additional claims Williams may try to make that Energy Transfer owes Williams any breakup fee.

It is unclear when a decision on either question may be expected.

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[89] https://www.wsj.com/articles/pipeline-operator-williams-comes-under-fire-11586286169
[90] https://finance.yahoo.com/news/energy-transfer-announces-restructuring-lake-143000081.html

THE PLAYERS: WARREN AND ARMSTRONG

In many ways, **Kelcy L. Warren** grew up in the oil business in Texas. His father was a ditch digger for what was then Sun Oil Company for a time while Kelcy and his four brothers were growing up. Warren's boyhood, like so many others in that time and place, revolved around their Baptist church and Boy Scouts.

With money from an array of odd jobs he had held starting at age 12, he was able to attend the University of Texas at Austin. He did not manage the freedom he had being away from his small town home for the first time. His grades were poor and he had to withdraw from school. In the year that followed he said he "grew up," earned more money and was granted readmission to UTA.

This time he worked hard at his courses and showed ambition and promise as an innovative pipeline engineer. In 1981, just three years after graduating, he joined Endevco, a small energy development company, and got more into the commercial aspect of energy development.

Ten years later, Warren and a partner acquired Endevco and then sold it four years later and co-founded Energy Transfer with Ray Davis.[91] As chairman, he has guided the company's growth and success.[92]

Alan S. Armstrong became president and chief executive officer of Williams in January 2011. Prior to being named CEO, Armstrong led the Company's North American midstream and olefins businesses through a period of growth and expansion as Senior Vice President – Midstream.

Previously, Mr. Armstrong served as Vice President of Gathering and Processing from 1999 to 2002; Vice President of Commercial Development from 1998 to 1999; Vice President of Retail Energy Services from 1997 to 1998 and Director of Commercial Operations for the company's midstream business in the Gulf Coast region from 1995 to 1997. He joined Williams in 1986 as an engineer.

Armstrong graduated from the University of Oklahoma in 1985, with a bachelor's degree in civil engineering. The *Tulsa World* named him one of the Tulsan's Of the Year in 2016.[93] The Williams Companies goes back to 1908, when two brothers with a construction business got into the new

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[91] https://horatioalger.org/members/member-detail/kelcy-l-warren/.
[92] https://www.forbes.com/profile/kelcy-warren/#28f2e16e237d
[93] https://www.tulsaworld.com/alan-armstrong-president-and-ceo-of-williams-cos/article_6e4c8790-b41f-5250-8faf-125c7ecc9bab.html

area of building pipelines. They were good at it and the company expanded over the decades to come.

In 1966, Williams bought a pipeline in what was the largest leveraged buyouts that Wall Street had ever seen. Over the next 30 years, it continued its transformation from a pipeline builder to an owner and operator of large pipeline systems and became a conglomerate with businesses ranging from fertilizer and steel to telecommunications to retail stores and commercial real estate development. It eventually turned its full focus back to energy and pipelines.

In 2009, Williams began investing to grow its business in the Marcellus producing area of the U.S. Northeast and became one of the largest gatherers and processors of natural gas in the region. The acquisition of controlling interest in Access Midstream Partners, L.P. added to Williams's growth footprint in the Marcellus and Utica producing areas and in areas of the Mid-Continent and the West.[94]

[94] https://www.williams.com/our-company/our-history/

ABOUT THE AUTHOR

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Charles Sauer is a seasoned economic policy expert, author, President and Founder of the Market Institute. Sauer began developing his expertise in finance and tax by working for the chairman of the Finance Committee, and then going on to be a legislative analyst focused on tax, immigration and labor issues in a governor's office. In 2007, Sauer was named the Deputy Legislative Director for the National Center for Policy Analysis, a think tank dedicated to finding free-market alternatives to government regulation. After his time at NCPA, he was President of Entrepreneurs for Growth, a Capitol Hill education program that educated Hill staff on entrepreneurship. Sauer then co-founded and served as the Executive Director for the Free Market Medical Association. In 2010, he founded the Market Institute and serves as President to date. Sauer authored the book, *Profit Motive: What Drives the Things We Do* and is a frequent voice appearing in outlets like the *Washington Examiner, Forbes, Investor's Business Daily,* and many more.

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