**No. 17-0862**

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**In the Supreme Court of Texas**

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**Energy Transfer Partners, L.P. and Energy Transfer Fuel, L.P.,**

*Petitioners,*

**v.**

**Enterprise Products Partners, L.P. and Enterprise Products Operating LLC,**

*Respondents.*

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# PETITION FOR REVIEW

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## STATEMENT OF THE CASE

***Nature of the case*:** This case turns on the totality-of-the-circumstances test in the Texas Business Organizations Code ("TBOC") for determining whether parties formed a partnership. Respondent Enterprise has not challenged the sufficiency of the evidence establishing its partnership with Petitioner ETP under that test. Nor has Enterprise challenged the jury finding that it breached its duty of loyalty by stealing a multi-billion dollar partnership opportunity for itself.

The court of appeals nevertheless held that there was no partnership as a matter of law. The court determined that so-called "conditions precedent" in a letter signed early in the parties' relationship conclusively negated all the parties' later conduct and writings creating a partnership under the TBOC—even though the letter was at most disputed evidence of a single factor in the TBOC test. The question for this Court is whether that single-factor approach abrogates the Legislature's totality-of-the-circumstances test and allows a partner to evade its duty of loyalty in violation of the TBOC.

***Course of Proceedings*:** Following a four-week trial, the jury found that (1) the parties formed a partnership under the TBOC's multi-factor test and (2) Enterprise breached its statutory duty of loyalty. (App. 4)

***Trial Court*:** The case was tried in the 298th Judicial District Court, Dallas County, Texas; the Honorable Emily Tobolowsky, presiding.

***Trial Court's Disposition*:** The trial court entered judgment for ETP on the jury's findings after reducing the jury's disgorgement award by almost 75%. The final judgment awards ETP actual damages of $319,375,000 and disgorgement of $150,000,000, as well as pre- and post-judgment interest. (App. 5)

***Court of Appeals' Disposition*:** On appeal to the Dallas Court of Appeals, Enterprise did not challenge the sufficiency of the evidence supporting the findings of partnership formation and breach of the duty of loyalty, but the court of appeals reversed and rendered judgment for Enterprise. The court held that a single early-stage letter (App. 7), which the jury considered in its evaluation of the TBOC's totality-of-the-circumstances test, foreclosed a partnership as a matter of law, despite

considerable conduct thereafter satisfying the statute's test for partnership formation.

Justice Lana Myers wrote the opinion, joined by Justices William Whitehill and Craig Stoddart. *Enterprise Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. filed). (App. 1) A motion for rehearing was denied. (App. 3)

## STATEMENT OF JURISDICTION

The Court has jurisdiction because this case presents questions regarding the TBOC that are important to the jurisprudence of the State. *See* TEX. GOV'T CODE § 22.001(a).

The court of appeals' opinion repudiates the totality-of-the-circumstances test for partnership formation created by the TBOC and recognized by this Court in *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009). The opinion also misinterprets the statutory definition of a "for profit" partnership and allows the prospective elimination of the statutory duty of loyalty in violation of the TBOC.

Review by this Court is important to restore the Legislature's test for partnership formation, its definition of partnership, and its prohibition against eliminating the duty of loyalty.

## ISSUES PRESENTED

### 1. The TBOC's partnership-formation test

The jury question on partnership formation properly submitted the five factors "indicating that persons have created a partnership" under § 152.052 of the TBOC. Consistent with *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009), which held that § 152.052 establishes a "totality-of-the-circumstances test," the charge correctly told the jury to "consider[] all of the evidence" about those factors, with "[n]o single fact" being dispositive. (1CR657; App. 4) Ignoring *Ingram*, the court of appeals set aside the jury's partnership finding, holding that as a matter of law an early-stage letter imposed conditions precedent that nullified ETP's unchallenged proof of the TBOC factors.

- Did the court of appeals rewrite the TBOC's partnership-formation test?

- Did the court of appeals further err by holding that, as a matter of law, a disputed, early-stage letter considered by the jury established conditions precedent that precluded the parties from later forming a partnership under the TBOC's partnership-formation test?

**2. Role of profit in partnership formation**

The court of appeals held that a partnership to market and pursue a pipeline opportunity—that won a billion-dollar shipping commitment—was not a partnership because it was not "an association of two or more persons to carry on a business for profit" under TBOC § 152.051.

- Did the court of appeals rewrite the TBOC, and partnership law generally, by limiting partnerships to associations or ventures that earn a profit?

**3. Scope of a partner's statutory duty of loyalty**

The jury found—in a finding not challenged by Enterprise—that Enterprise breached its duty of loyalty when it stole a partnership opportunity for itself. Section 152.002(b) of the TBOC says that partners may not "eliminate the duty of loyalty," but the court of appeals allowed an early-stage letter to relieve Enterprise of responsibility for its undisputed breach of that duty.

- Did the court of appeals erroneously permit a partner to prospectively eliminate the statutory duty of loyalty in violation of the TBOC?

**4. Role of "waiver" in the partnership-formation test.** (Unbriefed)

After concluding that an early-stage letter imposed, as a matter of law, conditions precedent that forever precluded a partnership by conduct under the TBOC, the court of appeals held that those conditions could be avoided only by an independent jury finding that the claimed conditions precedent were waived—even though the jury weighed the letter along with evidence of waiver in finding a partnership under the TBOC's five-factor test.

- In light of the TBOC's totality-of-the-circumstances test, did the court of appeals err in holding that waiver was an independent defense on which ETP had the burden of proof?

- If waiver is an independent defense, was an express finding of waiver necessary in light of the evidence presented and the charge given?

## STATEMENT OF FACTS

This case turns on the application of the TBOC, which codified century-old law holding that parties form a partnership when they act like partners. The TBOC lists five factors "indicating that persons have created a partnership[.]" TBOC § 152.052(a); App. 6. As this fact statement shows, ETP and Enterprise engaged in conduct under the factors "indicating … a partnership" to pursue a lucrative pipeline project, including agreeing to share profits and losses, repeatedly expressing their intent to be partners, telling others they were partners, jointly controlling the partnership, and contributing money and property. *Id.*

The evidence of partnership formation was so compelling that Enterprise did not challenge it in the court of appeals.

### A. ETP and Enterprise formed the Double E partnership to market and pursue an oil pipeline from Oklahoma to the Gulf Coast.

ETP and Enterprise are pipeline companies. Beginning in 2010, they—and nearly every other major pipeline company—tried to build a pipeline connecting the "Pipeline Crossroads of the World" in Cushing, Oklahoma, to refineries along the Gulf Coast. (CX9; 27RR116-19) The

project had the potential for enormous profit because massive production in Canada had created a glut of oil at Cushing, with no viable way to move it to the Gulf Coast for refining. (27RR116-19; 39RR33-34)

To finance such a project, a pipeline company needed long-term commitments from oil producers. (39RR41-44) But producers would not commit to any company without knowing that it would be the first to complete a pipeline. (39RR40-43; 41RR140-41) For a project to appear viable in the marketplace and to allay those concerns, a pipeline company needed an "anchor shipper" to commit a large amount of oil to its project. (29RR23; 39RR45-46)

By March 2011, Enterprise's only option for attracting an anchor shipper and becoming the first-mover was to partner with ETP. (47RR170) ETP owned a 200-mile natural gas pipeline called "Old Ocean," which covered nearly half the distance and could be modified to move crude oil south. (PX21) Enterprise approached ETP, and their relationship began. (27RR105-23)

During their initial discussions in April 2011, ETP and Enterprise signed a letter describing a potential limited liability company that could construct and operate a pipeline, using Old Ocean (defined as the "Transaction"). (DX1; App. 7) This early-stage letter stated that it did not "create any binding or enforceable obligations between the Parties" and that no such obligations would exist absent "board approvals and definitive agreements." (*Id.*) Enterprise later argued that this letter created "conditions precedent" necessary for a partnership with ETP at any stage, regardless of later conduct.

But in fact, the letter did not stop the parties from acting like partners or repeatedly proclaiming their partnership. Indeed, "speed to market was critical," so ETP and Enterprise "quickly moved away from this [letter]." (27RR138-40) They decided, for example, not to use Old Ocean, but instead to build a new, larger pipeline that would be only slightly more expensive than retrofitting Old Ocean. (28RR101-12; 49RR119-38) In the race to secure the first anchor shipper, ETP and Enterprise "began a full-fledged partnership." (27RR138-40)

In early May 2011, Enterprise and ETP named their partnership "Double E" and agreed on ground rules: no secret meetings, joint participation in meetings with potential shippers, and disclosure of any shipper willing to commit or obtain equity in the pipeline. (29RR167-68; 49RR167-76)

These ground rules flowed from the two-phase structure of all massive pipeline projects—a market-and-pursue phase, followed by a "build" phase. (49RR12-13) During the market-and-pursue phase, pipeline companies market their project to shippers during an "open season" governed by federal law. (28RR72-73; 29RR154-55)

During Double E's open season, ETP and Enterprise took actions recognized as creating a partnership under § 152.052(a):

- ***Shared Profit and Loss (§ 152.052(a)(1), (4))***: They agreed to create a "50/50 joint venture" with "[e]arnings split 50/50 between the partners," which meant "a sharing of all things … ultimate revenues, ultimate expenses, ultimate net profits[.]" (42RR12-13; 27RR132-33; 28RR51; 35RR41-43; PX23)

- ***Expressions of Intent (§ 152.052(a)(2))***: They repeatedly and unambiguously told the world they had formed a "joint venture" and "partnership." (*E.g.*, 27RR136-37; 28RR99; DX1128) To start the open season, the parties issued a "Notice of Binding Open Commitment Period" declaring that: "EE brings together two joint venture partners with exceptional track records for the timely completion of major infrastructure projects like the Double E Pipeline." (PX25) The parties declared dozens of times that they had formed a partnership—in conference calls, presentations, web articles, press releases, emails, and meetings. (*E.g.*, PX409; PX27; PX1464; PX394)

- ***Participation and Control (§ 152.052(a)(3))***: They jointly prepared marketing materials, conducted the "open season," and set rates. (35RR45-47; 42RR14-17; 45RR37-38; PX44; PX451) They jointly established and controlled an Integrated Project Team for their engineers to work together, and their employees jointly developed plans for hydraulics, electricity supply, pipe supply, environmental impact, and other operational matters. (32RR22-51; CX2; 35RR49)

- ***Contribution (§ 152.052(a)(5))***: They agreed to contribute capital to develop the project and devoted hundreds of hours of employee "sweat equity." (28RR84; 32RR51-67; 39RR177; PX21; 29RR64)

## B. The Double E partnership obtained a critical billion-dollar commitment from Chesapeake.

On August 12, Double E got its anchor shipper when Chesapeake Energy Corporation signed a commitment to ship at least 100,000 barrels of light crude daily for ten years, generating future revenues of more than $800 million. (PX80; 27RR109-11) This "huge contract" was the "anchor shipper" the partners had worked so hard to secure. (35RR80-81) That same day, Continental Resources, a major oil producer, stated in writing its "interest to work with a consortium of participants to participate in the proposed Double E pipeline." (36RR119-20) The Chesapeake contract gave Double E 30 days to accept, allowing ETP and Enterprise time to leverage these dual commitments to attract other shippers—especially from Canada. (41RR93-94; 27RR109-10)

Enterprise, however, had been plotting other plans behind ETP's back.

### C. Enterprise secretly met with Enbridge, lied about the Chesapeake commitment, and stole the Double E partnership opportunity.

On August 1, nearly two weeks before Double E's open season ended, Enterprise—without telling ETP—approached Enbridge, a large Canadian pipeline company, to propose that they combine forces to build a Cushing-to-Gulf pipeline. (49RR189-90; 48RR38-41; CX10) The two companies had discussed the possibility before, but Enterprise had nothing to offer. (49RR84-85; 53RR19-20) This time, Enterprise had Double E's commitment from a major anchor shipper—Chesapeake.

During secret discussions over the next few weeks, Enterprise told Enbridge about the Chesapeake commitment and promised that it could "bring [it] across" to a project with Enbridge. (CX20; 54RR14; 51RR146-47; PX170, PX205; PX206) Enterprise falsely claimed that the Chesapeake commitment was made only to Enterprise and Enterprise alone had 30 days to accept. (CX6; 51RR146-47; PX84) Enterprise also sent Enbridge proprietary information from Double E, worked on a term sheet for an Enterprise-Enbridge pipeline in direct competition with Double E, and

declared alignment with Enbridge on all major tenets—*all while ETP and Enterprise were still partners*. (PX34; PX1557; 28RR123-24; CX3; CX5)

Enterprise's duplicity worked. Enbridge agreed to form a partnership with Enterprise to pursue the same pipeline Double E was pursuing. And Enterprise began trying to extricate itself from Double E, telling Enbridge that it needed to first "end [its] JV with ETP" (the very "JV" that Enterprise now denies ever existing) before announcing a new partnership with Enbridge. (CX5; PX170; PX205; PX219) On August 15, the first business day after Double E's open season ended, Enterprise terminated the partnership with ETP. (29RR21)

ETP was stunned. With the Chesapeake commitment, it believed Double E was on the cusp of success, and it pleaded with Enterprise to reconsider. (27RR109-10; PX411; PX69) Enterprise refused.

Building on the commitments and work of Double E, Enterprise and Enbridge conducted a record-breaking open season; they constructed a Cushing-to-Gulf pipeline that opened in June 2012; and they have since

enjoyed the financial rewards of a joint venture valued at trial at *more than $2.3 billion*. (54RR66-67; 55RR42-43; 44RR102; 40RR54; PX1651; PX1652)

### D. Although the jury found a partnership under the TBOC factors and a breach by Enterprise of its statutory duty of loyalty (in findings Enterprise did not challenge), the court of appeals reversed.

ETP sued Enterprise for breaching its statutory duty of loyalty. On instructions to consider the TBOC's totality-of-the-circumstances test, the jury found that ETP and Enterprise formed a partnership and that Enterprise breached its statutory duty of loyalty, causing millions of dollars in damages. (App. 4)

On appeal, Enterprise did not challenge the sufficiency of the evidence establishing the partnership under the statutory factors or the jury's finding of breach. The court of appeals nevertheless reversed and rendered judgment for Enterprise, holding that, as a matter of law, an early-stage letter nullified all subsequent conduct establishing a partnership under the TBOC's five-factor test.

## REASONS TO GRANT REVIEW AND SUMMARY OF ARGUMENT

Partnerships are one of the most widely-used forms of business association, in Texas and nationally. The partnership criteria codified in the TBOC are derived from a model law that provides broad recognition of partnerships and comprehensive protections for partners. The court of appeals erroneously limited the TBOC and undermined the protections it provides. The court's decision injects considerable doubt into Texas partnership law, requiring review.

***1. The court of appeals vitiated the TBOC's partnership-formation test.*** The court of appeals' first and overarching error was to rewrite the five-factor partnership-formation test in the TBOC. Section 152.052(a) identifies the "[f]actors indicating that persons have created a partnership," and this Court held in *Ingram* that no one factor is dispositive. 288 S.W.3d at 895-904. "Whether a partnership exists must be determined by an examination of the totality of the circumstances." *Id*. at 903-04. Ignoring *Ingram*, the court of appeals purported to "supplement" the five-factor test with "the law of conditions precedent," but in fact rewrote it. The court

erroneously held that "conditions precedent" in an early-stage letter, which the jury considered, nullified overwhelming and unchallenged evidence that the parties later formed a partnership under the TBOC factors. At most, this letter was disputed, inconclusive evidence of a single factor. Treating it as dispositive repudiates the TBOC's totality-of-the-circumstances test and directly conflicts with *Ingram*.

***2. The court of appeals erroneously restricted the scope of the TBOC by misconstruing the term "for profit."*** Section 152.051(b) of the TBOC says that a partnership is "an association … to carry on a business for profit[.]" The court of appeals erroneously held that the Double E partnership was not a partnership under the TBOC because it did not "generate a profit"—even though it obtained a billion-dollar shipping commitment and would have earned a profit but for Enterprise's theft. The court's construction excludes from the TBOC countless exploratory partnerships and encourages partners to steal opportunities before the partnership can profit from them.

***3. The court of appeals allowed a partner to eliminate the duty of loyalty in violation of the TBOC.*** Section 152.002(b) of the TBOC states that partners "may not … eliminate the duty of loyalty[.]" Yet the court of appeals allowed Enterprise to avoid the partnership created under the TBOC because of an early-stage letter the parties later disregarded, thereby releasing Enterprise from its duty of loyalty. The repercussions are real and serious. Under the court's opinion, partners may now prospectively avoid the TBOC and the duties imposed by the Legislature.

The court of appeals thus rewrote the partnership statute and radically limited its protections. The far-reaching implications of that opinion require review.

## ARGUMENT

The court of appeals misapplied the TBOC in three ways. *First*, the court repudiated the TBOC's totality-of-the-circumstances test for partnership formation. *Second*, the court erroneously held that the TBOC's definition of "partnership" excludes businesses exploring new opportunities because they are not "for profit." And *third*, the court permitted a partner to prospectively eliminate the duty of loyalty in violation of the TBOC.

### A. The court of appeals rewrote the TBOC's test for partnership formation.

The court of appeals abrogated the TBOC's five-factor test for partnership formation by holding that an early-stage letter nullified all other evidence establishing a partnership under the five statutory factors. Correctly placed in the statutory scheme, however, the letter was at most disputed evidence about a single factor properly weighed by the jury.

### 1. The TBOC requires a totality-of-the-circumstances analysis, which the jury properly performed here.

The TBOC identifies five factors "indicating that persons have created a partnership":

> (1) receipt or right to receive a share of profits of the business;
> (2) expression of an intent to be partners in the business;
> (3) participation or right to participate in control of the business;
> (4) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties against the business; and
> (5) agreement to contribute or contributing money or property to the business.

TBOC § 152.052; App. 6. As this Court held in *Ingram*, the TBOC provides that no single factor is determinative. 288 S.W.3d at 895-904.[1] Rather, evidence of the factors should be considered as part of a "totality-of-the-circumstances test." *Id*.

The TBOC factors have a long and well-established history in Texas. They originated in the common law as distinct requirements, each of which had to be proven to show a partnership. *See id.* at 894-95. In 1993, the

[1] *Ingram* analyzed the Texas Revised Partnership Act, which applied "substantially the same" rules for determining partnership formation as the TBOC. *Id*. at 894 n.4.

Texas Legislature codified the factors. *Id*. at 894. A few years later in *Ingram*, this Court, "[a]fter examining the statutory language," determined that "the issue of whether a partnership exists should be decided considering all of the evidence bearing on the [TBOC] partnership factors." *Id*. at 896. Proof of all five factors was no longer necessary under the statute, but "conclusive evidence of all five factors establishes a partnership as a matter of law." *Id*. at 904.

Here, the jury instructions faithfully recited the TBOC's five-factor test, explained that "[n]ot all of these factors must be established," and told the jury to "consider[] all of the evidence that bears on these factors." (1CR657; App. 4) That evidence included an early-stage letter, the impact of which the parties hotly disputed. (*E.g.*, 57RR127-28) Weighing all the evidence under the TBOC factors, the jury found that ETP and Enterprise formed a partnership "to market and pursue a pipeline project to transport crude oil from Cushing, Oklahoma to the Gulf Coast." (1CR657; App. 4) The evidence was so overwhelming that Enterprise did not challenge it on appeal.

### 2. The court of appeals rejected the TBOC's totality-of-the-circumstances test by regarding evidence of a single TBOC factor as dispositive.

The court of appeals nevertheless reversed the jury's finding of partnership under the TBOC test, misreading the statute and ignoring *Ingram*.

To justify its departure from the statutory text, the court announced that the TBOC is "not exclusive" or "the sole source of rules for determining partnership formation." 529 S.W.3d at 538. It said: "Section 152.003 of the Business Organizations Code states that '[t]he principles of law and equity' supplement the statutory partnership provisions 'unless otherwise provided by this chapter or the other partnership provisions.'" *Id*. (citing TBOC § 152.003). One of those "principles of law," the court decided, is the "law of conditions precedent": "[W]e conclude that unperformed conditions precedent to forming a partnership will prevent the partnership from forming," regardless whether the parties later conduct themselves as partners. *Id*. at 538-40. The court then held that, as a matter of law, the early-stage letter created "conditions precedent"

necessary for ETP and Enterprise to form a partnership and nullified the overwhelming evidence establishing their partnership under the TBOC factors. *Id*. at 537-45.

The court's reasoning is flawed and eviscerates the statute.

*First*, the court's opinion treats as dispositive what is at most disputed evidence of a single factor. Enterprise repeatedly argued at trial that the letter was evidence about the second factor—"expression of an intent to be partners in the business." (57RR127-28, 140-48) But the TBOC does not elevate that factor over others. To the contrary, it says that "expression of [] intent" is only one of several "[f]actors indicating that persons have created a partnership[.]" TBOC § 152.052(a); *see also id*. § 152.051(b)(1). This Court held in *Ingram*, moreover, that no one factor is controlling and that "expression of intent" is only "a factor to consider" and is, in fact, unnecessary "for a partnership to exist." 288 S.W.3d at 891-99. By using the letter to negate as a matter of law the evidence supporting the five factors, the court of appeals created a direct conflict with *Ingram* and judicially amended the statute.

*Second*, while the court of appeals said that it was merely "supplementing" the TBOC factors with "the law of conditions precedent," it instead supplanted them altogether. 529 S.W.3d at 538. The plain meaning of "supplement[]" is "supplying something additional" or "adding what is lacking"—not adding something entirely different. BLACK'S LAW DICTIONARY 1577 (10th ed. 2014). Yet, here, the court of appeals allowed claimed "conditions precedent" in an early-stage letter—at most disputed evidence of a single factor—to nullify the overwhelming evidence of the TBOC factors as a matter of law. As this Court held in *Ingram*, the TBOC imposes a "totality-of-the-circumstances test" for determining partnership formation, and thus any evidence of "conditions precedent"—whether evidence of a single factor or evidence of something else—cannot be dispositive. *See* 288 S.W.3d at 895-904.

*Third*, the court of appeals' reliance on the early-stage letter to invalidate the parties' later *conduct* misunderstands the very reason for the TBOC's five-factor test. *Ingram* held that the factors focus on what parties *do* because their actions—including all of their "speech, writings, and

conduct"—are the best evidence of what they intended. *Id*. at 896-99. "The [statutory] factors seem to serve as a proxy for the common law requirement of intent to form a partnership by identifying conduct that logically suggests a collaboration of a business's purpose and resources to make a profit as partners." *Id*. at 896.

Texas courts have long agreed, holding, for example, that:

- parties form a partnership if they share profits and losses and jointly control the enterprise, even if they earlier stated that they were lessor-lessee, not partners, *Giddings v. Harding*, 267 S.W. 976, 976-77 (Tex. 1925); and

- parties form a partnership, even if their agreement includes a "condition precedent to the formation of a partnership" that remains unsatisfied, if the parties "actually proceed with the business" of the partnership, *Thompson v. Thompson*, 500 S.W.2d 203, 209 (Tex. Civ. App.—Dallas 1973, no writ).[2]

Another court, citing "significant authority," explained that the parties' *conduct* is determinative—"'[a] duck which is called a horse does not

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[2] The court of appeals misinterpreted *Thompson* as holding that an unperformed condition precedent precludes partnership formation unless the condition is "waived." 529 S.W.3d at 540-41. But *Thompson* held that a partnership *could* exist despite an unfulfilled written condition and, without addressing waiver, remanded to determine whether the parties later acted as partners. 500 S.W.2d at 208-10.

become a horse; a duck is a duck.'" *Grimmett v. Higginbotham*, 907 S.W.2d 1, 2 n.3 (Tex. App.—Tyler 1994, writ denied) (citations omitted); *see also* Christine Hurt & D. Gordon Smith, BROMBERG & RIBSTEIN ON PARTNERSHIP § 2.04[C] at 2-49 & n.39 (2d ed. 2014) (explaining that "the relevant intent is to do the acts that in law constitute partnership," even where the parties never considered themselves to be partners).

The court's opinion deviates from this established law, rewrites the TBOC's partnership-formation test, and calls into question countless partnerships formed under the TBOC.

### 3. The early-stage letter relied on by the court of appeals cannot override the TBOC's partnership-formation test.

The court of appeals compounded its error by holding that, as a matter of law, the letter at issue here created conditions precedent precluding the partnership. 529 S.W.3d at 542.[3]

The letter, however, addressed a limited set of circumstances that quickly changed as the parties raced to market. The letter described a

[3] Enterprise argued that two other documents also precluded partnership formation, but the court of appeals correctly declined to address those documents because they involved different parties and subjects.

particular "Transaction" involving a limited liability company that would construct and operate an existing pipeline—"Old Ocean." (DX1) But that Transaction never materialized. Instead, following extensive study, the partners decided to construct a *new* pipeline. (28RR102-06; 49RR119-38) The letter made no mention of this to-be-built pipeline project, which is the subject of the partnership found by the jury. In fact, the letter's relevance was so tenuous that *Enterprise* proposed a jury question to determine whether it applied here. (1CR636)

The court of appeals' holding that these so-called "conditions precedent" were forever binding on the parties—despite later proof of the statutory factors—is refuted by the letter, which states that "[n]either this letter nor the [attached] JV Term Sheet *create any binding or enforceable obligations between the Parties*[.]" (DX1 (emphasis added)). A document that says it "is not binding" does not create obligations that control as a matter of law. *See John Wood Grp. USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 17 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *see also, e.g.*, *Foreca v. GRD Dev. Co.*, 758 S.W.2d 744, 746 (Tex. 1988).

The court of appeals purported to avoid this problem by drawing a distinction between contractual "obligations" and "impediments." But that distinction misses the bigger picture. Whether called an "obligation" or "impediment," the letter is still only disputed evidence of a single factor. The factual issues surrounding the letter—whether it applied to the relevant project and the force of its disclaimer of binding obligations—are exactly the issues that the TBOC says should be submitted to the jury under the statute's five-factor test. And that is exactly what occurred here.

### B. The court of appeals improperly limited the scope of the TBOC by misconstruing the statutory term "for profit."

The TBOC defines a "partnership" to mean "an association of two or more persons to carry on a business for profit as owners." TBOC § 152.051(b); App. 6. The court of appeals erroneously held that Double E "cannot be a partnership" under the TBOC because it did not "generate any revenue or earn a profit." 529 S.W.3d at 539. That faulty interpretation creates a dangerous gap in the protections provided by the statute.

The term "for profit" means "established, maintained, or conducted for the purpose of making a profit." WEBSTER'S COLLEGIATE DICTIONARY

493 (11th ed. 2003); *cf.* BLACK'S LAW DICTIONARY 417 (10th ed. 2014) ("for-profit corporation" is "organized for the purpose of making a profit"). The Code defines "for profit" even more expansively to include any entity that is not a nonprofit charitable organization. *See* TBOC § 1.002(26) ("'For-profit entity' means an entity other than a nonprofit entity.").[4]

Double E is "for profit" because it was formed to market and pursue a business opportunity from which ETP and Enterprise would share profits. Double E was certainly not a non-profit charity. It procured a billion-dollar commitment to ship oil on its pipeline—the very commitment that Enterprise usurped and transformed into a business now earning it an enormous profit. Courts have recognized similar joint ventures as partnerships protected by law. *See*, *e.g.*, *Omohundro v. Matthews*, 341 S.W.2d 401, 403 (Tex. 1960) (recognizing partnership for "exploration and development of" oil leases, even though parties had never jointly made a

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[4] *See also* Official Comment, Revised Uniform Partnership Act, § 202 cmt. 2. ("unincorporated nonprofit organization … is not a 'for profit' organization"); Hurt & Smith, § 2.05[C] at 2-65 (2d ed. 2014) ("profit" in RUPA is meant to exclude "businesses in which no one has a contractual right to the firm's net income").

profit); *see also* Hurt & Smith, § 2.05[A] at 2-60.1 ("It is not essential to the existence of a partnership that the business actually has been carried on. An agreement to carry on a partnership is sufficient[.]"); *id*. § 2.05[C].

The court of appeals' narrow—and incorrect—interpretation of "for profit" opens the door to rampant misconduct. In a state with robust energy and real estate markets, parties routinely join together to seek and develop profitable opportunities. If such joint ventures are not "partnerships" under the TBOC, then nothing prevents one side from doing exactly what Enterprise did here—feigning work for the partnership while secretly appropriating partnership opportunities for itself. Neither the TBOC nor the common law supports that result.

### C. The court of appeals permitted a partner to prospectively eliminate its statutory duty of loyalty in violation of the TBOC.

The TBOC states that partners may not "eliminate the duty of loyalty … the duty of care … [or] the obligation of good faith," except in circumstances not relevant here. TBOC § 152.002(b); App. 6. This prohibition is essential to partnerships—indeed, "[a] partnership exists solely because the partners choose to place personal confidence and trust in one another." *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546 (Tex. 1998).

Yet the court of appeals' opinion allows a partner to prospectively eliminate the very duties the TBOC prohibits partners from abolishing. By allowing an early-stage letter to nullify later conduct forming a partnership, the court freed Enterprise from the TBOC altogether, including the duty of loyalty owed to ETP. The court's opinion is a roadmap for future parties who want to operate a partnership like Double E while evading the TBOC and its obligations, including the duties the TBOC prohibits partners from eliminating. It creates a judicial loophole that undermines the statute's policy goals.

### D. The court of appeals' opinion undercuts important legislative policies underlying the TBOC.

Partnership is one of the most common forms of business organization. In states like Texas, the rules for determining whether parties formed a partnership protect honest businesspersons from unexpected, unfair denials of partnership. *See* Hurt & Smith, §§ 2.01, *et seq*.

Enterprise has complained loudly about "partnership by ambush." But the TBOC prevents such "ambush." It expressly relies on the parties' *conduct* to determine partnership formation. There can be no ambush when, as here, the parties knowingly acted as partners and publicly proclaimed their "partnership" more than 30 times. The "ambush" occurred when Enterprise abruptly abandoned their partnership after seeing a chance to secretly enrich itself.

At its core, the TBOC's partnership-formation test rests on the timeless principle that actions speak louder than words. The court of appeals' contrary decision reflects its own policy judgment, in direct conflict with the wisdom of the Legislature and this Court's precedent.

## CONCLUSION

The court of appeals' opinion rewrites the TBOC's partnership-formation test and drastically limits its scope and the protections provided by the Legislature. This Court should grant review, reverse the court of appeals, and remand for further proceedings consistent with that reversal.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. Pursuant to TEX. R. APP. P. 9.4(i)(3), I hereby certify that this Petition for Review contains a total of 4,460 words excluding the parts exempted by TEX. R. APP. P. 9.4(i)(1), as verified by Microsoft Word 2010. This Petition for Review is therefore in compliance with TEX. R. APP. P. 9.4(i)(2)(D).

2. This brief complies with the typeface requirements of TEX. R. APP. P. 9.4(e) because it has been prepared in a conventional typeface using Microsoft Word 2010 software in Palatino Linotype 14-point font in text and Palatino Linotype 12-point font in footnotes.

*/s/ Jeremy D. Kernodle*
Jeremy D. Kernodle

4827-1184-6745 v.2

## APPENDIX INDEX

| Appendix Number | Description | Record Ref. |
|---|---|---|
| 1 | Court of Appeals' Opinion | N/A |
| 2 | Court of Appeals' Judgment | N/A |
| 3 | Court of Appeals' Order Denying Motion for Rehearing | N/A |
| 4 | Jury Charge and Verdict | 1CR654-75 |
| 5 | Trial Court Final Judgment | 1CR977-79 |
| 6 | TEX. BUS. ORG. CODE §§ 152.001-152.005 and 152.051-152.056 | N/A |
| 7 | April 21, 2011 letter | DX1 |

# Appendix 1

529 S.W.3d 531
Court of Appeals of Texas,
Dallas.

ENTERPRISE PRODUCTS PARTNERS, L.P. and Enterprise Products Operating L.L.C., Appellants
v.
ENERGY TRANSFER PARTNERS, L.P. and Energy Transfer Fuel, L.P., Appellees

No. 05-14-01383-CV
|
Opinion Filed July 18, 2017
|
Rehearing Overruled September 13, 2017

**Synopsis**

**Background:** Crude oil pipeline developer brought action against its purported partner, another pipeline company, for breach of joint enterprise and breach of fiduciary duty after company terminated its participation in project. The 298th Judicial District Court, Dallas County, Emily G. Tobolowsky, J., 2014 WL 10120268, entered judgment upon jury verdict for developer. Company appealed.

**Holdings:** The Court of Appeals, Myers, J., held that:

[1] parties' letter agreement concerning development of pipeline had unmet conditions precedent to formation of partnership, and

[2] parties did not waive conditions precedent to formation of partnership.

Affirmed in part and reversed and rendered in part.

West Headnotes (12)

**[1]** **Partnership** Form, Requisites, and Validity of Agreement

Letter agreement concerning development of crude oil pipeline created conditions precedent to the formation of a partnership, which, being unmet, prevented pipeline developers from forming the alleged partnership through their conduct; letter agreement required the approvals of the transaction by both parties' board of directors and execution and delivery of definitive agreements before a partnership arose.

Cases that cite this headnote

**[2]** **Partnership** Creation and Requisites in General

The Business Organizations Code section setting forth factors for determining if a partnership has been created is not the sole source of rules for determining partnership formation. Tex. Bus. Org. Code § 152.052.

  

1 Cases that cite this headnote

**[3]** **Contracts** What are conditions precedent in general

A "condition precedent" is an event that must happen or be performed before a right can accrue to enforce an obligation.

Cases that cite this headnote

**[4]** **Partnership** Creation and Requisites in General

Unperformed conditions precedent to forming a partnership will prevent the partnership from forming unless the parties waive the performance of the conditions precedent or other rules of law or equity nullify them.

Cases that cite this headnote

**[5]** **Joint Ventures** Joint venture as partnership;applicability of partnership law in general

A joint venture is governed by the same rules as a partnership.

Cases that cite this headnote

**[6]** **Action** Conditions precedent in general

A condition precedent to the right to maintain an action must be performed and the fact of performance or excuse of performance must be alleged and proved in order to warrant a recovery.

Cases that cite this headnote

**[7]** **Partnership** Form, Requisites, and Validity of Agreement

Crude oil pipeline developer and its purported partner, another pipeline company, did not waive conditions precedent to formation of partnership that were set forth in their letter agreement, beyond the requirements in their subsequent reimbursement agreement that company begin to develop an engineering design package and that developer reimburse company, where reimbursement agreement stated that "nothing herein shall be deemed to create or constitute" a joint venture or partnership, and letter agreement did not require parties to build the pipeline regardless of its apparent future profitability.

Cases that cite this headnote

**[8]** **Estoppel** Nature and elements of waiver

"Waiver" is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.

Cases that cite this headnote

**[9]** **Estoppel** Nature and elements of waiver

**Estoppel** Implied waiver and conduct constituting waiver

Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances.

  

Cases that cite this headnote

**[10]** **Evidence** Sufficiency to support verdict or finding

Evidence is conclusive only if reasonable people could not differ in their conclusions.

Cases that cite this headnote

**[11]** **Appeal and Error** Reasons for Decision

Ordinarily, an appellant must challenge every independent ground supporting the judgment.

Cases that cite this headnote

**[12]** **Appeal and Error** Form and requisites in general

Purported partner was not obliged to challenge waiver of unmet conditions precedent to formation of partnership in its opening appellate brief as a challenge to an independent ground supporting the judgment against it finding existence of partnership and breach of fiduciary duty, where it was undisputed that the conditions precedent were not met, other purported partner did not plead waiver of conditions precedent, no element of waiver was submitted to the jury, and other partner did not argue after trial that it had conclusively proved waiver. Tex. R. Civ. P. 279.

Cases that cite this headnote

***532 On Appeal from the 298th Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-11-12667-M. Emily G. Tobolowsky, Judge.**

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Before Justices Myers, Stoddart, and Whitehill

## OPINION

Opinion by Justice Myers

****1** In this case, the jury found Enterprise Products Partners, L.P. ("Enterprise") was in a general partnership with Energy Transfer Partners, L.P. ("ETP") and that Enterprise breached its duty of loyalty as a partner to ETP. The trial court's judgment awarded ETP actual damages of $319,375,000 and disgorgement of $150 million. Enterprise [1] brings

four issues on appeal contending: (1) the trial court erred by denying Enterprise's motions for directed verdict and JNOV because the parties' written agreements contained unperformed conditions precedent that as a matter of law precluded the forming of the disputed partnership;[2] (2) the jury charge omitted a necessary instruction and wrongly imposed the burden of proof on Enterprise; (3) the award of actual damages was not supported by legally and factually sufficient evidence; and (4) the disgorgement award was unsupported by the evidence, unauthorized by statute, and contrary to principles of equity. As discussed below, we conclude that:

1. The unfulfilled conditions precedent in the parties' written agreements precluded forming the alleged partnership unless ETP obtained a jury finding that the parties waived those conditions precedent;

2. ETP's failure to request such a finding meant that it had to establish waiver of the conditions precedent as a matter of law; and

3. ETP did not prove as a matter of law that the parties waived the conditions precedent.

Accordingly, we reverse the trial court's judgment as to ETP's claims against Enterprise and render judgment that ETP take nothing on those claims.

## BACKGROUND

ETP and Enterprise are builders and operators of oil and gas pipelines. At the beginning of 2011, there was a glut of crude oil in storage facilities in Cushing, Oklahoma, but there were no pipelines running south from Cushing to the refineries in the Houston area. The Seaway Pipeline, which carried oil north from Houston to Cushing, was jointly owned by Enterprise and ConocoPhillips. ConocoPhillips refused Enterprise's requests that they modify the pipeline to carry oil south from Cushing to Houston.

****2** In early 2011,[3] Enterprise approached ETP about potentially working together to ***534** build a pipeline transporting crude oil from Cushing to Houston. ETP owned the Old Ocean Pipeline, which was a natural-gas pipeline running north from Houston to just south of Dallas. Enterprise thought the Old Ocean Pipeline could be converted to carry crude oil south, which would save considerable expense and time in building the Cushing-to-Houston pipeline. ETP agreed to work with Enterprise on determining the viability of the project. They called the proposed pipeline the Double E Pipeline.

Before beginning work, the parties signed three agreements. The March 10 Confidentiality Agreement provided safeguards for the parties to exchange confidential information. The April 21 Letter Agreement stated the parties were "entering discussions" concerning building and operating a pipeline between Cushing and Houston, and the parties included an attached Term Sheet that contained the general terms for the potential transaction. The Term Sheet stated the ownership structure for the construction and operation of the pipeline would be a limited liability company with equal representation between ETP and Enterprise. The April 27 Reimbursement Agreement provided that the parties were still negotiating "definitive agreements" but provided that Enterprise could begin the engineering-design work before the parties executed definitive agreements. The Reimbursement Agreement also provided that ETP would reimburse Enterprise for half the expenditures to third parties. All three agreements contained provisions purporting to limit the parties' obligations to one another.

After executing the three agreements, ETP's and Enterprise's engineering and marketing executives worked together to determine whether the pipeline would be economically feasible. They agreed that, before building the pipeline, they would need oil shippers to commit during an "open season"[4] to shipping at least 250,000 barrels per day for ten years at certain rates. The companies' marketing executives then traveled around the country trying to convince shippers to

commit to ship on the proposed pipeline. Enterprise and ETP learned that shippers were not interested in shipping oil from Cushing to Houston on a stand-alone pipeline at the offered rates. Instead, shippers wanted the pipeline to be part of a larger network that could ship oil from Canada to Houston. Enterprise and ETP also learned that their rates were higher than those of other pipeline builders that were considering building a Cushing-to-Houston pipeline.

Enterprise suggested to ETP that instead of using ETP's Old Ocean Pipeline, they build a new, larger pipeline in the Seaway Pipeline right-of-way and that they consider adding a third participant to the project. ETP agreed to these changes.

**3 Despite the efforts of ETP's and Enterprise's marketing executives, the open season closed on August 12 with only one shipper agreeing to ship on the Double E *535 Pipeline, and it committed to ship 100,000 barrels per day for ten years, well below the parties' agreed minimum-commitment requirement of 250,000 barrels per day. On August 15, Enterprise contacted ETP and terminated its participation in the Double E project.

About two weeks before the end of the open season, Enterprise had discussions with Enbridge (US) Inc., which operated a pipeline system from Alberta, Canada to Cushing and was in the process of determining whether to extend its network with a pipeline running from Cushing to Houston. Enterprise told Enbridge that if the open season failed to garner sufficient shipping commitments, then Enterprise was interested in pursuing a Cushing-to-Houston pipeline with Enbridge. Enterprise did not disclose these communications to ETP. The day after Enterprise withdrew from the Double E Pipeline project with ETP, Enterprise's executives met with Enbridge's executives, and Enterprise and Enbridge agreed to work together on the pipeline. Before they began construction on the pipeline, however, ConocoPhillips announced it would sell its half of the Seaway Pipeline. Enterprise and Enbridge agreed that Enbridge would purchase ConocoPhillips's interest in the Seaway Pipeline. They then changed their plan from building a new pipeline following the Seaway Pipeline to using the Seaway Pipeline itself and modifying it to flow south from Cushing to Houston. Once that was accomplished, Enterprise and Enbridge planned to build a second pipeline in the Seaway Pipeline right-of-way. Enterprise and Enbridge received sufficient commitments from shippers for their project, and they began operating the pipeline from Cushing to Houston.

## The Litigation

On September 30, ETP sued Enterprise for breach of joint enterprise and breach of fiduciary duty. [5] ETP's case against Enterprise, as presented in its live petition, the evidence, and the jury charge, was that ETP and Enterprise had a partnership to "market and pursue a pipeline from Cushing, Oklahoma to the Texas Gulf Coast." Their work on the Double E project imbued both ETP and Enterprise with knowledge about the pipeline market, the requisites for a successful pipeline venture between Cushing and the Gulf Coast, and the identities of shippers interested in transporting oil on such a pipeline and at what terms. According to ETP, if Enterprise or ETP was to use its knowledge of these matters to build a pipeline between Cushing and the Gulf Coast, the construction and operation of the pipeline would constitute a business opportunity of the Double E partnership. ETP asserted that Enterprise usurped that business opportunity *536 by teaming with Enbridge to build the pipeline while not disclosing its use of the business opportunity to ETP. As an equal partner with Enterprise in the Double E partnership, ETP argued that Enterprise owed a duty of loyalty to ETP to account for the profits from its usurpation of Double E's business opportunity. ETP asserted that Enterprise breached this duty and owes ETP fifty percent of the discounted net profits that Enterprise would receive during the lifetime of the Seaway Pipeline with Enbridge.

**4 At the end of the four-week trial, the jury found that ETP and Enterprise "create[d] a partnership to market and pursue a pipeline project to transport crude oil from Cushing, Oklahoma to the Gulf Coast"; Enterprise failed to prove it complied with its duty of loyalty as a partner; Enterprise withdrew from the partnership on August 15, 2011; $319,375,000

  

would compensate ETP for its damages proximately caused by Enterprise's breach of its duty of loyalty; and the benefit to Enterprise from its breach of its duty of loyalty was $595,257,433.

The trial court awarded ETP the damages of $319,375,000 found by the jury, plus interest. The court also awarded ETP disgorgement against Enterprise of $150 million.

## PRECLUSION OF PARTNERSHIP BY CONDITIONS PRECEDENT IN WRITTEN AGREEMENTS

In its first issue, Enterprise contends that the trial court erred by denying Enterprise's motions for directed verdict and for JNOV because its written agreements with ETP prohibited the formation of a partnership without approvals by the parties' respective boards of directors and executed and delivered definitive agreements, neither of which occurred.

A directed verdict or judgment notwithstanding the verdict is warranted when the evidence is such that no other verdict can be reached and the moving party is entitled to judgment as a matter of law. *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 645 (Tex. App.—Dallas 2015, no pet.); *see City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005) ("[T]he test for legal sufficiency should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review.").

Deciding this issue requires the interpretation and application of statutory and contractual provisions. When construing statutes, we attempt to ascertain and effectuate the legislature's intent. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). We start with the plain and ordinary meaning of the statute's words. *Id.* If a statute is unambiguous, we generally enforce it according to its plain meaning. *Id.* We read the statute as a whole and interpret it so as to give effect to every part. *Id.*; *see also Phillips v. Bramlett*, 288 S.W.3d 876, 880 (Tex. 2009) ("We further try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible.").

Likewise, when construing a contract, our primary goal is to determine the parties' intent as expressed in the terms of the contract. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 252 (Tex. 2009); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Contract language that can be given a certain or definite meaning is not ambiguous and is construed as a matter of law. *Chrysler Ins. Co.*, 297 S.W.3d at 252; *Coker*, 650 S.W.2d at 393. A contract is ambiguous when its meaning is uncertain and doubtful or it is reasonably susceptible to more than one meaning. *Coker*, 650 S.W.2d at 393; ***537** *United Protective Servs., Inc. v. W. Vill. Ltd. P'ship*, 180 S.W.3d 430, 432 (Tex. App.—Dallas 2005, no pet.). We review an unambiguous contract de novo. *Chrysler Ins. Co.*, 297 S.W.3d at 252.

**[1]** The three documents relied on by Enterprise are (1) the Confidentiality Agreement effective March 10, (2) the Letter Agreement with the attached Term Sheet signed April 21, and (3) the Reimbursement Agreement signed April 27. The Letter Agreement contains the clearest language, so that is the one we will consider.

The Letter Agreement stated the parties were entering negotiations to form a joint venture for constructing and operating a pipeline, and the Term Sheet attached to the agreement set out the proposed terms they expected would govern the joint venture, including that the parties would form a limited liability company to build and operate the pipeline. The Letter Agreement also stated,

> ****5** Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and ... *no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties.* Unless and until such definitive agreements are executed and delivered by both of the Parties, either [Enterprise] or ETP, for any

> reason, may depart from or terminate the negotiations with respect to the Transaction at any time without any liability or obligation to the other, whether arising in contract, tort, strict liability or otherwise.

(Emphasis added.) The Letter Agreement defined the "Transaction" as "a proposed joint venture transaction involving the construction (or conversion, as applicable) and operation of a pipeline to move crude oil from Cushing, Oklahoma to the Houston, Texas market."

The question before us is whether this Letter Agreement created conditions precedent to the formation of a partnership, which, being unmet, prevented the parties from forming the alleged partnership through their conduct in this case. In Texas, "an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether ... the persons intend to create a partnership...." TEX. BUS. ORGS. CODE ANN. § 152.051(b) (West 2012).

Enterprise argues the Letter Agreement created two conditions precedent that had to be fulfilled before a partnership could exist: (1) approvals by both parties' boards of directors and (2) executed and delivered definitive agreements for the "Transaction." Enterprise asserts that because the parties never received their boards of directors' approvals and never executed and delivered definitive agreements, the conditions precedent were not performed and no partnership could have formed. Accordingly, Enterprise asserts the trial court should have granted the motions for instructed verdict or JNOV and dismissed ETP's claims as a matter of law.

Conversely, ETP does not deny that the conditions precedent were not met but argues that whether a partnership was formed is controlled solely by the five-factor test set forth in the Business Organizations Code. Section 152.052 of the code, titled "Rules for Determining if Partnership is Created," states:

Factors indicating that persons have created a partnership *include* the persons':

***538** (1) receipt or right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

(4) agreement to share or sharing:

(A) losses of the business; or

(B) liability for claims by third parties against the business; and

(5) agreement to contribute or contributing money or property to the business.

BUS. ORGS. § 152.052(a) (West 2012) (emphasis added). ETP argues that the conditions precedent in the Letter Agreement are evidence of only one of the five factors in section 152.052, "expression of an intent to be partners in the business," and that the unfulfilled conditions precedent do not necessarily preclude the formation of a partnership. ETP maintains that the jury considered all the evidence, including the unfulfilled conditions precedent, under the five-factor test and properly concluded there was a partnership.

****6** **[2]** We disagree with ETP. Section 152.052 is not the sole source of rules for determining partnership formation. Section 152.052 states that determination of formation of a partnership should "include" the five factors listed in the section. However, those factors are not exclusive. *See* TEX. GOV'T CODE ANN. § 311.005(13) (West 2013) (" 'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."); *see Sneed v. Webre*, 465 S.W.3d 169, 190, 191–92 (Tex. 2015). Section 152.003 of the Business Organizations Code states that "[t]he principles of law and equity"

supplement the statutory partnership provisions "unless otherwise provided by this chapter or the other partnership provisions." BUS. ORGS. § 152.003 (West 2012). One of those other "principles of law" is the law of conditions precedent.

**[3]** "A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010) (citing RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.")). The requirements in the Letter Agreement of approvals of the "Transaction" by both parties' boards of directors and the execution and delivery of definitive agreements were events that had to happen or be performed before a partnership between ETP and Enterprise arose. Those requirements are conditions precedent.

ETP argues that the conditions precedent applied only to a pipeline using the Old Ocean Pipeline and did not apply to the change of plans in June to build a new pipeline in the Seaway Pipeline right-of-way. We disagree. In this argument, ETP relies on the definition of "Potential Transaction" in the Term Sheet, which was defined as a joint venture to build a pipeline between Cushing and Houston using the Old Ocean Pipeline. However, the conditions precedent appear in the Letter Agreement, not the Term Sheet. The conditions precedent refer to the "Transaction," not the "Potential Transaction." The Letter Agreement's definition of "Transaction" did not limit the term to a joint venture to build a pipeline using the Old Ocean Pipeline. The Letter Agreement broadly defined "Transaction" to mean "a proposed joint venture transaction involving the construction (or conversion, as applicable) and operation of a pipeline to move crude oil from Cushing, Oklahoma to ***539** the Houston, Texas market." This definition includes any pipeline built or used to transport oil from Cushing to Houston. Because "Transaction" as defined in the Letter Agreement, which contained the conditions precedent, was not limited to pipelines using the Old Ocean Pipeline, ETP's argument lacks merit.

ETP also argues that the Letter Agreement does not apply to the partnership found by the jury because the agreement's definition of "Transaction" as "involving the construction ... and operation of a pipeline" does not include the partnership found by the jury, which was "a partnership to *market and pursue* a pipeline project to transport crude oil from Cushing, Oklahoma to the Gulf Coast." (Emphasis added.) "Market and pursue" the pipeline was defined during the trial by ETP's president, Marshall McCrea, and other witnesses to mean phase one of two phases in the process of developing a pipeline. In phase one, the parties determine whether the pipeline project is viable by determining the revenue from the pipeline that will be necessary to cover the cost of building and operating the pipeline and provide the parties with a satisfactory profit. The parties then market the pipeline and hold an open season seeking sufficient shipping commitments to reach the desired level of revenue when the pipeline is built. If the open season generates sufficient commitments, then the parties move to phase two, which McCrea described as: "we go seek funding and approval to move forward on the project." Whether the parties progressed to phase two and built the pipeline was contingent on receiving sufficient shipping commitments. If the open season did not yield sufficient commitments, then the parties would not progress to phase two. Enterprise terminated the relationship in phase one, and the parties never entered phase two.

****7** The problem with ETP's argument that the jury could conclude there was a partnership limited to phase one is that phase one, as described by the witnesses, cannot be a partnership under the Business Organizations Code. A partnership is an "association ... to carry on a business for profit." BUS. ORGS. § 152.051(b). The evidence established that revenue, and therefore profit, could not be earned until after construction of the pipeline by either selling the pipeline or operating the pipeline and charging shippers. No evidence showed that "market[ing]" a pipeline or "pursu[ing]" a pipeline before the parties had decided to build it could generate any revenue or earn a profit. Nor did the evidence show that the parties were committed to building the pipeline if the open season failed to yield sufficient commitments. The purpose of the parties' association in phase one was not "to carry on a business for profit" but was to determine whether to continue to phase two. Only after the parties agreed to progress to phase two when they would build and operate the pipeline could their association be described as one "to carry on a business for profit." Because a partnership under the Business Organizations Code requires the potential for profit from the association, ETP's assertion of an association limited to

the determination of the feasibility of constructing and operating a pipeline is not a partnership under the Business Organizations Code. These actions cannot generate a profit, so the association is not one to carry on a business for profit and is not a partnership under the Business Organizations Code.

ETP also points out that the Letter Agreement stated it does not "create any binding or enforceable obligations between the Parties," so it cannot create conditions precedent that are "binding or enforceable" on the parties. Conditions precedent to the creation of a partnership do not ***540** "create any binding or enforceable obligations." Instead, they place an impediment on the parties' ability to "create any binding or enforceable obligations."

**[4]** **[5]** Both Enterprise and ETP cite this Court's opinion in *Thompson v. Thompson*, 500 S.W.2d 203 (Tex. Civ. App.—Dallas 1973, no writ). That case concerned whether a spouse's interest in a "joint venture" [6] to own an apartment complex was community property. The question before the court was whether the joint venture arose before or after the parties' divorce decree. The joint-venture agreement stated it would come into effect when the apartment complex was conveyed to the joint venture, which occurred eight months after the divorce decree. *Id.* at 209. However, the joint venture's tax returns stated the joint venture commenced doing business a year before the divorce decree. *Id.* Because the appeal was from a summary judgment, the question was whether there was a fact issue concerning the date the joint venture came into existence. *Id.* Enterprise quotes this Court's statement: "It is, of course, the general rule that when an agreement provides a condition precedent to the formation of a partnership, it will not come into existence until the condition has been met." *Id.* ETP quotes this statement: "However, such condition precedent may be waived and if the parties actually proceed with the business they may be held as partners even though the condition precedent has not been satisfied." *Id.* In accordance with *Thompson*, we conclude that unperformed conditions precedent to forming a partnership will prevent the partnership from forming unless the parties waive the performance of the conditions precedent or other rules of law or equity nullify them.

Enterprise argues that, pursuant to *Thompson*, ETP had to prove and obtain a jury finding that the parties waived the conditions precedent in order to prevail. Enterprise further asserts that ETP cannot recover because it did not obtain a jury finding that there was waiver of the conditions precedent to forming a partnership.

**[6]** We agree with Enterprise. "A condition precedent to the right to maintain an action must be performed and 'the fact of performance or excuse of performance must be alleged and proved in order to warrant a recovery.' " *Trevino v. Allstate Ins. Co.*, 651 S.W.2d 8, 11 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (quoting *Sw. Associated Tel. Co. v. City of Dalhart*, 254 S.W.2d 819, 825 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.)). If the plaintiff pleads that all conditions precedent have been performed or occurred, then the plaintiff must prove only the conditions that the defendant specifically denies. TEX. R. CIV. P. 54. In this case, ETP did not generally allege in its live pleading that all conditions precedent on its causes of action for joint enterprise and breach of fiduciary duty occurred or were performed. [7] Enterprise's answer, however, specifically denied:

> ****8** the occurrence or performance of all conditions precedent necessary for formation of any partnership, joint venture, or joint enterprise, because the parties did not receive their respective board approvals and the parties did not negotiate, ***541** execute and deliver definitive agreements memorializing the terms and conditions of any proposed joint venture, as required by the parties' March 10, 2011 [the Confidentiality Agreement] and April 21, 2011 [the Letter Agreement] agreements. Enterprise denies the occurrence or performance of all conditions precedent necessary for Plaintiff's claims for breach of partnership, joint venture, or joint enterprise, because the parties did not receive their respective board approvals and the parties did not negotiate, execute and deliver definitive agreements memorializing the terms and conditions of any proposed joint venture, as required by the parties' March 10, 2011 and April 21, 2011 agreements.

  

Therefore, ETP either had the burden to plead and prove compliance with the conditions precedent of approvals by the parties' boards of directors and execution and delivery of definitive agreements, or it had the burden to prove an excuse for nonperformance. *See Trevino*, 651 S.W.2d at 11 (defendant has burden of pleading nonperformance of conditions precedent, but plaintiff has burden of proving performance of conditions precedent).

ETP did not plead that the two conditions precedent were performed or that they were excused by waiver.[8] However, even if ETP had pleaded that the conditions precedent were performed or waived, it still had the burden of proving their performance or waiver. *See Trevino*, 651 S.W.2d at 11; *see also Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 283 (Tex. 1998) (citing *Trevino*). It is undisputed that the conditions precedent were not performed. Therefore, we must determine whether ETP can recover on a theory that the conditions precedent were waived.

Enterprise asserts that ETP had the duty to request a jury question or instruction on waiver of the conditions precedent. Rule of Civil Procedure 279 governs this situation:

> Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived. When a ground of recovery or defense consists of more than one element, if one or more of such elements necessary to sustain such ground of recovery or defense, and necessarily referable thereto, are submitted to and found by the jury, and one or more of such elements are omitted from the charge, without request or objection, and there is factually sufficient evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted element or elements in support of the judgment. If no such written findings are made, such omitted element or elements shall be deemed found by the court in such a manner as to support the judgment.

TEX. R. CIV. P. 279. Under this rule, if waiver of the conditions precedent was an independent ground of recovery or defense by ETP and ETP did not conclusively prove waiver of the conditions precedent, then ETP waived that ground of recovery or defense, and Enterprise prevails on this issue.

***542** The supreme court has "recognize[d] that waiver is an independent ground of recovery or defense and must be pleaded and proved as such." *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 554 (Tex. 1986). The supreme court applied this ruling to waiver of conditions precedent and rule 279 in *Washington v. Reliable Insurance Co.*, 581 S.W.2d 153 (Tex. 1979). In that case, Mrs. Washington applied for a life insurance policy from Reliable with her son, A.W. Washington, as beneficiary. The policy contained the provision, "This Policy shall become effective on the Policy Date if the Insured is then alive and in good health, but not otherwise." *Id.* at 157. It was undisputed that Mrs. Washington "was a very sick woman" when she applied for the policy, and she died three months later. *Id.* at 156. Reliable refused to pay the policy benefits and tried to return the premiums, but A.W. brought suit for payment of the policy benefits. *Id.* A.W. asserted that Reliable had waived the good-health requirement because its insurance agent knew that Mrs. Washington was in poor health when she signed the application. *Id.* at 157. No jury questions were requested or submitted on this waiver theory. *Id.* The supreme court concluded that because the good-health provision was violated and A.W. failed to prove conclusively that Reliable waived the good-health provision, A.W. could not recover on the policy. *Id.* at 160.[9] Although the supreme court did not use the language of conditions precedent and rule 279 (the opinion described waiver of the good-health clause as "an affirmative defense" of the plaintiff), it did cite both rule 279 and an earlier case that described a good-health provision in a life-insurance policy as "a valid condition precedent to the policy's becoming effective." *See id.* at 157 (citing *Tex. Prudential Ins. Co. v. Dillard*, 158 Tex. 15, 307 S.W.2d 242, 243 (1957)). Essentially, the supreme court's analysis was that waiver of the good-health condition precedent was an independent ground of recovery for which A.W. had to secure a jury finding. Because he did not do so, and because waiver of the good-health condition precedent was not proven as a matter of law, he waived the question of

waiver of the condition precedent. And, because the good-health requirement was not waived, the condition precedent barred A.W.'s recovery. *Id.* at 157–58.

**9 **[7]** In this case, the Letter Agreement barred the formation of a partnership "unless and until [1] the Parties have received their respective board approvals and [2] definitive agreements ... have been ... executed and delivered by both of the Parties." These conditions precedent were not performed. Unless they were waived, no partnership was formed, and ETP cannot recover on its claims for breach of joint enterprise and breach of fiduciary duty. Although waiver of conditions precedent is an independent ground of recovery, ETP did not request a jury finding on waiver of the conditions precedent. Therefore, unless waiver of the conditions precedent was *543 established as a matter of law, ETP cannot recover on its claims.

**[8]** **[9]** **[10]** **[11]** **[12]** Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. *Id.* In this case, the question is whether the parties' conduct conclusively established their waiver of both conditions precedent. "Evidence is conclusive only if reasonable people could not differ in their conclusions...." *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). [10]

ETP asserts that the parties acted inconsistently with the Letter Agreement by signing and then amending the Reimbursement Agreement. The original Reimbursement Agreement, signed April 27 (six days after the Letter Agreement), required that Enterprise begin work to develop an engineering-design package for the project before the parties executed definitive agreements and that ETP reimburse Enterprise for half of Enterprise's expenditures on third parties up to $250,000. On May 23, the parties amended the Reimbursement Agreement by raising the limit of ETP's reimbursement obligation to $1 million. The Reimbursement Agreement also stated:

> It is understood by each of the Parties that the execution of this Agreement is intended to create and does create legally binding obligations between Enterprise and ETP *but only as set forth herein*.... Nothing herein shall be deemed to create or constitute a joint venture, a partnership, a corporation, or any entity taxable as a corporation, partnership or otherwise.

**10 (Emphasis added.) We agree with ETP that the Reimbursement Agreement was in part inconsistent with the "no binding or enforceable obligations" clause of the Letter Agreement because it purported to impose obligations on the parties without definitive agreements and approval of the boards of directors, but the quoted provision shows that inconsistency extends only to the requirements that Enterprise begin the engineering-design work and that ETP reimburse Enterprise up to $1 million for half of Enterprise's expenditures on third parties. The evidence does not conclusively establish that the parties intended in the Reimbursement Agreement to abandon *544 the conditions precedent in the Letter Agreement and undertake the obligations of partners without their respective boards' approvals and without the execution and delivery of definitive agreements. Instead, the sentence in the Reimbursement Agreement stating "[n]othing herein shall be deemed to create or constitute a joint venture, a partnership" demonstrates that the parties did not intend for the Reimbursement Agreement to waive the "no binding or enforceable obligations" clause of the Letter Agreement beyond the obligations imposed by the Reimbursement Agreement. We conclude that the Reimbursement Agreement and its amendment do not establish, conclusively or otherwise, that the parties waived the conditions precedent beyond the requirements that Enterprise begin to develop an engineering-design package and that ETP reimburse Enterprise.

ETP also presented evidence purporting to show that the parties ostensibly acted inconsistently with the conditions precedent and formed the alleged partnership sometime in May 2011. According to ETP's witnesses, particularly its president, Marshall McCrea, ETP and Enterprise formed a partnership starting in May because they agreed to share capital costs, liabilities, profits, and losses "on a 50/50 basis," and they agreed "who would control what and how we would combine our efforts to develop this project." However, as discussed above, no evidence showed there could be any profits until after the construction of the pipeline, and the parties' agreements did not require them to build the pipeline

regardless of its apparent future profitability. Even McCrea testified that the pipeline would be built only after the parties successfully completed phase one by determining the project would be profitable, receiving "approval" presumably from the parties' boards of directors, and obtaining funding. All of this evidence shows there could not be an association to operate a business for profit until the parties agreed to build the pipeline, which required the approvals of both parties' boards of directors. *Cf. COC Servs., Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 662–70 (Tex. App.—Dallas 2004, pet. denied) (no evidence that parties intended to be bound by unexecuted master franchise agreement when a signed letter of intent required execution of the master franchise agreement by a specific date). Moreover, this testimony is at least equally consistent with an agreement regarding the terms that would be included in a forthcoming definitive agreement if approved by the respective boards of directors. Therefore, it does not conclusively prove the required waiver. We conclude that because this evidence is consistent with the conditions precedent, it does not conclusively establish waiver of the conditions precedent.

ETP also cites the testimony of Enterprise's president, Michael Creel. Creel was asked, "Can you tell me whether or not you will agree with me, yes or no, that on April 27th there was an agreement to form a 50/50 joint venture? Was there one, yes or no?" Creel did not answer "yes" or "no"; instead, he stated, "I think we had a verbal understanding that we would work together to form a 50/50 project." This testimony could be construed that the parties' business relationship, when they formed one, would involve "50/50" interests. However, it is not conclusive evidence that they had a partnership on April 27 or that they ever formed a partnership. *Cf. id.* Furthermore, this testimony does not address whether the parties intended to waive the conditions precedent and form a partnership without executing and delivering definitive agreements and without the approvals of their boards of directors. Therefore, the testimony does not conclusively ***545** establish that the parties waived the conditions precedent.

ETP also argues that the Letter Agreement did not contain a no-oral-modification clause, meaning that the parties permitted oral modifications to reflect changing circumstances. However, ETP does not cite, and we have not found, any evidence that the parties orally agreed to waive the conditions precedent.

****11** Applying rule 279, we conclude that ETP waived its waiver theory by failing to obtain a jury finding on the waiver theory. Because the conditions precedent were not performed and ETP did not conclusively prove the parties waived the conditions precedent, there was no partnership between Enterprise and ETP. We therefore conclude the trial court erred by denying Enterprise's motions for directed verdict and JNOV. We sustain Enterprise's first issue. [11]

## CONCLUSION

We reverse the trial court's judgment as to ETP's claims against Enterprise and render judgment that ETP take nothing on those claims. In all other respects, we affirm the trial court's judgment.

### All Citations

529 S.W.3d 531, 2017 WL 3033312

Footnotes

1 The parties' documents in this appeal state the appellants are (1) Enterprise Products Partners, L.P. and (2) Enterprise Products Operating LLC and the appellees are (1) Energy Transfer Partners, L.P. and (2) Energy Transfer Fuel, L.P. The trial court's judgment, however, awards no relief to Enterprise Products Operating LLC or Energy Transfer Fuel, L.P., nor does it impose any liability on them. ETP filed a notice of cross-appeal, but its brief does not assert any cross-points.

2 Enterprise's first issue, as set forth in its appellant's brief, is: "Did the parties' three written agreements preclude the formation of a partnership?" Enterprise stated that it "preserved this issue by moving for directed verdict and JNOV." However, Enterprise

  

never expressly identified in the statement of the issue or in the argument the trial court's error warranting reversal. We construe briefs liberally, and we conclude appellants intended to assert the trial court erred by denying the motions for directed verdict and JNOV.

3 Unless otherwise noted, all dates are during the year 2011.

4 Before pipeline developers break ground on the construction of a new pipeline, which can cost billions of dollars, the developers seek long-term commitments to ship oil through the pipeline. Shippers are allowed to sign long-term contracts during a period called an "open season." During the open season, a shipper can sign a Transportation Services Agreement, or TSA, agreeing to ship a certain quantity of oil at a certain rate for a certain term if the pipeline is built. Before a pipeline company commits to building a pipeline, the company tries to obtain a minimum level of shipping commitments through TSAs. The benefit to the shipper from committing during the open season is that the rates offered during an open season to shippers willing to make a long-term shipping commitment are usually lower than the rates charged to "walk up" shippers who do not commit.

5 ETP also brought causes of action against Enterprise for breach of joint venture agreement, breach of partnership agreement, unfair competition, and breach of confidentiality agreement, but it nonsuited them. ETP also brought a cause of action for declaratory judgment seeking a declaration that the Term Sheet did not contain any binding conditions precedent to the formation of a partnership. The trial court did not make any declarations, and ETP does not appeal the trial court's failure to do so. ETP also listed as "causes of action" its requests for a constructive trust, exemplary damages, and attorney's fees. However, these are remedies, not causes of action.

ETP sued Enbridge for tortious interference with existing contract and with prospective business relations, unfair competition, and conspiracy and aiding and abetting breach of fiduciary duty. ETP nonsuited the tortious-interference and unfair-competition claims and the jury found Enbridge was not "part of a conspiracy to breach Enterprise's duty of loyalty to ETP." The trial court's judgment ordered that "ETP takes nothing by its claims against Enbridge."

6 As we stated in *Thompson*, a joint venture is governed by the same rules as a partnership. *Thompson*, 500 S.W.2d at 209; *see also* BUS. ORGS . § 152.051(b)(2) ("[A]n association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether ... (2) the association is called a 'partnership,' 'joint venture,' or other name.").

7 ETP did allege performance of all conditions precedent to its recovery of attorney's fees.

8 Enterprise does not argue that ETP's failure to plead waiver of the conditions precedent constitutes waiver of ETP's theory that the conditions precedent were waived by the parties' conduct, nor does ETP address the effect of its failure to plead waiver of the conditions precedent. Accordingly, we do not address the effect, if any, of ETP's failure to plead waiver.

9 There were actually two policies sold to Mrs. Washington by different agents. One of the insurance agents testified he did not know she was ill and that she appeared to be in good health. On that policy, the supreme court concluded the court of appeals correctly determined recovery on that policy was barred because the evidence did not establish waiver of the good-health clause as a matter of law. *Washington*, 581 S.W.2d at 157–58. A witness testified that when Mrs. Washington signed the other insurance application in front of the agent, Mrs. Washington was obviously in poor health. *Id.* at 158. The witness testified the agent said the insurance company would pay despite her poor health. The supreme court concluded this testimony established waiver of the good-health clause as a matter of law. *Id.* at 158–59.

10 Enterprise's opening brief did not attack the sufficiency of the evidence supporting the theory that the parties waived the unsatisfied conditions precedent, but we conclude Enterprise had no burden to make such an attack in its opening brief. Ordinarily, an appellant must challenge every independent ground supporting the judgment. *See Prater v. State Farm Lloyds*, 217 S.W.3d 739, 740–41 (Tex. App.—Dallas 2007, no pet.) ("When a separate and independent ground that supports a ruling is not challenged on appeal, we must affirm the lower court's ruling."). But here, there is no basis for concluding that waiver of conditions precedent was an independent ground for the judgment. Once Enterprise pleaded failure of the conditions precedent in its answer, ETP had the burden to prove either that the conditions precedent were met, waived, or otherwise excused. *See* TEX. R. CIV. P. 54; *Betty Leavell Realty Co. v. Raggio*, 669 S.W.2d 102, 104 (Tex. 1984); *Trevino*, 651 S.W.2d at 11–12.

It is undisputed that the conditions precedent were not met and ETP did not plead waiver of conditions precedent. No element of waiver was submitted to the jury, so there could be no implied trial-court finding under rule 279. Furthermore, ETP did not argue after trial that it had conclusively proved waiver. Accordingly, Enterprise was not obliged to challenge waiver in its opening brief, and it appropriately addressed waiver in its reply brief when ETP raised the issue in its appellee's brief.

11 Having sustained Enterprise's first issue, we do not address its remaining issues. *See* TEX. R. APP. P. 47.1 (opinion must address every issue necessary to disposition of the appeal).

End of Document

# Appendix 2

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

ENTERPRISE PRODUCTS PARTNERS, L.P. and ENTERPRISE PRODUCTS OPERATING LLC, Appellants

No. 05-14-01383-CV V.

ENERGY TRANSFER PARTNERS, L.P. and ENERGY TRANSFER FUEL, L.P., Appellees

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-11-12667-M.
Opinion delivered by Justice Myers. Justices Stoddart and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. That portion of the trial court's judgment awarding judgment to appellee ENERGY TRANSFER PARTNERS, L.P. against appellant ENTERPRISE PRODUCTS PARTNERS, L.P., is **REVERSED** and judgment is **RENDERED** that appellee ENERGY TRANSFER PARTNERS, L.P. take nothing on its claims against appellant ENTERPRISE PRODUCTS PARTNERS, L.P. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that appellants ENTERPRISE PRODUCTS PARTNERS, L.P. and ENTERPRISE PRODUCTS OPERATING LLC recover their costs of this appeal from appellees ENERGY TRANSFER PARTNERS, L.P. and ENERGY TRANSFER FUEL, L.P.

The obligations of ARCH Insurance Company as surety on appellant ENTERPRISE PRODUCTS PARTNERS, L.P.'s supersedeas bond are **DISCHARGED**.

Judgment entered this 18th day of July, 2017.

# Appendix 3

**Order entered September 13, 2017**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-14-01383-CV**

**ENTERPRISE PRODUCTS PARTNERS, L.P. AND ENTERPRISE PRODUCTS OPERATING LLC, Appellants**

**V.**

**ENERGY TRANSFER PARTNERS, L.P. AND ENERGY TRANSFER FUEL, L.P., Appellees**

**On Appeal from the 298th Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. DC-11-12667-M**

## ORDER

Before Justices Myers, Stoddart, and Whitehill

Appellees' motion for rehearing is **DENIED**.

/s/ LANA MYERS
JUSTICE

# Appendix 4

DC-11-12667
COC
CHARGE OF COURT
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GARY FITZSIMMONS
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**CAUSE NO. 11-12667**

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| **ENERGY TRANSFER PARTNERS, L.P., AND ENERGY TRANSFER FUEL, L.P.** | § | **IN THE DISTRICT COURT** |
| **Plaintiffs,** | § | |
| **v.** | § | **DALLAS COUNTY, TEXAS** |
| **ENTERPRISE PRODUCTS PARTNERS, L.P., ENBRIDGE (US) INC., AND ENTERPRISE PRODUCTS OPERATING LLC,** | § | |
| **Defendants.** | § | **298th JUDICAL DISTRICT** |

FILED
12 MAR -4 PM 4:15
GARY FITZSIMMONS
DISTRICT CLERK
DALLAS CO., TEXAS
DEPUTY

## CHARGE OF THE COURT

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.

2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer "yes" or "no" to all questions unless you are told otherwise. A "yes" answer must be based on a preponderance of the evidence unless you are told otherwise. Whenever a question requires an answer other than "yes" or "no," your answer must be based on a preponderance of the evidence unless you are told otherwise.

   The term "preponderance of the evidence" means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a "yes" answer, then answer "no." A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

   A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror's amount and then figuring the average.

10. Do not trade your answers. For example, do not say, "I will answer this question your way if you answer another question my way."

11. Unless otherwise instructed, the answers to the questions must be based on the decision of at least ten of the twelve jurors. The same ten jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties' money, and would require the taxpayers of this county to pay for

another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.

As used in the following questions and instructions, these terms mean the following:

"ETP" means Energy Transfer Partners, L.P.

"Enterprise" means Enterprise Products Partners, L.P.

"Enbridge" means Enbridge (US), Inc.

Certain testimony has been presented to you through a videotaped deposition. A deposition is the sworn, recorded answers to questions asked a witness in advance of the trial. Some time before this trial, attorneys representing the parties in this case questioned those witnesses under oath. A court reporter was present and recorded the testimony. Some of those questions and answers were read and shown to you. This deposition testimony is entitled to the same consideration, and weighed and otherwise considered by you insofar as possible in the same way, as if the witness had been present and had testified from the witness stand in court. The process of editing the video for presentation to you in an efficient way may have produced "skips" in the apparent movements of the witness or counsel, but you should not weigh any such byproducts of edits in your evaluation of that witness's testimony.

## QUESTION NO. 1

An association of two or more businesses to carry on a business for profit as owners creates a partnership, regardless of whether businesses intend to create a partnership, or the association is called a "partnership," "joint venture," or other name. A joint venture is governed by the same rules as a partnership.

Factors indicating that businesses have created a partnership include their:

(1) receipt or right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

(4) agreement to share or sharing:

(A) losses of the business; or

(B) liability for claims by third parties against the business; and,

(5) agreement to contribute or contributing money or property to the business.

Not all of these factors must be established for a partnership to exist. The issue of whether a partnership exists should be decided considering all of the evidence that bears on these factors. No single fact may be stated as a complete and final test of partnership.

Answer "Yes" or "No."

**Did ETP and Enterprise create a partnership to market and pursue a pipeline project to transport crude oil from Cushing, Oklahoma to the Gulf Coast?**

**Answer:** Yes

If you answered "Yes" to Question 1, then answer the following question. Otherwise, proceed to Question No. 12.

## QUESTION NO. 2

Because of the partnership that you have found between Enterprise and ETP, Enterprise owed ETP a duty of loyalty and must prove it complied with its duty.

A partner's duty of loyalty includes:

(1) accounting to and holding for the partnership property, profit, or benefit derived by the partner:

(A) in the conduct and winding up of the partnership business; or

(B) from use by the partner of partnership property;

(2) refraining from dealing with the partnership on behalf of a person who has an interest adverse to the partnership; and

(3) refraining from competing or dealing with the partnership in a manner adverse to the partnership.

A partner shall discharge its duties to its other partner and exercise any rights and powers in the conduct or winding up of the partnership business:

(1) in good faith; and

(2) in a manner the partner reasonably believes to be in the best interest of the partnership.

Partners by agreement may identify specific types of activities or categories of activities that do not violate the duty of loyalty if the types or categories are not manifestly unreasonable.

Subject to all of the above, Enterprise does not violate its duty of loyalty merely because its conduct furthered its own interest.

Answer Yes" or "No":

**Did Enterprise comply with its duty of loyalty?**

**ANSWER:** NO

If you answered "No" to Question 2, then answer the following question. Otherwise, do not answer the following question.

## QUESTION NO. 3

A partner has the right to withdraw from the partnership and cease to be a partner at any time.

A person ceases to be a partner on the occurrence of an event of withdrawal. An event of withdrawal of a partner occurs on receipt by the partnership of notice of the partner's express will to withdraw as a partner on the date on which the notice is received.

Answer with a date:

**On what date did Enterprise withdraw from the partnership you have found in response to Question No. 1?**

**ANSWER:** August 15, 2011

If you answered "No" to Question 2, then answer the following question. Otherwise, do not answer the following question.

## QUESTION NO. 4

"Proximate cause" means a cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

In answering this question about damages, consider consequential damages that result naturally but not necessarily from Enterprise's wrongful act. Do not include any amount for opportunities that arose after the date that Enterprise withdrew from the partnership that you have found in response to Question No. 3. You may consider only consequential damages relating to any partnership opportunities lost before that date.

Do not increase or reduce the amount in your answer because of your answer to any other question. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers when the Court enters judgment.

Answer separately in dollars and cents for damages, if any. Please write a number figure and spell out that number in words.

**What sum of money, if any, if paid now in cash, would fairly and reasonably compensate ETP for its damages, if any, that were proximately caused by the conduct you have found in response to Question No. 2?**

**ANSWER:**

$319,375,000.00
three-hundred-nineteen-million, three hundred, seventy-five thousand dollars and zero cents.

If you answered Question 4 with a positive number, then answer the following question. Otherwise, do not answer the following question.

## QUESTION NO. 5

To be part of a conspiracy, Enbridge and Enterprise must have had knowledge of, agreed to, and intended a common objective or course of action to damage ETP in the manner you have found in response to Questions Nos. 2 and 4. Enbridge, Enterprise, or both must have performed some act or acts to further the common objective or course of action. Enbridge also must have agreed to engage in Enterprise's breach of the duty of loyalty that caused injury to ETP.

**Was Enbridge part of a conspiracy to breach Enterprise's duty of loyalty to ETP?**

**ANSWER: "Yes" or "No."**

NO

If you answered "No" to Question No. 2 and "Yes" to Question No. 5, then answer the following question. Otherwise, do not answer the following question.

**QUESTION NO. 6** – SKIP (NA)

Assign percentages of responsibility only to those you found caused or contributed to cause ETP's damages. The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of responsibility attributable to any one is not necessarily measured by the number of acts or omissions found.

For each defendant you found caused or contributed to cause damages to ETP, find the percentage of responsibility attributable to each:

1. Enterprise: _____ %

2. Enbridge: _____ %

TOTAL 100%

If you answered "No" to Question No. 2, then answer the following question. Otherwise, do not answer the following question.

## QUESTION NO. 7

The "benefit" to Enterprise is not the whole of the gain from the transactions in question, but the amount of the gain that is attributable to the conduct you have found in response to Question No. 2.

When a benefit has been realized in part as a result of misconduct and in part as a result of legitimate business activities, you may award only that portion of the benefit attributable to the misconduct.

A benefit is attributable to misconduct if Enterprise would not have entered into the transaction and realized the benefit but for the wrong. If Enterprise would have realized the benefit in any event, or if the benefit was the result of alternative causes aside from the misconduct of Enterprise, it is not attributable to misconduct.

Do not include any amount for opportunities that arose after the date that Enterprise withdrew from the partnership that you have found in response to Question No. 3. You may consider only benefits from partnership opportunities wrongfully acquired before that date.

Do not increase or reduce the amount in your answer because of your answer to any other question. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers when the Court enters judgment.

Answer separately in dollars and cents. Please write a number figure and spell out that number in words.

**What is the value to Enterprise, if any, of the benefit it gained as result of the conduct you have found in response to Question No. 2?**

**ANSWER:** $595,257,433.00
Five-hundred-ninety-five million, two-hundred-fifty-seven thousand, four-hundred thirty-three dollars and zero cents.

Answer the following Question only if you unanimously answered "No" to Question 2. Otherwise, do not answer the following Question.

To answer "Yes" to the following question, your answer must be unanimous. You may answer "No" to the following question only upon a vote of ten or more jurors. Otherwise, you must not answer the following question.

**QUESTION NO. 8** (NA-SKIP)

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means a specific intent to cause substantial injury or harm to ETP.

**Do you find by clear and convincing evidence that the harm to ETP resulted from malice by Enterprise?**

**ANSWER: "Yes" or "No."**

**ANSWER:**

Answer the following Question only if you unanimously answered "Yes" to Question 5. Otherwise, do not answer the following Question.

To answer "Yes" to the following question, your answer must be unanimous. You may answer "No" to the following question only upon a vote of ten or more jurors. Otherwise, you must not answer the following question.

## QUESTION NO. 9

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means a specific intent to cause substantial injury or harm to ETP.

**Do you find by clear and convincing evidence that the harm to ETP resulted from malice by Enbridge?**

**ANSWER "Yes" or "No."**

NO

Answer the following Question only if you unanimously answered "Yes" to Question 8. Otherwise, do not answer the following Question.

You must unanimously agree on the amount of any award of exemplary damages.

**QUESTION NO. 10** – SKIP/NA

What sum of money, if any, if paid now in cash, should be assessed and awarded to ETP and against Enterprise as exemplary damages, if any, for the conduct found in response to Question No. 8.

Answer in dollars and cents for damages, if any. Please write a number figure and spell out that number in words.

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment. Factors to consider in awarding exemplary damages, if any, are—

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the Defendants.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

**ANSWER:**

_____

Answer the following Question only if you unanimously answered "Yes" to Question 9. Otherwise, do not answer the following Question.

You must unanimously agree on the amount of any award of exemplary damages.

## QUESTION NO. 11 (NA/SKIP)

What sum of money, if any, if paid now in cash, should be assessed and awarded to ETP and against Enbridge as exemplary damages, if any, for the conduct found in response to the Question No. 9.

Answer in dollars and cents for damages, if any. Please write a number figure and spell out that number in words.

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment. Factors to consider in awarding exemplary damages, if any, are—

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the Defendants.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

**ANSWER:**

_____

## QUESTION NO. 12

Did ETP fail to comply with its promise in paragraph 1 of the Reimbursement Agreement?

**Answer "Yes" or "No."**

**Answer:** Yes

If you have answered "Yes" to Question No. 12, then answer the following question. Otherwise, do not answer the following question

**QUESTION NO. 13**

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Enterprise for its damages, if any, that resulted from ETP's failure to comply?

Consider the following elements of damages, if any, and none other: 50% of the expenditures.

**Answer in dollars and cents.**

**Answer:** $ 84,140.00

## QUESTION NO. 14

Did ETP fail to comply with Paragraph 9 of the Reimbursement Agreement?

**Answer "Yes" or "No."**

**Answer:** NO

**Presiding Juror:**

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:

   a. have the complete charge read aloud if it will be helpful to your deliberations;

   b. preside over your deliberations, meaning manage the discussions and see that you follow these instructions;

   c. give written questions or comments to the bailiff who will give them to the judge;

   d. write down the answers you agree on;

   e. get the signatures for the verdict certificate; and

   f. notify the bailiff that you have reached a verdict.

   Do you understand the duties of the presiding juror? If you do not, please tell me now.

**Instructions for Signing the Verdict Certificate:**

1. Unless otherwise instructed, you may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict. If eleven jurors agree on every answer, those eleven jurors sign the verdict. If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten who agree on every answer will sign the verdict.

4. There are some special instructions before Questions 8,9,10,and 11 explaining how to answer those questions. Please follow the instructions. If all twelve of you answer those questions, you will need to complete a second verdict certificate for those questions.

Do you understand these instructions? If you do not, please tell me now.

JUDGE PRESIDING

## Verdict Certificate

Check one:

_____ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

_____ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

__✓__ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

| Signature | Name Printed |
|---|---|
| 1 | Penny Griffin |
| 2 | Julio A. Lopez |
| 3 | Steve Bell |
| 4 | Marianne Denning |
| 5 | Ester McCoy |
| 6 | Paul Ngethe |
| 7 | James Stonaker |
| 8 | Andrea Lee |
| 9 | Noraisah Fod |
| 10 | Mathew Hicks |
| 11 | |

If you have answered Question No. 10, then you must sign this certificate also.

**Additional Certificate** (NA)

I certify that the jury was unanimous in answering the following questions. All twelve of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve of us.

Question No. 2

Question No. 8

Question No. 10

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

If you have answered Question No. 11, then you must sign this certificate also.

**Additional Certificate** (NA)

I certify that the jury was unanimous in answering the following questions. All twelve of us agreed to each of the answers. The presiding juror has signed the certificate for all twelve of us.

Question No. 2

Question No. 5

Question No. 9

Question No. 11

_____ _____

Signature of Presiding Juror Printed Name of Presiding Juror

# Appendix 5

348M -000179

**CAUSE NO. 11-12667**

| | | |
|---|---|---|
| **ENERGY TRANSFER PARTNERS, L.P., AND ENERGY TRANSFER FUEL, L.P.** | § | **IN THE DISTRICT COURT** |
| **Plaintiffs,** | § | **DALLAS COUNTY, TEXAS** |
| **v.** | § | |
| **ENTERPRISE PRODUCTS PARTNERS, L.P., ENBRIDGE (US) INC., AND ENTERPRISE PRODUCTS OPERATING LLC** | § | **298th JUDICAL DISTRICT** |
| **Defendants.** | § | |

## FINAL JUDGMENT

On January 27, 2014, the trial of this case began. Plaintiffs Energy Transfer Partners, L.P. ("ETP") and Energy Transfer Fuel, L.P. appeared in person and through their attorneys and announced ready for trial. Defendants Enterprise Products Partners, L.P. ("Enterprise"), Enterprise Products Operating LLC ("Enterprise LLC"), and Enbridge (US) Inc. ("Enbridge"), appeared in person and through their attorneys and announced ready for trial. The Court determined that it had jurisdiction over the subject matter and the parties in this case.

A panel of twelve qualified jurors was selected, and the case proceeded to trial. The jury heard the evidence and arguments of counsel. The parties concluded evidence on February 25, 2014, when the parties through their attorneys announced in open court that they had presented all their evidence and rested. The Court submitted questions, definitions, and instructions to the jury on March 4, 2014. In response, the jury made findings that the Court received, filed, and entered of record. The jury's verdict, as reflected in the Charge of the Court, is expressly incorporated in this Final Judgment for all purposes and by references. After considering the

evidence and testimony received, the evidence before the Court and the arguments of counsel, the Court renders final judgment for ETP against Enterprise as follows:

1. ETP shall recover $535,794,777.40 from Enterprise, comprised of the following elements:

   a. Disgorgement of benefit in the amount of $150,000,000.00;

   b. Damages in the amount of $319,375,000.00;

   c. Pre-judgment interest in the amount of five percent (5%) per annum in simple interest, accruing from September 30, 2011 until the day before this judgment was entered on July 29, 2014, at a *per diem* rate of $64,297.95, in the total amount of $66,419,777.40.

2. ETP shall recover post-judgment interest on the above, at the rate of five percent (5%) per annum, compounded annually. The post-judgment interest shall begin to accrue on the date following the date of this judgment and shall continue to accrue until this judgment is satisfied in full. Accordingly, for example:

   a. for the first year after judgment, interest will accrue at a *per diem* amount of $73,396.54, so on July 29, 2015, the total judgment amount will be $562,584,516.27;

   b. for the second year after judgment, interest will accrue at a *per diem* amount of $77,066.37, so on July 29, 2016, the total judgment amount will be $590,713,742.08;

   c. for the third year after judgment, interest will accrue at a *per diem* amount of $80,919.69, so on July 29, 2017, the total judgment amount will be $620,249,429.18.

3. ETP takes nothing by its claims against Enbridge.

4. Enterprise and Enterprise LLC are not entitled to any net recovery on their counterclaims.

5. All costs of court are assessed against Enterprise.

6. All writs and processes necessary for the enforcement and collection of this judgment, including costs of court, shall be granted and issued. This Court shall have continuing jurisdiction over any disputes that arise with respect to enforcement, collection, or dissipation of assets.

7. This judgment finally disposes of all claims and all parties and is appealable. All prior orders and judgments are incorporated herein by reference. All relief not expressly granted herein is denied. This is a final judgment.

SO ORDERED this 29 day of July, 2014.

HONORABLE EMILY G. TOBOLOWSKY
PRESIDING JUDGE

APPROVED
~~AGREED~~ AS TO FORM ONLY:

Michael P. Lynn
*Counsel for Plaintiffs Energy Transfer Partners, L.P. and Energy Transfer Fuel, L.P.*

# Appendix 6

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter A. General Provisions

V.T.C.A., Business Organizations Code § 152.001

# § 152.001. Definitions

Effective: January 1, 2006
Currentness

In this chapter:

(1) “Event of withdrawal” or “withdrawal” means an event specified by Section 152.501(b).

(2) “Event requiring a winding up” means an event specified by Section 11.051 or 11.057.

(3) “Foreign limited liability partnership” means a partnership that:

(A) is foreign; and

(B) has the status of a limited liability partnership pursuant to the laws of the jurisdiction of formation.

(4) “Other partnership provisions” means the provisions of Chapters 151 and 154 and Title 1 [1] to the extent applicable to partnerships.

(5) “Transfer” includes:

(A) an assignment;

(B) a conveyance;

(C) a lease;

(D) a mortgage;

(E) a deed;

  

(F) an encumbrance; and

(G) the creation of a security interest.

(6) “Withdrawn partner” means a partner with respect to whom an event of withdrawal has occurred.

**Credits**

Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

Footnotes

1 V.T.C.A., Business Organizations Code § 1.001 et seq.

V. T. C. A., Business Organizations Code § 152.001, TX BUS ORG § 152.001

Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter A. General Provisions

V.T.C.A., Business Organizations Code § 152.002

# § 152.002. Effect of Partnership Agreement; Nonwaivable and Variable Provisions

Effective: September 1, 2015
Currentness

(a) Except as provided by Subsection (b), a partnership agreement governs the relations of the partners and between the partners and the partnership. To the extent that the partnership agreement does not otherwise provide, this chapter and the other partnership provisions govern the relationship of the partners and between the partners and the partnership.

(b) A partnership agreement or the partners may not:

(1) unreasonably restrict a partner's right of access to books and records under Section 152.212;

(2) eliminate the duty of loyalty under Section 152.205, except that the partners by agreement may identify specific types of activities or categories of activities that do not violate the duty of loyalty if the types or categories are not manifestly unreasonable;

(3) eliminate the duty of care under Section 152.206, except that the partners by agreement may determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable;

(4) eliminate the obligation of good faith under Section 152.204(b), except that the partners by agreement may determine the standards by which the performance of the obligation is to be measured if the standards are not manifestly unreasonable;

(5) vary the power to withdraw as a partner under Section 152.501(b)(1), (7), or (8), except for the requirement that notice be in writing;

(6) vary the right to expel a partner by a court in an event specified by Section 152.501(b)(5);

(7) restrict rights of a third party under this chapter or the other partnership provisions, except for a limitation on an individual partner's liability in a limited liability partnership as provided by this chapter;

(8) select a governing law not permitted under Sections 1.103 and 1.002(43)(C); or

  

(9) except as provided in Subsections (c) and (d), waive or modify the following provisions of Title 1: [1]

(A) Chapter 1, if the provision is used to interpret a provision or to define a word or phrase contained in a section listed in this subsection;

(B) Chapter 2, other than Sections 2.104(c)(2), 2.104(c)(3), and 2.113;

(C) Chapter 3, other than Subchapters C and E of that chapter; or

(D) Chapters 4, 5, 10, 11, and 12, other than Sections 11.057(a), (b), (c)(1), (c)(3), (d), and (f).

(c) A provision listed in Subsection (b)(9) may be waived or modified in a partnership agreement if the provision that is waived or modified authorizes the partnership to waive or modify the provision in the partnership's governing documents.

(d) A provision listed in Subsection (b)(9) may be waived or modified in a partnership agreement if the provision that is modified specifies:

(1) the person or group of persons entitled to approve a modification; or

(2) the vote or other method by which a modification is required to be approved.

**Credits**

Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006. Amended by Acts 2007, 80th Leg., ch. 688, § 104, eff. Sept. 1, 2007; Acts 2015, 84th Leg., ch. 23 (S.B. 859), § 3, eff. Sept. 1, 2015.

Footnotes

1 V.T.C.A., Business Organizations Code § 1.001 et seq.

V. T. C. A., Business Organizations Code § 152.002, TX BUS ORG § 152.002

Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter A. General Provisions

V.T.C.A., Business Organizations Code § 152.003

# § 152.003. Supplemental Principles of Law

Effective: January 1, 2006
Currentness

The principles of law and equity and the other partnership provisions supplement this chapter unless otherwise provided by this chapter or the other partnership provisions.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.003, TX BUS ORG § 152.003
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter A. General Provisions

V.T.C.A., Business Organizations Code § 152.004

# § 152.004. Rule of Statutory Construction Not Applicable

Effective: January 1, 2006
Currentness

The rule that a statute in derogation of the common law is to be strictly construed does not apply to this chapter or the other partnership provisions.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.004, TX BUS ORG § 152.004
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter A. General Provisions

V.T.C.A., Business Organizations Code § 152.005

# § 152.005. Applicable Interest Rate

Effective: January 1, 2006
Currentness

If an obligation to pay interest arises under this chapter and the rate is not specified, the interest rate is the rate specified by Section 302.002, Finance Code.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.005, TX BUS ORG § 152.005
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter B. Nature and Creation of Partnership

V.T.C.A., Business Organizations Code § 152.051

# § 152.051. Partnership Defined

Effective: January 1, 2006
Currentness

(a) In this section, "association" does not have the meaning of the term "association" under Section 1.002.

(b) Except as provided by Subsection (c) and Section 152.053(a), an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether:

(1) the persons intend to create a partnership; or

(2) the association is called a "partnership," "joint venture," or other name.

(c) An association or organization is not a partnership if it was created under a statute other than:

(1) this title and the provisions of Title 1 applicable to partnerships and limited partnerships;

(2) a predecessor to a statute referred to in Subdivision (1); or

(3) a comparable statute of another jurisdiction.

(d) The provisions of this chapter govern limited partnerships only to the extent provided by Sections 153.003 and 153.152 and Subchapter H, Chapter 153.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.051, TX BUS ORG § 152.051
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter B. Nature and Creation of Partnership

V.T.C.A., Business Organizations Code § 152.052

# § 152.052. Rules for Determining if Partnership is Created

Effective: January 1, 2006
Currentness

(a) Factors indicating that persons have created a partnership include the persons':

(1) receipt or right to receive a share of profits of the business;

(2) expression of an intent to be partners in the business;

(3) participation or right to participate in control of the business;

(4) agreement to share or sharing:

(A) losses of the business; or

(B) liability for claims by third parties against the business; and

(5) agreement to contribute or contributing money or property to the business.

(b) One of the following circumstances, by itself, does not indicate that a person is a partner in the business:

(1) the receipt or right to receive a share of profits as payment:

(A) of a debt, including repayment by installments;

(B) of wages or other compensation to an employee or independent contractor;

(C) of rent;

  

(D) to a former partner, surviving spouse or representative of a deceased or disabled partner, or transferee of a partnership interest;

(E) of interest or other charge on a loan, regardless of whether the amount varies with the profits of the business, including a direct or indirect present or future ownership interest in collateral or rights to income, proceeds, or increase in value derived from collateral; or

(F) of consideration for the sale of a business or other property, including payment by installments;

(2) co-ownership of property, regardless of whether the co-ownership:

(A) is a joint tenancy, tenancy in common, tenancy by the entirety, joint property, community property, or part ownership; or

(B) is combined with sharing of profits from the property;

(3) the right to share or sharing gross returns or revenues, regardless of whether the persons sharing the gross returns or revenues have a common or joint interest in the property from which the returns or revenues are derived; or

(4) ownership of mineral property under a joint operating agreement.

(c) An agreement by the owners of a business to share losses is not necessary to create a partnership.

**Credits**

Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.052, TX BUS ORG § 152.052
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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Vernon's Texas Statutes and Codes Annotated
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Subchapter B. Nature and Creation of Partnership

V.T.C.A., Business Organizations Code § 152.053

# § 152.053. Qualifications to be Partner; Nonpartner's Liability to Third Person

Effective: January 1, 2006
Currentness

(a) A person may be a partner unless the person lacks capacity apart from this chapter.

(b) Except as provided by Section 152.307, a person who is not a partner in a partnership under Section 152.051 is not a partner as to a third person and is not liable to a third person under this chapter.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.053, TX BUS ORG § 152.053
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
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Subchapter B. Nature and Creation of Partnership

V.T.C.A., Business Organizations Code § 152.054

# § 152.054. False Representation of Partnership or Partner

Effective: January 1, 2006
Currentness

(a) A false representation or other conduct falsely indicating that a person is a partner with another person does not of itself create a partnership.

(b) A representation or other conduct indicating that a person is a partner in an existing partnership, if that is not the case, does not of itself make that person a partner in the partnership.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.054, TX BUS ORG § 152.054
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
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Chapter 152. General Partnerships
Subchapter B. Nature and Creation of Partnership

V.T.C.A., Business Organizations Code § 152.055

# § 152.055. Authority of Certain Professionals to Create Partnership

Effective: June 1, 2017
Currentness

(a) Persons licensed as doctors of medicine and persons licensed as doctors of osteopathy by the Texas Medical Board, persons licensed as podiatrists by the Texas State Board of Podiatric Medical Examiners, and persons licensed as chiropractors by the Texas Board of Chiropractic Examiners may create a partnership that is jointly owned by those practitioners to perform a professional service that falls within the scope of practice of those practitioners.

(b) When doctors of medicine, osteopathy, podiatry, and chiropractic create a partnership that is jointly owned by those practitioners, the authority of each of the practitioners is limited by the scope of practice of the respective practitioners and none can exercise control over the other's clinical authority granted by their respective licenses, either through agreements, bylaws, directives, financial incentives, or other arrangements that would assert control over treatment decisions made by the practitioner.

(c) The Texas Medical Board, the Texas State Board of Podiatric Medical Examiners, and the Texas Board of Chiropractic Examiners continue to exercise regulatory authority over their respective licenses.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006. Amended by Acts 2017, 85th Leg., ch. 388 (S.B. 679), § 2, eff. June 1, 2017.

V. T. C. A., Business Organizations Code § 152.055, TX BUS ORG § 152.055
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
Chapter 152. General Partnerships
Subchapter B. Nature and Creation of Partnership

V.T.C.A., Business Organizations Code § 152.0551

# § 152.0551. Partnerships Formed by Physicians and Physician Assistants

Effective: June 17, 2011
Currentness

(a) Physicians licensed under Subtitle B, Title 3, Occupations Code, [1] and physician assistants licensed under Chapter 204, Occupations Code, may create a partnership to perform a professional service that falls within the scope of practice of those practitioners.

(b) A physician assistant may not be a general partner or participate in the management of the partnership.

(c) A physician assistant may not contract with or employ a physician to be a supervising physician of the physician assistant or of any physician in the partnership.

(d) The authority of each practitioner is limited by the scope of practice of the respective practitioner. An organizer of the entity must be a physician and ensure that a physician or physicians control and manage the entity.

(e) Nothing in this section may be construed to allow the practice of medicine by someone not licensed as a physician under Subtitle B, Title 3, Occupations Code, or to allow a person not licensed as a physician to direct the activities of a physician in the practice of medicine.

(f) A physician assistant or combination of physician assistants may have only a minority ownership interest in an entity created under this section. The ownership interest of an individual physician assistant may not equal or exceed the ownership interest of any individual physician owner. A physician assistant or combination of physician assistants may not interfere with the practice of medicine by a physician owner or the supervision of physician assistants by a physician owner.

(g) The Texas Medical Board and the Texas Physician Assistant Board continue to exercise regulatory authority over their respective license holders according to applicable law. To the extent of a conflict between Subtitle B, Title 3, Occupations Code, and Chapter 204, Occupations Code, or any rules adopted under those statutes, Subtitle B, Title 3, or a rule adopted under that subtitle controls.

**Credits**
Added by Acts 2011, 82nd Leg., ch. 782 (H.B. 2098), § 2, eff. June 17, 2011.

  

Footnotes

1 V.T.C.A., Occupations Code § 151.001 et seq.

V. T. C. A., Business Organizations Code § 152.0551, TX BUS ORG § 152.0551

Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

Vernon's Texas Statutes and Codes Annotated
Business Organizations Code (Refs & Annos)
Title 4. Partnerships (Refs & Annos)
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V.T.C.A., Business Organizations Code § 152.056

# § 152.056. Partnership as Entity

Effective: January 1, 2006
Currentness

A partnership is an entity distinct from its partners.

**Credits**
Acts 2003, 78th Leg., ch. 182, § 1, eff. Jan. 1, 2006.

V. T. C. A., Business Organizations Code § 152.056, TX BUS ORG § 152.056
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

**End of Document**

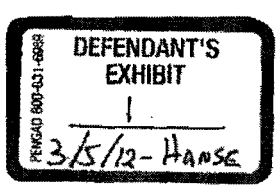
# Appendix 7

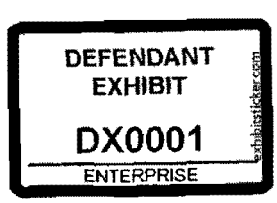
| | |
|---|---|
| **From:** | Edlund, Susan |
| **To:** | McCrea, Mackie |
| **Sent:** | 4/26/2011 3:44:38 PM |
| **Subject:** | Non-Binding Term Sheet |
| **Attachments:** | img-426153741-0001.pdf |

On behalf of Mark Hurley, please find attached an executed copy of the Non-Binding Term Sheet for Proposed Joint Venture between Enterprise Products Partners, L.P. and Energy Transfer Partners, L.P., dated April 21, 2011.

Susan Edlund
Executive Assistant
Crude Oil & Offshore
Enterprise Products Partners, L.P.
1100 Louisiana
Houston, TX 77002
Tel: 713.381.7923
Email: sledlund@eprod.com





April 21, 2011

Energy Transfer Partners, L.P.
3738 Oak Lawn Avenue
Dallas, Texas 75219
Attn: Tim Dahlstrom, Roy Patton, & Mackie McCrea

Re: Non-Binding Term Sheet for Proposed Joint Venture between Enterprise Products Partners, L.P. and Energy Transfer Partners, L.P.

Gentlemen-

Enterprise Products Partners, L.P. and its affiliates (collectively "EPD") and Energy Transfer Partners, L.P. and its affiliates (collectively, "ETP" and, together with EPD, the "Parties") are entering discussions regarding a proposed joint venture transaction involving the construction (or conversion, as applicable) and operation of a pipeline to move crude oil from Cushing, Oklahoma to the Houston, Texas market (the "Transaction"). The Transaction would also involve the construction and operation of storage tanks at EPD's announced Enterprise Crude Houston Terminal. This letter is intended only to set forth the general terms of the Transaction between the Parties, which are contained in the term sheet attached hereto as Exhibit A (the "JV Term Sheet").

Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and, except for the Confidentiality Agreement dated March 16, 2011 between the Parties (the "Confidentiality Agreement"), no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties. Unless and until such definitive agreements are executed and delivered by both of the Parties, either EPD or ETP, for any reason, may depart from or terminate the negotiations with respect to the Transaction at any time without any liability or obligation to the other, whether arising in contract, tort, strict liability or otherwise.

If this letter and the attached JV Term Sheet correctly reflect ETP's understanding of the terms of the Transaction, please execute this letter in the space provided below and return a fully executed copy to EPD at the address provided above.

ENTERPRISE PRODUCTS PARTNERS, L.P.
By: Enterprise Products Holdings LLC,
Its General Partner

By: _____
Name: MARK A. HUDLEY
Title: SR VICE PRESIDENT - CRUDE OIL & DERIVATIVES

ACCEPTED AND AGREED, this 21st day of April, 2011

ENERGY TRANSFER PARTNERS, L.P.
By: Energy Transfer Partners GP, L.P.,
Its General Partner
By: Energy Transfer Partners, L.L.C.,
Its General Partner

By: _____
Name: MACKIE McCREA
Title: PRESIDENT & COO

**EXHIBIT A**

# PROPOSED CRUDE PIPELINE JV
## ETD / EPD

**NON-BINDING TERM SHEET**

**April 18, 2011**

**Parties:**

Enterprise Products Partners, L.P. ("EPD") and Energy Transfer Partners, L.P. ("ETP") and/or their designated affiliates (individually, a "Party", and collectively, the "Parties").

**Purpose:**

The JV will construct/convert and operate a pipeline that will move crude oil from Cushing, OK to the Houston, TX market.

**Potential Transaction:**

A joint venture ("JV") involving a crude oil pipeline transportation system originating from EPD's terminal in Cushing, OK and terminating at EPD's announced Enterprise Crude Houston ("ECHO") Terminal. The JV will also construct and own two storage tanks at the ECHO terminal. EPD's Cushing and ECHO terminals will remain under EPD's ownership and will not be part of this JV. The JV would utilize and convert to crude service ETP's approximately 240 mile 24" natural gas line between Maypearl, TX and Sweeney, TX (the "Old Ocean" line).

- New pipelines to be constructed between the following locations:
  - From the termination of the Old Ocean line in Sweeny, TX to the ECHO Terminal.
  - From EPD's Cushing, OK Terminal to the termination of the Old Ocean line in Maypearl, TX

The Old Ocean line and the new pipelines referenced above are referred to herein as the "Initial Facilities".

**Ownership Structure:**

A mutually agreeable Limited Liability Company Agreement would be entered into by the Parties for the JV, providing for a Management Committee, with equal representation between EPD and ETP, to govern the

significant affairs of the JV, and containing other terms mutually agreeable to the Parties. In the event of a dispute that can not be resolved by the Management Committee, the issue will be raised to Senior Management of the parties. If the dispute can not be resolved by the Senior Management of the parties it will then be referred to arbitration.

Distributions of available cash would be made on a monthly basis. The Limited Liability Company Agreement would contain customary provisions regarding rights of first refusal in the event a Party wishes to sell its interest in the JV.

**Contribution from Partners:**

A mutually agreeable Contribution Agreement would be entered into among the Parties (and/or their affiliates) and the JV providing for the contribution of the assets as described above to the JV and containing such representations, warranties, indemnities and other terms and provisions that are typically found in agreements of this type and that are mutually acceptable to the Parties.

EPD will contribute $610 million to the JV and allow for a connection at EPD's Cushing Terminal. EPD will also allow the JV to construct two tanks at EPD's ECHO terminal. EPD would also contribute right of way for connection of south end at Old Ocean pipeline to the ECHO terminal subject to negotiation with right of way landowners. Any out of pocket expenses associated with right of way acquisition would be the responsibility of the JV. ETP will contribute $590 million and the Old Ocean pipeline to the JV. The Parties will have equal ownership in the JV at the 50%/50% level.

**Major Decisions:**

The following matters would require unanimous approval by the Parties:

- Issuance of additional membership interests
- Merger into or consolidate with another person/entity
- Acquisition of an equity interest in another person/entity
- Dissolution of the LLC
- Tax elections
- Approval of the budget
    - Any items in excess of $100,000 not approved in the budget will require Management

Committee approval

- Request for capital contributions
- Declaration of distributions
- Encumbering the assets or guaranteeing the obligations of any other person
- Incurrence of any debt
- Asset purchases or sales greater than $5 million
- Contracts greater than $10 million
- Initiation or settlement of litigation greater than $500,000
- Any change of a tax election or accounting policy
- Tariff changes
- Material commercial contracts
- Affiliate agreements

**Commercial Decisions:**

Following completion of the Initial Facilities, for any new capital projects above $10 million meeting certain economic criteria, either Party may decide to participate, or not, based on additional capital contributions required. However, all projects affecting the JV must be approved by the Management Committee. If any member decides not to participate in the Capital Project they must elect one of the two options below:

1) Sharing Ratio Adjustment: The non-participating member can have their share of the partnership diluted by a sharing ratio adjustment. The sharing ratio will be adjusted proportionate to each member's capital accounts after adjustment for capital contributions is made.
2) 300% Solution: The non-participating member can elect to not receive any net revenue from the additional project(s) until such time as the participating member has received the first 300% of the capital contribution made by the participating member derived solely from the net revenue of the new project(s). Special Projects are property of the JV for all purposes, and all decisions with the respect to a Special Project (other than construction, which shall be subject to the control of the participating member) shall be made under the authority of the Management Committee.

Notwithstanding paragraphs (1) and (2) above,

any new capital projects must meet a minimum rate of return threshold to be agreed upon by the parties and set forth in the LLC Agreement.

**Integrated Project Team:** During the design and construction phase, prior to Pipeline operations, an Integrated Project Team (IPT) comprising both EPD and ETP personnel will be appointed by both parties. The IPT will manage the direction of the design and construction of the pipeline.

**Operations and Administration:** The JV would contract operations of the Initial Facilities and administration of the JV to EPD. EPD would be entitled to be reimbursed for direct out of pocket costs and would be entitled to a monthly operating fee. EPD would be responsible for performing all tax, accounting, cash management, land, and regulatory reporting. ETP and EPD would work together to establish the ~~and~~ budgeting and ~~/~~planning activities. EPD and ETP would work together on the business development opportunities and would establish in the LLC how the day-to-day commercial business activities would be run. ~~would have day to day commercial (business development) and~~ EPD would have facility operating responsibility and responsibility for SCADA monitoring on the Initial Facilities.

**Other:** The parties agree to discuss new terms for EPD's continued purchase of condensate from ETC's LaGrange facility.