

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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<b>In re</b>	:	<b>Chapter 11</b>
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<b>SEMCRUDE, L.P., et al.,</b>	:	<b>Case No. 08-11525 (BLS)</b>
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<b>Debtors.</b>	:	<b>Jointly Administered</b>
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	:	
<b>BETTINA M. WHYTE, as the Trustee,</b>	:	
<b>on behalf of the SemGroup Litigation Trust,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	
	:	<b>Adversary No. 10-51808-BLS</b>
<b>v.</b>	:	
	:	
<b>COTTONWOOD PARTNERSHIP, LLP,</b>	:	
<b>ROSENE FAMILY, L.L.C., SATCO</b>	:	
<b>INVESTMENTS, L.L.C., and</b>	:	
<b>DOE DEFENDANTS, 1-100</b>	:	
	:	
<b>Defendants.</b>	:	
	:	
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**SECOND AMENDED COMPLAINT**

Plaintiff Bettina M. Whyte (“Plaintiff”), the duly appointed Trustee of the SemGroup Litigation Trust (the “Litigation Trust”) established pursuant to the “Fourth Amended Joint Plan of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code” (the “Plan”), brings this action against Defendants Cottonwood Partnership, LLP, Rosene Family, L.L.C., Satco

Investments, L.L.C.; and Doe Defendants<sup>1</sup> (collectively, the “Defendants”). Plaintiff respectfully alleges as follows:

### **NATURE OF FIRST AMENDED COMPLAINT**

1. Founded in February 2000, SemGroup, L.P. (“SemGroup”) and its affiliates provided transportation, storage, and distribution of oil and gas products to crude oil producers and refiners in North America’s energy corridor stretching from Canada to the Gulf Coast. Within just a few years, SemGroup began to grow rapidly and by 2007 it was regarded as the nation’s fifth largest privately held company by Forbes Magazine.

2. In July 2008, however, SemGroup announced that it had run out of money and was forced to seek bankruptcy protection.

3. Facts uncovered after SemGroup sought bankruptcy protection reveal that since at least July 31, 2007 (and maybe much earlier), SemGroup was insolvent and had unreasonably small capital to make the two massive cash distributions (the “Partnership Distributions”) it made to its limited partners in August 2007, totaling \$90 million and in February 2008, totaling \$100 million.

4. During the relevant period, former SemGroup CEO Thomas Kivisto (“Kivisto”) and others at his direction engaged in unauthorized, speculative derivatives trading that dramatically increased SemGroup’s liabilities without a corresponding increase in assets. And contrary to SemGroup’s debt covenants and other documents provided to creditors and trading counterparties, these trades bore no reasonable relationship to SemGroup’s actual storage

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<sup>1</sup> Doe Defendants are any entity affiliated with the other defendants that received Partnership Distributions (as defined herein), including as subsequent transferees, that are not currently named in this Second Amended Complaint.

or transport capacity. The net liability resulting from these trades, when combined with SemGroup's other liabilities, exceeded the fair value of SemGroup's assets as of July 31, 2007. Even SemGroup's *reported* balance sheets for the period ended December 31, 2007, revealed that SemGroup's liabilities exceeded its assets by approximately \$342 million. SemGroup continued to be insolvent through the time it sought bankruptcy protection in July 2008.

5. This unauthorized, speculative derivatives trading violated SemGroup's covenants under that certain Amended and Restated Credit Agreement, dated as of October 18, 2005 (as amended from time to time, the "Credit Agreement") and that certain Indenture dated as of November 18, 2005 (as amended from time to time, the "Indenture"), for the 8.75% Senior Notes due 2015, giving rise to events of default under those agreements. Had SemGroup's creditors known about the circumstances giving rise to these events of default, they likely would not have waived them. Without continued access to capital, credit, and trading arrangements on the same terms and conditions, SemGroup's ability to continue to operate its midstream oil transport and storage business would have been in jeopardy.

6. Further, Kivisto caused SemGroup to extend credit, on terms unfair to SemGroup and its creditors, to Westback Purchasing Co. L.L.C. ("Westback") – an entity owned by Kivisto and his wife - for the personal benefit of Kivisto. Between the end of 2006 and the February 2008 Partnership Distribution, the receivable owed by Westback to SemGroup (the "Westback Receivable") increased by at least \$200 million. This extension of credit was prohibited by the Credit Agreement and the Indenture. Had SemGroup's creditors known about the violations of debt covenants caused by the Westback Receivable, they likely would not have waived them.

7. In addition, the Westback Receivable, which was approximately \$265 million in February 2008, was actually worth only a fraction of its face amount, if it was worth anything at all. Moreover, Westback's own balance sheets in August 2007 and throughout 2008 showed (falsely) that it owed nothing to SemGroup, meaning that while SemGroup reported the Westback Receivable as an asset on its balance sheet, Westback took the position that it owed nothing.

8. In August 2007, SemGroup made \$90 million in partnership distributions (the "2007 Distributions"). Had SemGroup's creditors known about the circumstances giving rise to the Westback Receivable and related events of default, they likely would not have waived these events of default nor permitted the 2007 Distributions. The 2007 Distributions were made when SemGroup was insolvent and/or had unreasonably small capital to make such distributions. The Defendants received, in the aggregate, approximately \$4.4 million directly on account of their limited partnership interests and indirectly on account of distributions to SemGroup G.P., L.L.C. ("Sem GP") from the 2007 Distributions.

9. In spite of the fact that SemGroup's reported balance sheets as of December 31, 2007 showed negative partner equity of \$342 million, on or about February 15, 2008 SemGroup's Management Committee caused SemGroup to make special distribution payments of \$100 million to all holders of partnership interests (the "2008 Distributions"). Had SemGroup's creditors known about the circumstances giving rise to the Westback Receivable and related events of default, they likely would not have waived these events of default nor permitted the 2008 Distributions. The Defendants received, in the aggregate, approximately \$4.9 million directly on account of their limited partnership interests and indirectly on account of distributions to Sem GP.

10. SemGroup received no value in exchange for transferring its scarce cash to the Defendants. Because SemGroup transferred the Partnership Distributions to the Defendants while it was insolvent and/or had unreasonably small capital, and because it received no value in exchange, the Partnership Distributions are constructively fraudulent transfers that are subject to avoidance.

11. Further, each Defendant, as an initial transferee and as a subsequent transferee of Sem GP, is liable to repay its share of the Partnership Distributions to SemGroup's estate.

### **JURISDICTION AND VENUE**

12. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 because this is a civil proceeding arising in or relating to Plaintiff's case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This is a core proceeding pursuant to 28 U.S.C. § 157(b).

13. Venue is proper in this Court under 28 U.S.C. § 1409(a).

14. This proceeding is initiated pursuant to Rule 7001(1) & (7) of the Federal Rules of Bankruptcy Procedure.

### **PARTIES**

15. On July 22, 2008 and October 22, 2008 (the "Petition Dates"), SemGroup and certain of its affiliates (collectively, the "Debtors")<sup>2</sup> filed voluntary petitions for relief (the "Bankruptcy Cases") under chapter 11 of the Bankruptcy Code.

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<sup>2</sup> The term "Debtors" refers to the jointly administered Debtors in these chapter 11 cases, which, along with the last four (4) digits of each Debtor's federal tax identification number, are: SemCrude, L.P. (7524); Chemical Petroleum Exchange, Incorporated (8866); Eaglwing, L.P. (footnote continued)

16. At all relevant times prior to the Petition Dates, SemGroup was an Oklahoma limited partnership. At all relevant times prior to the Petition Dates, Sem GP was the sole general partner of SemGroup. On information and belief, Sem GP owns no assets other than its equity interests in SemGroup.

17. Plaintiff is the duly appointed Trustee of the Litigation Trust, which was formed pursuant to the Plan. The Plan, which was confirmed by order of this Court, became effective on November 30, 2009. Among other things, the Plan provides for the transfer of claims against the Defendants from the Debtors' estates to the Litigation Trust. The Plan also provided for the transfer of Contributing Lenders' Claims to the Litigation Trust.

18. Defendant Cottonwood Partnership, LLP ("Cottonwood") is a Texas limited liability partnership with its principal place of business in Tulsa, Oklahoma. Cottonwood Partnership holds interests in SemGroup on behalf of Gary Adams ("Adams"). On information and belief, Cottonwood first acquired partnership interests in SemGroup in or about the year 2000. Cottonwood also held interests in Sem GP. Since 2002, Cottonwood has received over \$12.9 million in distributions on account of such interests.

19. Defendant Rosene Family, L.L.C. ("Rosene Family") is an Oklahoma limited liability corporation, with its principal place of business in Tulsa, Oklahoma. Rosene

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(7243); Grayson Pipeline, L.L.C. (0013); Greyhawk Gas Storage Company, L.L.C. (4412); K.C. Asphalt L.L.C. (6235); SemCanada II, L.P. (3006); SemCanada L.P. (1091); SemCrude Pipeline, L.L.C. (9811); SemFuel Transport L.L.C. (6777); SemFuel, L.P. (1015); SemGas Gathering L.L.C. (4203); SemGas Storage, L.L.C. (0621); SemGas, L.P. (1095); SemGroup Asia, L.L.C. (5852); SemGroup Finance Corp. (3152); SemGroup, L.P. (2297); SemKan, L.L.C. (8083); SemManagement, L.L.C. (0772); SemMaterials Vietnam, L.L.C. (5931); SemMaterials, L.P. (5443); SemOperating G.P., L.L.C. (5442); SemStream, L.P. (0859); SemTrucking, L.P. (5355); Steuben Development Company, L.L.C. (9042); SemCap, L.L.C. (5317). SemGroup Holdings, L.P. (6746) is also a debtor, but its chapter 11 case was not jointly administered with the other Debtors' cases.

Family is owned by Robert B. Rosene (“Rosene”). On information and belief, Rosene Family interests in SemGroup were originally acquired in the name of Robert B. Rosene and/or the Robert B. Rosene Trust in or about the year 2000. Such interests were transferred to Rosene Family on December 15, 2006. Since 2002, Rosene Family or related entities have received over \$5 million in distributions on account of such interests in SemGroup.

20. Defendant Satco Investments, L.L.C. (“Satco”) is an Oklahoma limited liability corporation, with its principal place of business in Tulsa, Oklahoma. Satco is owned by Michael D. Cooke. Cooke is an attorney with the law firm Hall Estill Hardwick Gable Golden & Nelson, P.C., and in that capacity has provided legal services to SemGroup. Cooke also serves as the registered agent for Eaglwing Energy and Westback in Oklahoma. On information and belief, Satco first acquired partnership interests in SemGroup in or about the year 2002. Satco also held interests in Sem GP. Since 2002, Satco has received over \$2.5 million in distributions on account of such interests.

### **STATEMENT OF FACTS SUPPORTING RELIEF**

#### **A. The Debtors’ Prepetition Business**

21. The Debtors were involved in the storage, transportation, and sale of crude oil, refined products such as heating oil and gasoline, natural gas, and natural gas liquids such as propane and other related products. In connection with their businesses, the Debtors traded commodities to offset the risk of price fluctuation inherent in their businesses.

22. Prior to the Petition Date, SemGroup was (directly and indirectly) the parent company of all of the other Debtors. Prior to the Petition Date, SemGroup generally prepared financial statements on a consolidated basis. SemGroup’s fiscal year prior to the Petition Dates ended on December 31 of each year.

23. The prepetition operations of SemGroup and its subsidiaries based in the United States were, in many ways, intertwined and inter-dependent. For example, SemGroup used a centralized cash management system that ultimately centralized cash in a single depository account maintained with Bank of Oklahoma, N.A., and intercompany transfers were made in the ordinary course every day.

**B. SemGroup's Prepetition Capital Structure**

24. Immediately prior to the 2007 Distributions, SemGroup was the borrower with respect to or had guaranteed in excess of \$2.7 billion in debt.<sup>3</sup>

25. As of July 31, 2007, SemGroup was the guarantor of \$2.1 billion of debt under the Credit Agreement, which was comprised of three facilities: (a) a \$1.42 billion working capital facility due October 18, 2010; (b) a \$495 million revolving credit facility due October 18, 2010; and (c) a \$200 million term loan due March 16, 2011. Substantially all of SemGroup's assets, except for assets of certain subsidiaries that were not guarantors under the Credit Agreement, were pledged as collateral to Bank of America, N.A., as administrative agent (the "Agent"), for the lenders (the "Lenders") under the Credit Agreement.

26. The outstanding obligations as of July 31, 2007 also included approximately \$593.8 million (not including the current portion of such debt) of unsecured notes issued under the Indenture.

27. Between July 2007 and February 2008, SemGroup's total outstanding debt obligations increased in excess of \$1 billion as, among other things, SemGroup accessed funds

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<sup>3</sup> Various SemGroup subsidiaries maintained their own credit facilities. For purposes of this Second Amended Complaint, to the extent such facilities existed on the Partnership Distribution transfer dates, they are included in solvency and reasonable capital analyses.



borrowed under the Credit Agreement. As described below, these borrowings were used to fund margin requirements. As further described below, the Credit Agreement contained covenants that prohibited speculative trading. Violations of these covenants caused SemGroup to default under the Credit Agreement. Further, upon default, the Lenders had the right to accelerate the repayment of the loans under the Credit Agreement.

**C. Kivisto's Speculative Trading and SemGroup's Descent Into Insolvency.**

28. According to its audited 2006 financial statements (reported on a consolidated basis), as of December 31, 2006, SemGroup's assets totaled approximately \$4,449 million and its liabilities totaled approximately \$4,089 million, such that there was approximately \$359.5 million in positive partner capital.

29. While partner capital at the end of 2006 was positive, SemGroup's operating cash flow in 2006 was negative.

30. SemGroup's financial condition dramatically declined in 2007. Among other indications of its weakening financial condition, SemGroup reported a net loss of approximately \$605 million during 2007.

31. SemGroup also significantly scaled back its acquisition of assets in 2007. Whereas in 2006 SemGroup spent approximately \$250 million acquiring assets, and approximately another \$82 million during the first five months of 2007, between June 1, 2007 and December 31, 2007, SemGroup spent only \$33 million acquiring assets.

32. A material reason for SemGroup's declining financial condition in 2007 was due to speculative trading by Kivisto, in violation of the Credit Agreement.

33. Beginning in early 2007, Kivisto engaged in a pattern of unauthorized, speculative, directional trading untethered to SemGroup's physical storage or transport capacity.<sup>4</sup>

34. As part of these trading practices, Kivisto caused SemGroup to assume "naked" or "uncovered" short positions—obligations to sell oil that were not matched against SemGroup's physical capacity or an offsetting trading position. Such "naked" and "uncovered" trading positions exposed SemGroup to enormous financial risks, for example, if the price of oil increased. When oil prices began to rise significantly in 2007 and into 2008, the liabilities associated with these trading positions substantially grew.

35. Kivisto's speculative trading was also designed to avoid immediately realizing trading losses. In a manner that multiplied the risks his trading posed to SemGroup, Kivisto "rolled forward" negative positions that would have otherwise expired with a realized loss. Like betting "double or nothing" after losing a bet, this strategy had the effect of delaying the recognition of a realized loss temporarily and potentially increasing the realized loss significantly in the future. Kivisto essentially "bet" that the price of oil would return to historical price ranges and that the unrealized losses associated with the "rolled forward" trades would eventually expire in the future without incurring any actual losses. Each time he rolled a position forward, it became more disconnected from SemGroup's actual storage and transport capacity.

36. Kivisto's bet turned out to be wrong. Between September 4, 2007 and February 29, 2008, NYMEX West Texas Intermediate crude oil benchmark prices went from

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<sup>4</sup> On December 22, 2010, Defendants Cottonwood and Rosene filed a complaint against Kivisto and PwC in Oklahoma state court (the "Cottonwood/Rosene Complaint"), alleging, among other things, that Kivisto's speculative trading strategy had begun as early as 2005, and that as of early December 2006 SemGroup was facing "a huge risk" that was a "result of Kivisto's costly and reckless trading strategy."

approximately \$75.00 per barrel to approximately \$100.00 per barrel. Specifically, as oil prices rapidly increased in 2007, which increases continued in January and February 2008, Kivisto's trading positions resulted in increasingly large unrealized losses. Between December 31, 2006 and December 31, 2007, these trading positions caused SemGroup's net derivative liabilities to increase by approximately \$1.2 billion.

37. Kivisto's rolling forward of SemGroup's trading positions resulted in huge demands for cash to fund margin payments and subsequent margin calls.

38. Such margin calls became increasingly difficult for SemGroup to fund. Were SemGroup unable to satisfy these demands for cash, SemGroup would have to sell open positions and incur realized losses at that point in time. Instead, SemGroup obtained additional cash by borrowing under the Credit Agreement, to support the mounting losses in SemGroup's trading positions. Indeed, in 2007, SemGroup was forced to borrow another \$1 billion primarily to partially fund the approximately \$1.7 billion in margin calls.

39. By the end of July 2007, SemGroup's consolidated balance sheets, when adjusted for the fair market value of the items thereon, reveal that SemGroup was insolvent. Specifically, by July 31, 2007, SemGroup's liabilities were at least approximately \$5.47 billion, while its assets were no more than approximately \$5.29 billion. Thus, as of immediately prior to the 2007 Distributions, net equity was approximately a *negative* \$193.7 million.

40. The adjustments to the balance sheets included (but are not limited to):

- Elimination of the Westback Receivable, which was effectively worthless. As of July 2007, the Westback Receivable was valued on the balance sheets as at least \$172.7 million; and

- Reductions to goodwill, customer relations, construction-in-progress, and other assets.

41. By December 31, 2007, SemGroup's audited consolidated financial statements also revealed that SemGroup remained insolvent.<sup>5</sup> Specifically, as of December 31, 2007, SemGroup's liabilities, as disclosed in its audited consolidated financial statements, were approximately \$7.047 billion, while its assets, on a consolidated basis, were only approximately \$6.705 billion. Thus, according to the audited consolidated financial statements, without adjustments, partner capital was a *negative* \$342.1 million.

42. Further, whereas prior to the 2007 Distributions, SemGroup routinely made distributions to its limited partners and to Sem GP for tax purposes, starting in the third quarter of 2007, SemGroup ceased making such distributions.

43. SemGroup's consolidated earnings before interest, taxes, depreciation, and amortization ("EBITDA"), another metric for examining SemGroup's financial condition, was, on information and belief, approximately *negative* \$308 million for the year ended December 31, 2007, and approximately *negative* \$208.7 million for the three months ended March 31, 2008.

44. In addition, in July 2007, SemGroup entered into a series of transactions with SemGroup Energy Partners, L.P. and certain of its affiliates ("SGLP"), including a "throughput agreement" pursuant to which SemGroup agreed to pay SGLP for services subject to a minimum monthly volume requirement (regardless of whether SemGroup actually used such services). Thus, in addition the \$1.6 billion in debt owed under the Credit Agreement and the

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<sup>5</sup> SemGroup's auditor, PricewaterhouseCoopers, later retracted its unqualified audit opinions previously certifying that SemGroup's consolidated financial statements for 2006–2007 were fair and accurate presentations of SemGroup's consolidated financial condition.

Indenture, obligations owed under subsidiary credit facilities, and obligations owed under myriad contracts with third parties, SemGroup incurred millions of dollars in obligations to SGLP.

45. The Debtors' financial circumstances only grew worse in the first quarter of 2008. As oil prices continued to rise, the net derivative liabilities from Kivisto's trading positions increased without any corresponding increase in assets, and margin demands escalated, draining SemGroup's liquidity. According to its consolidated balance sheets as of January 31, 2008, without making any adjustments, partner capital was a *negative* \$362.15 million, a \$20 million loss in equity in just one month.

46. The January 31, 2008 balance sheets required hundreds of millions in downward adjustments to determine the fair market value of SemGroup's assets. As of January 31, 2008 (only a few weeks prior to the 2008 Distributions), partner capital was at least a *negative* \$818 million.

- SemGroup's consolidated balance sheets during this period continued to include the Westback Receivable, which was effectively worthless. As of January 31, 2008, the Westback Receivable was valued on the balance sheets as at least \$263.4 million;
- On information and belief, the January 31, 2008 balance sheets included numerous intangible assets, like goodwill, capitalized interest costs, capitalized debt issuance costs, and aspects of construction-in-progress, which assets had virtually no fair market value; and
- The January 31, 2008 balance sheets included \$181.97 million for SemGroup's minority interest in Niska Gas Storage and another, smaller, entity known as Westpac. SemGroup sold its interest in Niska Gas Storage in February 2008 for

\$146.2 million, just days before the 2008 Partnership Distributions. Thus, the January 31, 2008 balance sheets overstated the fair market value of this category of assets by approximately \$16 million.

47. In January 2008, SemGroup entered into another series of transactions with SGLP, including a terminal access and use agreement and a terminalling and storage agreement. These agreements required Semgroup to pay for services subject to minimum monthly volume requirements.

48. An unaudited consolidated financial statement as of March 31, 2008 disclosed that SemGroup's liabilities, on a consolidated basis, were approximately \$6.0 billion, while its assets, on a consolidated basis, were valued at only approximately \$5.2 billion. These financial statements indicate that SemGroup's partner capital had decreased to a *negative* \$801.51 million. This is prior to making necessary downward adjustments.

49. Speculative trading was prohibited by SemGroup's risk management policy ("RMP"). Indeed, the RMP expressly stated: "[I]t is SemGroup's policy not to sell naked options."

50. The RMP also imposed a trading volume limit at any given time of 12 million barrels of crude oil for the United States and Canada, and a spread limit. Notwithstanding these policy limits, in 2006 and thereafter hundreds of millions of barrels of crude oil were traded.

51. Further, SemGroup disclosed in its audited financial statements that its commodity trading activity was supposed to be designed to reduce risks and expressly stated that speculative transactions in commodities were not permitted. SemGroup stated in such financial statements: "We seek to maintain a neutral net purchase and sale position and minimize

exposure to commodity prices. Our commodity price risk management policy dictates that all derivative transactions entered into must offset our inventory and other risk positions.

Speculative transactions in commodities are not permitted.”

52. The speculative trading that began at least as early as 2007 was also prohibited by the Credit Agreement. Specifically, numerous sections of the Credit Agreement, including sections 7.03(f), 7.04, 7.09, 7.12, and 7.13, prohibited the type of trading in which Kivisto had caused SemGroup to engage.

53. SemGroup was also obligated under the Credit Agreement to submit mark-to-market and position reports, as well as borrowing base reports, to the Agent. Certain insiders of SemGroup manipulated the information in these reports to make it appear that SemGroup was not engaged in speculative trading, even though Kivisto engaged in such trading through 2007 and early 2008. Based on these reports, SemGroup’s Lenders were wrongly led to believe that SemGroup was not engaged in speculative trading.

54. 54. Each time SemGroup requested a credit extension under the Credit Agreement, certain insiders of SemGroup misrepresented to the Lenders that no default under the Credit Agreement existed at the time of the requested credit extension, even though Kivisto was engaged in speculative trading. Relying on these false representations, the Lenders continued to extend credit to SemGroup during 2007 and 2008 even though SemGroup was engaged in speculative trading at the time

55. SemGroup and its subsidiaries continued to take on additional debt. For example, just a little over a month prior to the Petition Date, SemCrude Pipeline, L.L.C. entered into a \$120 million credit agreement, dated as of June 17, 2008 (the “GECC Credit Agreement”), with General Electric Capital Corporation, as administrative agent (“GECC”). Pursuant to its

terms, SemGroup's default under the Credit Agreement constituted an event of default by SemCrude Pipeline, L.L.C. under the GECC Credit Agreement. On information and belief, if GECC had known about Kivisto's speculative trading and defaults under the Credit Agreement, GECC would not have extended loans to SemCrude Pipeline, L.L.C.

56. In the case of the Indenture, SemGroup was generally barred from incurring non-ordinary course debt obligations. While SemGroup was permitted to incur hedging obligations, hedging obligations expressly excluded speculative trading.

57. Had SemGroup's Lenders, GECC, and noteholders known about the circumstances giving rise to these events of default, they likely would not have waived them. Without continued access to capital, credit, and trading arrangements on the same terms and conditions, SemGroup's ability to continue to operate its midstream transport and storage business would have been in jeopardy.

58. Further, on information and belief, parties that traded with SemGroup would have taken actions to protect themselves and/or limit SemGroup's trading arrangements.

59. Indeed, the Examiner's Report details examples of creditors and counterparties taking action when they began to suspect Kivisto's speculative trading. For example, when SemGroup exceeded its trading limits with Bank of Oklahoma ("BOK") in December 2007, BOK placed restrictions on SemGroup's ability to trade, including demanding payment of \$10 million in earnest money. According to the Examiner, Prudential Bache Commodities, LLC raised numerous concerns regarding SemGroup's trading strategy, provided Kivisto and others opportunities to explain that SemGroup was not engaged in speculative trading, but finally determined to terminate its trading relationship absent SemGroup reducing its



trading positions. The Examiner Report's describes similar action taken by Calyon and Magellan.

**D. SemGroup's Relationship With Westback**

60. SemGroup's financial condition was distorted by a receivable owed by Westback. Westback was, at all relevant times, owned 50% by Kivisto and 50% by his wife, Julie L. Kivisto. Kivisto caused SemGroup to fund Westback's trading activities for his personal benefit. Kivisto accomplished this by having Eaglwing L.P. (a subsidiary of SemGroup) purchase derivatives and post margin for Westback's account.

61. The Westback trading relationship violated both the Credit Agreement and the Indenture, which barred SemGroup from entering into transactions with affiliates other than on fair and reasonable terms that would be obtainable in a comparable arm's length transaction with a person other than an affiliate. Eaglwing and SemGroup received no consideration for extending to Westback what amounted to an interest-free loan. The material aspects of Westback's relationship with SemGroup were hidden from SemGroup's creditors.

62. Kivisto's use of Eaglwing for Westback trading amounted to trading for his own personal benefit. SemGroup's risk management policy prohibited SemGroup traders from engaging in trading activity for their personal benefit.

63. At the beginning of 2006, Westback owed SemGroup approximately \$19.8 million. But by the end of 2006, the receivable owed by Westback had grown to \$136.3 million as Kivisto caused SemGroup (through Eaglwing) to post margin on Westback's behalf.

64. The Credit Agreement required delivery of audited financial statements by SemGroup. SemGroup's 2006 consolidated audited financial statements disclosed that SemGroup "acts as an agent for an entity owned by certain producer unitholders and an officer of

[SemGroup].” There was no disclosure of the name “Westback,” that Westback was wholly owned by Kivisto and his spouse (and not by any other “producer unitholders”), or that SemGroup was providing interest-free credit to fund Westback’s trading.

65. By the end of 2007, the Westback Receivable had grown to over \$336 million. Many of the incomplete disclosures in the 2006 audited financial statements were not corrected in the 2007 audited financial statements.

66. SemGroup’s financial statements did not adequately disclose the Westback relationship even though the Westback Receivable was material to SemGroup’s financial condition. As of December 31, 2006, the Westback Receivable represented 10% of SemGroup’s entire accounts receivable and 3.1% of SemGroup’s total assets. As of December 31, 2007, the Westback Receivable represented 18% of SemGroup’s entire accounts receivable and 4.8% of SemGroup’s total assets.

67. Westback did not show the obligation on its own financial statements because, had it done so, it would have been forced to acknowledge that it was balance sheet insolvent.

**E. The Defendants’ Partnership Interests and the Partnership Distributions**

68. On information and belief, beginning in 2000, Cottonwood acquired ownership interests in SemGroup. As of the date immediately prior to the 2007 Distributions, on information and belief, Cottonwood had already received approximately \$7 million on account of its partnership interests in SemGroup. As of the date of the 2007 Distributions, Cottonwood owned (directly and indirectly through its interests in Sem GP) approximately 3% of the partnership interests in SemGroup.

69. On information and belief, beginning in 2000, Rosene Family acquired ownership interests in SemGroup. As of the date immediately prior to the 2007 Distributions, on information and belief, Rosene Family had already received approximately \$3 million on account of its partnership interests in SemGroup. As of the date of the 2007 Distributions, Rosene Family owned (directly and indirectly through its interests in Sem GP) approximately 1% of the partnership interests in SemGroup.

70. On information and belief, beginning in 2000, Satco acquired ownership interests in SemGroup. As of the date immediately prior to the 2007 Distributions, on information and belief, Satco had already received approximately \$1.5 million on account of its partnership interests in SemGroup. As of the date of the 2007 Distributions, Satco owned (directly and indirectly through its interests in Sem GP) approximately 1% of the partnership interests in SemGroup.

71. Thus, even before the Partnership Distributions, Defendants had received nearly \$12 million in equity distributions from SemGroup.

72. In August 2007, as a part of the 2007 Distributions, SemGroup made \$90 million in distributions to holders of partnership interests in SemGroup. Approximately \$88.2 million was distributed to limited partners, with the balance distributed to Sem GP. Defendants received approximately \$4.4 million of such distributions directly on account of their limited partnership interests and indirectly on account of distributions to Sem GP.

73. On February 15, 2008, SemGroup made the 2008 Distributions, providing \$100 million in distributions to entities and persons holding partnership interests in SemGroup. Approximately \$98 million was distributed to limited partners, with the balance distributed to Sem GP. Defendants received approximately \$4.9 million of such distributions directly on

account of their limited partnership interests and indirectly on account of distributions to Sem GP.

74. On information and belief, SemGroup did not request or receive an opinion indicating that SemGroup was solvent immediately prior to the Partnership Distributions or that SemGroup would be solvent immediately after the delivery of the Partnership Distributions.

75. The Partnership Distributions provided to the Defendants occurred at a time when SemGroup was operating with unreasonably small capital. Further, SemGroup was insolvent or became insolvent as a result of the Partnership Distributions.

76. Taking into account any assets of Sem GP for purposes of determining SemGroup's insolvency does not change the fact that SemGroup was insolvent or rendered insolvent by the Partnership Distributions. This is because Sem GP's only asset was its partnership interests in SemGroup, amounting to approximately 2% of the equity in SemGroup.

77. The Partnership Distributions to the Defendants were on account of their partnership interests. The Defendants did not provide any consideration to SemGroup in exchange for the approximately \$30.0 million they received from the Partnership Distributions. Under any circumstances SemGroup received less than reasonably equivalent value on account of the Partnership Distributions.

78. The Defendants received millions of dollars in Partnership Distributions, on information and belief, in the amounts set forth in the table below.<sup>6</sup> The Partnership

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<sup>6</sup> The table below represents the Plaintiff's understanding, on information and belief, of the specific Defendants that received Partnership Distributions. The Plaintiff reserves the right (footnote continued)

Distributions are divided into distributions on account of the Defendants’ limited partnership interests (the “Limited Partnership Distributions”) and on account of the Defendants’ interests in Sem GP, which itself received Partnership Distributions (the “General Partnership Distributions”).

Partner	2007 Distribution		2008 Distribution		Total Distribution
	Limited Partnership Distributions	General Partnership Distributions	Limited Partnership Distributions	General Partnership Distributions	
Cottonwood Partnership, L.L.P.	\$2,746,535.56	\$56,343.71	\$3,051,706.16	\$62,604.12	\$5,917,189.55
Rosene Family, L.L.C.	\$1,037,902.81	\$21,336.13	\$1,153,225.32	\$23,706.81	\$2,236,171.07
Satco Investments, L.L.C.	\$547,047.92	\$11,202.36	\$607,831.04	\$12,447.07	\$1,178,528.39
<b>TOTAL</b>	<b>\$4,331,486.29</b>	<b>\$88,882.20</b>	<b>\$4,812,762.52</b>	<b>\$98,758.00</b>	<b>\$9,331,889.01</b>

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to amend this Second Amended Complaint to identify additional Defendants or to correct the amounts received by each Defendant.

## COUNT ONE

### **Constructive Fraudulent Transfer under §§ 544(b) and 550 – Limited Partnership Distributions of the 2007 Distributions against Defendants that Received Such Distributions**

79. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

80. Pursuant to 11 U.S.C. § 544(b), Plaintiff has the rights of an existing unsecured creditor of the Debtors. 11 U.S.C. § 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under Oklahoma law (Okla. Stat. 24-116 and 24-117(A)).

81. As of the 2007 Distributions, there were unsecured creditors of SemGroup, including holders of notes issued under the Indenture.

82. Within the four-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to the Defendants the Limited Partnership Distributions relating to the 2007 Distributions. Each transfer of such Limited Partnership Distributions to the Defendants constituted a transfer of the Debtors' property interests.

83. SemGroup received no consideration or, under any circumstances, received less than reasonably equivalent value, on account of each Limited Partnership Distribution transferred to each Defendant.

84. At the time of such Limited Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.

85. Therefore, such Limited Partnership Distributions are voidable under 11 U.S.C. § 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

86. Because such Limited Partnership Distributions are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to 11 U.S.C. § 550(a)(1), Plaintiff may recover from the Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made.

## **COUNT TWO**

### **Constructive Fraudulent Transfer Under §§ 548(a)(1)(B) and 550 – Limited Partnership Distributions of the 2007 Distributions against Defendants that Received Such Distributions**

87. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

88. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to the Defendants the Limited Partnership Distributions relating to the 2007 Distribution. Each transfer of such Limited Partnership Distributions to the Defendants constituted a transfer of the Debtors' property interests.

89. SemGroup received no consideration or, under any circumstances, received less than reasonably equivalent value, on account of each Limited Partnership Distribution provided to each Defendant.

90. At the time of such Limited Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.

91. Therefore, such Limited Partnership Distributions are voidable under 11 U.S.C. § 548(a)(1)(B) of the Bankruptcy Code.

92. Because such Limited Partnership Distributions are avoidable under the Bankruptcy Code, pursuant to 11 U.S.C. § 550(a)(1) Plaintiff may recover from the Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made.

### **COUNT THREE**

#### **Constructive Fraudulent Transfer Under §§ 544(b) and 550 – General Partnership Distributions of the 2007 Distributions against Defendants that Received Such Distributions**

93. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

94. Pursuant to 11 U.S.C. § 544(b), Plaintiff has the rights of an existing unsecured creditor of the Debtors. 11 U.S.C. § 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under Oklahoma law (Okla. Stat. 24-116 and 24-117(A)).

95. As of the 2007 Distributions, there were unsecured creditors of SemGroup, including holders of notes issued under the Indenture.

96. Within the four-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to Sem GP the General Partnership Distributions relating to the 2007 Distributions. Each transfer of such General Partnership Distributions constituted a transfer of the Debtors' property interests.

97. Sem GP subsequently transferred to the Defendants their *pro rata* share of General Partnership Distributions.

98. At the time of the General Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.



99. Therefore, such General Partnership Distributions are voidable under 11 U.S.C. § 544(b) of the Bankruptcy Code.

100. Because such General Partnership Distributions are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to 11 U.S.C. § 550(a)(1), Plaintiff may recover from the Defendants as subsequent transferees or entities for whose benefit the fraudulent transfers were made.

#### **COUNT FOUR**

##### **Constructive Fraudulent Transfer Under §§ 548(b) and 550 – General Partnership Distributions of the 2007 Distribution against Defendants that Received Such Distributions**

101. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

102. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to Sem GP the General Partnership Distributions relating to the 2007 Distribution. Each transfer of such General Partnership Distributions constituted a transfer of the Debtors' property interests.

103. Sem GP subsequently transferred to the Defendants their *pro rata* share of General Partnership Distributions.

104. At the time of such General Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.

105. Therefore, such General Partnership Distributions are voidable under 11 U.S.C. § 548(b) of the Bankruptcy Code.

106. Because such General Partnership Distributions are avoidable under the Bankruptcy Code, pursuant to 11 U.S.C. § 550(a)(1) Plaintiff may recover from the Defendants as subsequent transferees or entities for whose benefit the fraudulent transfers were made.

#### **COUNT FIVE**

#### **Constructive Fraudulent Transfer under §§ 544(b) and 550 – Limited Partnership Distributions of the 2008 Distributions against Defendants that Received Such Distributions**

107. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

108. Pursuant to 11 U.S.C. § 544(b), Plaintiff has the rights of an existing unsecured creditor of the Debtors. 11 U.S.C. § 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under Oklahoma law (Okla. Stat. 24-116 and 24-117(A)).

109. As of the 2008 Distributions, there were unsecured creditors of SemGroup, including holders of notes issued under the Indenture.

110. Within the four-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to the Defendants the Limited Partnership Distributions relating to the 2008 Distributions. Each transfer of such Limited Partnership Distributions to the Defendants constituted a transfer of the Debtors' property interests.

111. SemGroup received no consideration or, under any circumstances, received less than reasonably equivalent value, on account of each Limited Partnership Distribution transferred to each Defendant.

112. At the time of such Limited Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.

113. Therefore, such Limited Partnership Distributions are voidable under 11 U.S.C. § 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

114. Because such Limited Partnership Distributions are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to 11 U.S.C. § 550(a)(1), Plaintiff may recover from the Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made.

#### **COUNT SIX**

#### **Constructive Fraudulent Transfer Under §§ 548(a)(1)(B) and 550 – Limited Partnership Distributions of the 2008 Distributions against Defendants that Received Such Distributions**

115. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

116. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to the Defendants the Limited Partnership Distributions relating to the 2008 Distributions. Each transfer of such Limited Partnership Distributions to the Defendants constituted a transfer of the Debtors' property interests.

117. SemGroup received no consideration or, under any circumstances, received less than reasonably equivalent value, on account of each Limited Partnership Distribution provided to each Defendant.

118. At the time of such Limited Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.

119. Therefore, such Limited Partnership Distributions are voidable under 11 U.S.C. § 548(a)(1)(B) of the Bankruptcy Code.

120. Because such Limited Partnership Distributions are avoidable under the Bankruptcy Code, pursuant to 11 U.S.C. § 550(a)(1) Plaintiff may recover from the Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made.

### **COUNT SEVEN**

#### **Constructive Fraudulent Transfer Under §§ 544(b) and 550 – General Partnership Distributions of the 2008 Distributions against Defendants that Received Such Distributions**

121. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

122. Pursuant to 11 U.S.C. § 544(b), Plaintiff has the rights of an existing unsecured creditor of the Debtors. 11 U.S.C. § 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under Oklahoma law (Okla. Stat. 24-116 and 24-117(A)).

123. As of the 2008 Distributions, there were unsecured creditors of SemGroup, including holders of notes issued under the Indenture.

124. Within the four-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to Sem GP the General Partnership Distributions relating to the 2008 Distributions. Each transfer of such General Partnership Distributions constituted a transfer of the Debtors' property interests.

125. Sem GP subsequently transferred to the Defendants their *pro rata* share of General Partnership Distributions.

126. At the time of such General Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.

127. Therefore, such General Partnership Distributions are voidable under 11 U.S.C. § 544(b) of the Bankruptcy Code.

128. Because such General Partnership Distributions are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to 11 U.S.C. § 550(a)(1), Plaintiff may recover from the Defendants as subsequent transferees or entities for whose benefit the fraudulent transfers were made.

### **COUNT EIGHT**

#### **Constructive Fraudulent Transfer Under §§ 548(b) and 550 – General Partnership Distributions of the 2008 Distributions against Defendants that Received Such Distributions**

129. Plaintiff repeats and re-alleges each and every allegation contained in each of the preceding paragraphs.

130. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, SemGroup transferred to Sem GP the General Partnership Distributions relating to the 2008 Distributions. Each transfer of such General Partnership Distributions constituted a transfer of the Debtors' property interests.

131. Sem GP subsequently transferred to the Defendants their *pro rata* share of General Partnership Distributions.

132. At the time of such General Partnership Distributions, SemGroup had unreasonably small capital and/or was insolvent because its liabilities exceeded the fair value of its assets.

133. Therefore, such General Partnership Distributions are voidable under 11 U.S.C. § 548(b) of the Bankruptcy Code.

134. Because such General Partnership Distributions are avoidable under the Bankruptcy Code, pursuant to 11 U.S.C. § 550(a)(1) Plaintiff may recover from the Defendants as subsequent transferees or entities for whose benefit the fraudulent transfers were made.

WHEREFORE, Plaintiff, on behalf of the Debtors' chapter 11 estates, prays for relief and judgment, as follows:

- a. Declaring that all 2007 Distributions transferred to the Defendants (including Limited Partnership Distributions and General Partnership Distributions) are avoidable pursuant to 11 U.S.C. §§ 544 and/or 548;
- b. Declaring that all 2008 Distributions transferred to the Defendants (including Limited Partnership Distributions and General Partnership Distributions) are avoidable pursuant to 11 U.S.C. §§ 544 and/or 548;
- c. Awarding Plaintiff judgment in an amount equal to the challenged Partnership Distributions and directing the Defendants to pay Plaintiff an amount equal to the Partnership Distributions pursuant to 11 U.S.C. § 550(a), together with pre-judgment and post-judgment interest on such amount;
- d. Awarding Plaintiff attorneys' fees, costs and other expenses; and
- e. Granting such other and further relief as the Court considers appropriate.

Dated: November 1, 2011

BLANK ROME LLP

/s/ David A. Dorey

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