IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PETER BRINCKERHOFF, INDIVIDUALLY AND AS TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR U A DTD 10/17/97,	:	
Plaintiff,	:	
v.	:	C.A. No. 5526-VCN
ENBRIDGE ENERGY COMPANY, INC.; ENBRIDGE, INC.; ENBRIDGE ENERGY MANAGEMENT, LLC; ENBRIDGE EMPLOYEE SERVICES, INC.; MARTHA O. HESSE, JEFFREY A. CONNELLY, DAN WESTBROOK, GEORGE K. PETTY, STEPHEN J.J. LETWIN, TERRENCE L. MCGILL and STEPHEN J. WOURI,	:	
Defendants,	:	
and	:	
ENBRIDGE ENERGY PARTNERS, L.P.,	:	
Nominal Defendant.	:	

MEMORANDUM OPINION

Date Submitted: June 15, 2011
Date Decided: September 30, 2011

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NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Peter Brinckerhoff, individually and as trustee of the Peter R. Brinckerhoff Revocable Trust (the "Trust"), is the holder of limited partnership units ("LP units") of Enbridge Energy Partners, L.P. ("EEP" or the "Partnership"). Brinckerhoff, both derivatively, on behalf of EEP, and directly, on behalf of the public holders of EEP LP units, has brought claims against EEP's general partner—Enbridge Energy Company, Inc. ("EEP GP"), the company that manages EEP GP—Enbridge Energy Management, L.L.C. ("Enbridge Management"), EEP GP's board of directors ("EEP GP's Board"), EEP GP's controller—Enbridge, Inc. ("Enbridge"), and an affiliate of Enbridge—Enbridge Employee Services, Inc. ("EES") (collectively the "Defendants").

The Defendants have moved to dismiss all of Brinckerhoff's claims.[1] The resolution of those motions primarily hinges on a provision in EEP's limited partnership agreement (the "LPA") providing that EEP GP is conclusively presumed to have acted in good faith when it takes action in reliance upon the opinion of an investment banker. This is the Court's decision on those motions.

[1] There are two separate motions to dismiss. One motion is on behalf of EEP, EEP GP, Enbridge Management, and EEP GP Board members Martha O. Hesse, Jeffrey A. Connelly, Dan A. Westbrook, and Terrence L. McGill. Their opening brief will be referred to as "DB." The other motion is on behalf of Enbridge, EES, and EEP GP Board members George K. Petty, Stephen J.J. Letwin, and Stephen J. Wuori.

II. BACKGROUND[2]

A. *The Parties*

Brinckerhoff directly owns 1,000 EEP LP units, and the Trust currently owns 30,540 units. The Trust has continuously owned EEP LP units since December 26, 2008.

EEP is a publicly traded Delaware master limited partnership headquartered in Houston, Texas. EEP's business focuses on energy transportation in the mid-Continent and Gulf Coast regions of the United States. EEP was formed in 1991 to own and operate the U.S. portion of the Lakehead pipeline system ("Lakehead"). Lakehead is a crude oil and liquid petroleum pipeline system extending from the tars sands oil production fields in Northern Alberta, Canada through the upper and lower Great Lakes region of the United States to Eastern Canada. The public holds 61.5% of EEP's LP units.

EEP GP is EEP's general partner and a Delaware corporation. EEP GP has delegated to Enbridge Management, a Delaware limited liability company, the power and authority to manage EEP's business and affairs.

Enbridge is a Canadian corporation that operates an integrated midstream asset network in Canada and the United States. A wholly-owned subsidiary of

[2] Except in one noted instance, the factual background is based on allegations in the verified amended class and derivative complaint (the "Complaint" or "Compl.").

Enbridge owns the Canadian portion of Lakehead. Enbridge indirectly owns 100% of EEP GP.

EES is a Delaware corporation, the shares of which are all owned by Enbridge. EES employs all of the employees at EEP, EEP GP, and Enbridge Management.

Martha O. Hesse, Jeffrey A. Connelly, Dan A. Westbrook, George K. Petty, Stephen J.J. Letwin, Terrance L. McGill, and Stephen J. Wuori were all members of EEP GP's Board during the relevant time. In addition to their membership on EEP GP's Board, Petty, Letwin, McGill, and Wuori are affiliated with the Defendants in the following ways. Petty has served as a director of Enbridge since January 2001. Letwin has served as an executive officer of Enbridge at least since April 2000. McGill has served as an executive officer of EEP GP and Enbridge Management since April 2002. Wuori has served as an executive officer of Enbridge since 2001.

B. *Factual Background and Procedural History*

In response both to expected growth in the supply of petroleum in the Western Canada oil sands and to demand for that petroleum in the Midwestern U.S., EEP conceived of the Alberta Clipper project (the "ACP" or the "Project"). The ACP consisted of the construction and subsequent operation of a $1.2 billion pipeline from the Canadian border to Superior, Wisconsin. At the Canadian

border, the Project would connect to another pipeline owned by Enbridge Pipelines, Inc., a wholly owned subsidiary of Enbridge.

Initially, a subsidiary of EEP, Enbridge Energy, LP, was going to undertake the ACP on its own. EEP had a history of using its own resources to fund projects, and, at the time, had access to $1.6 billion in capital. The ACP was going to run along EEP's existing rights-of-way, and was to become part of EEP's Lakehead system. By attaching the planned pipeline to Lakehead, the pipeline would be connected to EEP's full range of delivery and storage points in the U.S., such as Chicago, Illinois.

In expectation of the Project, EEP negotiated and obtained permits and tariff agreements with shippers of petroleum liquids. EEP also negotiated a tariff agreement with the Canadian Association of Petroleum Producers, which was approved by the Federal Energy Regulatory Commission.

In March 2009, after EEP had conceived of the ACP and negotiated the above tariff agreements, and "when economic activity and the capital markets were at their nadir,"[3] Enbridge approached EEP to discuss obtaining an interest in the ACP. Enbridge proposed a joint venture agreement ("JVA"). Specifically, Enbridge suggested that it contribute to the cost of the ACP, and that EEP and Enbridge share in the Project's profits based solely upon their relative capital

[3] Compl. ¶ 9.

contributions. On April 1, 2009, Enbridge proposed that the JVA consist of it (Enbridge) contributing 75% of the cost of the Project and EEP contributing 25%. Under the JVA, EEP would not receive any compensation in return for already owning the project, for possessing the rights-of-way, for having negotiated the tariff agreements, or for having already spent $150 million on the project.

After receiving Enbridge's April 1, 2009 proposal, EEP GP's Board formed a special committee consisting of defendants Hesse, Connelly, and Westbrook (the "Special Committee"). EEP GP's Board asked the Special Committee to determine whether the JVA was "fair and reasonable to the Partnership and its unit holders" and to "make a recommendation to the Board on behalf of the Partnership with respect to the Proposed Transaction."[4] EEP GP's Board did not grant the Special Committee the authority to seek alternatives to the JVA, or even to refuse to approve an agreement with Enbridge. Rather, the Special Committee was authorized only to "review, evaluate and negotiate, on behalf of the Partnership, the terms and conditions upon which Enbridge, Inc. would become a participant in the Alberta Clipper Project."[5]

The Special Committee hired legal advisors, and Tudor Pickering Holt & Co. ("Tudor"), as its financial advisor. Tudor's retainer letter stated that it was

[4] *Id.* at ¶ 54.
[5] *Id.*

retained to render an opinion as to whether the terms of the JVA were "representative of an arm's length transaction."[6]

On April 7, 2009, the Special Committee met for the first time to consider the JVA. At that meeting, Enbridge's Executive Vice President and Chief Financial Officer, J.R. (Richard) Bird, explained that the JVA contemplated segregating the ACP's assets into a separate series (Series AC) of limited partnership interests within Enbridge Energy, LP, a wholly owned subsidiary of EEP through which EEP owned Lakehead. Under the JVA, Enbridge and EEP would own Series AC interests in proportion to their capital contributions in the ACP, and cash flow from the ACP would be distributed in the same proportions.

Within a week of the April 7, 2009 meeting, Enbridge prepared and sent to EEP a proposed term sheet. Two weeks thereafter, at a meeting on April 23, 2009, the Special Committee concluded that "because the Partnership had commenced the [AC Project] and therefore cannot practically cancel the Project, the Partnership [lacked] significant leverage points to use to obtain further substantive concessions from [Enbridge]."[7] On May 29, 2009, the Special Committee met again. At that meeting, Tudor explained that "to the extent that it is able to obtain capital at a reasonable cost, [. . .] the Partnership should retain as much equity in

[6] *Id.* at ¶ 56.
[7] *Id.* at ¶ 63.

Project AC as possible."[8] In light of Tudor's explanation, the Special Committee approved proceeding with the JVA provided that EEP hold a 33-1/3% equity stake in the ACP instead of a 25% stake.

On July 17, 2009, the Special Committee met for the last time. By that point, many Wall Street analysts believed that the capital markets had dramatically improved from their March 2009 "nadir." Neither the Special Committee nor Tudor, however, even discussed negotiating better terms from Enbridge. Rather, Tudor opined that the terms of the JVA "are representative, in all material respects, of those that would have been obtained by the Partnership in an arm's length transaction."[9]

Tudor's opinion was primarily based on a comparison of the relative capital investments of EEP and Enbridge in the ACP. Tudor did not use commonly used valuation metrics, such as a discounted cash flow analysis or an earnings analysis. Moreover, the price Enbridge was proposing to (and eventually did) pay for its stake in the ACP represented a 7x EBITDA multiple, even though Tudor's own website "stated that in setting price targets 'for pipelines, we [Tudor] typically used 9x forward year EBITDA [multiple],' and that 'if the company plans to place assets into an MLP, we will value a portion of the pipeline assets at a higher

[8] *Id.* at ¶¶ 64, 66.
[9] DB at 10-11. The Complaint states that Tudor gave this opinion, but fails to specify when. Compl. ¶ 97.

multiple, up to 12x forward year EBITDA.'"[10] Also, in comparing the JVA to other transactions, Tudor suggested that the JVA–an agreement that gave EEP and Enbridge an interest in the ACP based solely on their relative capital contributions–was similar to transactions in which the parties' interests in the transaction were based on the market value of their contributions.

After Tudor rendered its opinion, the Special Committee recommended that EEP proceed with the JVA. EEP GP's Board accepted the Special Committee's recommendation, passing a resolution dated July 17, 2009 that approved the JVA. In SEC filings and other public statements, EEP and Enbridge Management's officers and directors represented that the JVA was made necessary by conditions in the financial markets, which made it impossible or disadvantageous for EEP to finance the ACP alone. Construction of the ACP was completed in April 2010.

III. CONTENTIONS

Brinckerhoff originally filed a complaint, challenging the JVA, on May 28, 2010. The Complaint alleges four counts, both derivatively, on behalf of EEP, and directly, on behalf of the public holders of EEP LP units. Count I alleges that all of the Defendants breached their express and implied duties under the LPA by causing EEP to enter into the JVA, an agreement that was financially unfair to EEP. Count II alleges that all of the Defendants, except EEP GP, aided and

[10] Compl. ¶ 73.

abetted EEP GP's breach of its duties. Count III alleges that all of the Defendants breached the implied covenant of good faith and fair dealing. Count IV alleges that to the extent that Enbridge and EES are not liable for breaching their duties under the LPA, they tortiously interfered with the LPA and were thereby unjustly enriched. Brinckerhoff seeks to recover damages for the difference between: (1) what Enbridge contributed to the ACP under the JVA; and (2) what Enbridge would have been required to contribute to the ACP to obtain a two-thirds interest in the Project had the Defendants not breached the LPA or the implied covenant. In the alternative, Brinckerhoff seeks rescission of the JVA, or reformation of its terms.

The Defendants contend that the Complaint fails to allege any facts that would entitle Brinckerhoff to relief, and therefore, that the Complaint should be dismissed pursuant to Court of Chancery Rule 12(b)(6). With regard to Count I, the Defendants argue that EEP GP is the only defendant which is a party to the LPA, and thus, EEP GP is the only defendant which is subject to any duties imposed by the LPA. Furthermore, the Defendants state that the LPA expressly permits EEP GP to enter into a transaction with a related entity, such as Enbridge, as long as the terms of that transaction "are no less favorable to [EEP] than those generally being provided to or available from unrelated third parties."[11] The

[11] LPA, Art. 6.6(e).

Defendants argue that the JVA met that standard. Tudor opined that the JVA was representative of an arm's length transaction, and the LPA, the Defendant's contend, explicitly allowed EEP GP to rely on Tudor's opinion.

As for Count II, the Defendants argue that there is no cause of action for aiding and abetting a breach of contractually imposed duties. With regard to Count III, the Defendants argue that the implied covenant of good faith and fair dealing is essentially a gap-filling doctrine, which is not applicable here because the LPA explicitly lays out what duties the Defendants owe EEP. Moreover, the Defendants argue that they satisfied their duties under the LPA, and thus, acted in good faith as a matter of law.

With regard to Count IV, Enbridge and EES argue that since none of the Defendants breached their duties under the LPA, there is no breach of contract upon which to ground Brinckerhoff's tortious interference claim. Further, Enbridge and EES suggest that Brinckerhoff has failed to show that either of them acted intentionally or without justification, which, they argue, Brinckerhoff must do to plead a tortious interference claim. All of the Defendants also contend that Brinckerhoff's claims should fail for the separate and independently adequate reason that all of his claims are derivative, and he has failed either to make a demand on EEP GP's Board or to plead with particularity why making a demand would be futile.

Brinckerhoff, in opposing the Defendants' motions, argues that all of the Defendants do owe duties to EEP under the LPA, and that they breached those duties, particularly the duty to act in good faith, by causing EEP to enter into the JVA. Brinckerhoff further argues that none of the Defendants was entitled to rely on Tudor's opinion because it was fundamentally flawed. Tudor's opinion compared the JVA to transactions where the parties' interests in the venture were based on the market value of their contribution. Moreover, Tudor's opinion suggested that the ACP could fairly be valued at a 7x EBITDA multiple, whereas Tudor's own website reported that a 9x-12x multiple was typically used for pipelines. This discrepancy, Brinckerhoff argues, allowed Enbridge to purchase its stake in the ACP for $560 million below fair value. Brinckerhoff also argues that the Defendants breached the implied covenant of good faith and fair dealing by relying on Tudor's opinion, failing to do a market check, and causing EEP to enter into the JVA. Finally, with regard to his derivative claims, Brinckerhoff argues that he was not required to make demand upon EEP GP, or, in the alternative, that the Complaint alleges sufficient facts to excuse demand.

IV. ANALYSIS

A motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6) will only be granted if the plaintiff would be unable to recover under

"any reasonably conceivable set of circumstances susceptible of proof."[12] The Court must accept as true all of the complaint's well-pled facts and draw all reasonable inferences in the plaintiff's favor.[13] "The Court is not required, however, to accept conclusory allegations unsupported by specific, factual allegations, nor must it accept every strained interpretation of the plaintiff's allegations, but instead must only accept those reasonable inferences that logically flow from the face of the complaint."[14] Nonetheless, the Court must "accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim."[15]

A. *Whether Brinckerhoff's claims are direct or derivative*

In the corporate context, whether a plaintiff's claim is derivative or direct generally depends on "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)."[16] Shortly before *Tooley*, "[t]he test for distinguishing direct from derivative claims in

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[12] *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *5 (Del. Ch. Jan. 14, 2011) (citation omitted).
[13] *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007) (citation omitted).
[14] *Great-West Investors*, 2011 WL 284992, at *5 (citation and internal quotation omitted).
[15] *Central Mtg. Co. v. Morgan Stanley Mtg. Capital Holdings LLC*, 2011 WL 3612992, at *4 (Del. Aug. 18, 2011).
[16] *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). For an example of an exception to *Tooley, see Gentile v. Rossette*, 906 A.2d 91, 99 (Del. 2006) ("There is, however, at least one transactional paradigm-a species of corporate overpayment claim-that Delaware case law recognizes as being both derivative and direct in character.") (citing *Grimes v. Donald*, 673 A.2d 1207, 1212 (Del. 1996)). No exception, however, is applicable here.

the context of a limited partnership [wa]s substantially the same as that used when the underlying entity [wa]s a corporation."[17] The reason for using a similar test in both the limited partnership and corporate contexts was stated as follows: "the duties of a general partner and a director are very similar. Therefore, it follows that the determination of the nature of the claims regarding a breach of those duties also should be very similar."[18]

The duties of directors, on the one hand, and a general partner and its affiliates, on the other, are still very similar.[19] The logic of applying the same test in the corporate and limited partnership contexts to distinguish direct from derivative claims remains sound. Thus, the *Tooley* standard will guide the determination of whether Brinckerhoff's claims are direct, derivative or both.

Brinckerhoff alleges that the Defendants caused EEP to enter into the financially unfair JVA in violation of the LPA. The JVA was financially unfair, Brinckerhoff argues, because it allowed Enbridge to buy into the ACP, a project EEP developed, on the cheap. Thus, under the first prong of *Tooley*, EEP suffered the alleged harm. The ACP was not as profitable for EEP as it should have been.

With regard to *Tooley*'s second prong, Brinckerhoff seeks damages for the difference between what Enbridge contributed to the ACP and what Enbridge

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[17] *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 149 (Del. Ch. 2003) (citing *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 15 (Del. Ch. 1992)).
[18] *Litman*, 611 A.2d at 15 (citations omitted).
[19] *See infra* notes 27-28.

would have contributed to the Project had it not breached the LPA. If Enbridge should have contributed more to the ACP and is required to do so now, EEP will receive that contribution. EEP was the only other party involved in the ACP. Any additional contribution from Enbridge to the ACP will be EEP's gain.

Brinckerhoff cites *Brinckerhoff v. Texas Eastern Products Pipeline Company, L.L.C.* ("*Teppco*") for the proposition that if a limited partnership agreement specifically prohibits the actions challenged in a complaint, the limited partners have standing to enforce the partnership agreement directly.[20] In *Teppco*, a limited partner plaintiff brought claims against the limited partnership's controller. Before those claims were resolved, however, the controller proposed that the limited partnership merge into it. In light of *Teppco*'s posture, the Court explained:

> [i]f I were determining whether the action should be subject initially to the heightened pleading requirements of the statutory limited partnership analogs to Rule 23.1, *see* 6 *Del. C.* §§ 17-1001 to 17-1003, then treating the action as primarily derivative under *Tooley* . . . would serve the core Delaware public policies of promoting internal dispute resolution and ensuring that Teppco GP had the first opportunity to address and control the claim. Now, however, as a result of the [m]erger, the distinctions between a derivative action on behalf of Teppco for the indirect benefit of its LP unitholders and a class action on behalf of those same Teppco LP unitholders have blurred.[21]

[20] Pl.'s Answering Br. at 48-49 (citing *Teppco*, 986 A.2d 370, 383 (Del. Ch. 2010)).
[21] 986 A.2d at 383.

Thus, *Teppco* merely suggests that when a plaintiff is pursuing a derivative action on behalf of a limited partnership, and that partnership is about to be merged into another entity, the limited partners may have standing to pursue their claims directly.

The setting for this action is very different from that of *Teppco*. The Court is not faced with a situation where claims are about to be extinguished through a merger. Rather, the question, as the *Teppco* court foreshadowed, is whether Brinckerhoff's claims should initially be subject to the heightened pleading requirements imposed on derivative plaintiffs. The *Teppco* court explained: "treating the action as primarily derivative under *Tooley* . . . w[ill] serve the core Delaware public policies of promoting internal dispute resolution and ensuring that [EEP GP, the entity that manages EEP] ha[s] the first opportunity to address and control the claim[s]."[22] Thus, for purposes of this action, Brinckerhoff's claims are derivative.

B. *Whether demand would be futile*

Since Brinckerhoff's claims are derivative, 6 *Del. C.* § 17-1003 requires that the Complaint "set forth with particularity the effort, if any, of [Brinckerhoff] to secure initiation of the action by [EEP GP] or the reasons for not making the

[22] *Id.* at 383.

effort."[23] At the outset, the parties disagree as to whether Brinckerhoff needs to show that demand upon EEP GP would have been futile or whether demand upon EEP GP's Board would have been futile. This disagreement, however, is not important because Brinckerhoff has alleged with particularity that demand upon either would have been futile.

As Brinckerhoff contends, it would have been futile for him to demand that EEP, an entity completely owned by Enbridge, sue Enbridge.[24] Moreover, Brinckerhoff has alleged particularized facts creating a reasonable doubt that a majority of EEP GP's Board was independent of Enbridge and, thus, that it would have been futile for Brinckerhoff to have demanded that EEP GP's Board initiate claims against Enbridge or its affiliates.[25]

"A director . . . is not independent if the director is 'beholden' to another such that the director's decision would not be based on the merits of the subject before her."[26] EEP GP's Board is made up of seven members, and the Complaint

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[23] Court of Chancery Rule 23.1 imposes a similar requirement on Brinckerhoff: "[t]he complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." *See Seaford Funding Ltd. P'ship v. M & M Assocs. II, L.P.*, 672 A.2d 66, 69 (Del. Ch. 1995) (citing 6 *Del. C.* § 17-1003; Ct. Ch. R. 23.1).

[24] *See Dean v. Dick*, 1999 WL 413400, at *3 (Del. Ch. June 10, 1999) (asking, rhetorically, "where the *only* party against whom relief is sought is the 100% owner of the party that would be requested to prosecute the lawsuit-what could be closer to beholdenness?")

[25] *See Kahn v. Portnoy*, 2008 WL 5197164, at *13 (Del. Ch. Dec. 11, 2008) (stating "[b]ecause I have found that at least a majority of the TA directors were interested or not independent, demand on the company is excused as futile").

[26] *Id.* at *10 (citing *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).

alleges facts suggesting that four of them were beholden to Enbridge. Petty is a director of Enbridge. Letwin has served as an executive officer of Enbridge at least since April 2000. Wuori has served as an executive officer of Enbridge since 2001. McGill is an executive officer of EEP GP, who, like all executive officers of EEP GP, is paid by EES, a company that Enbridge wholly owns. Thus, the Complaint creates a reasonable doubt that a majority of EEP GP's Board is independent for these purposes, and demand is excused.

C. *EES does not owe any duties to EEP*

Because Brinckerhoff's particularized allegations show that demand would have been futile, the Court now turns to the Defendants' arguments under Rule 12(b)(6).

Under the facts as alleged in the Complaint, EEP GP, EEP GP's Board, Enbridge Management, and Enbridge all, at least potentially, owe fiduciary duties to EEP, but EES does not. It is established Delaware law that a general partner owes a partnership fiduciary duties similar to the duties directors owe to a corporation.[27] Moreover, this Court has determined that certain entities affiliated

[27] *See Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 2011 WL 3505355, at *31 (Del. Ch. Aug. 8, 2011) ("As a matter of default law, . . . [a general partner] clearly owes fiduciary duties to the limited partners. . . .") (citation omitted); *Lonergan v. EPE Holdings LLC*, 5 A.3d 1008, 1023 (Del. Ch. 2010) ("[I]n the limited partnership context, absent contractual modification, a general partner owes fiduciary duties that include a 'duty of full disclosure.'") (quoting *Sussex Life Care Assocs. v. Strickler*, 1988 WL 156833, at *4 (Del. Ch. June 13, 1989)); *Twin Bridges LP v. Draper*, 2007 WL 2744609, at *21 (Del. Ch. Sept. 14, 2007) (stating that "the fiduciary duty of loyalty of a general partner may be similar to that of a corporate director").

with a corporate general partner, such as its board of directors and controller, also owe fiduciary duties to the limited partnership that the general partner manages.[28] In delineating the entities, besides the general partner, who owe fiduciary duties to a limited partnership, however, this Court has been careful to tether duties to control.

In *In re USACafes, L.P. Litigation*,[29] this Court held that the directors of a corporate entity serving as the general partner of a limited partnership owe fiduciary duties to the limited partnership. The holding in *USACafes* was based on the Court's understanding that "the principle of fiduciary duty, stated most generally, [is] . . . that one who controls property of another may not, without implied or express agreement, intentionally use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner."[30] If an entity does not exercise control over partnership property, however, then there is no reason for the Court to fear that that entity will use partnership property to the partnership's detriment.

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[28] *See Wallace v. Wood*, 752 A.2d 1175, 1178 (Del. Ch. 1999) ("Officers, affiliates and parents of a general partner, *may* owe fiduciary duties to limited partners if those entities control the partnership's property.").
[29] 600 A.2d 43 (Del. Ch. 1991).
[30] *Id.* at 48.

The Complaint fails to allege that EES exercises any control over EEP. EES is a private corporation entirely owned by Enbridge that employs the people who work at EEP, EEP GP, and Enbridge Management. EES has no direct say in how EEP is managed, nor does it exercise any control over an entity that does.[31] Thus, EES does not owe any fiduciary duties to EEP.[32]

D. *The duties that EEP GP, EEP GP's Board, Enbridge Management, and Enbridge owe EEP*

The drafters of the LPA took advantage of 6 *Del. C.* § 17-1101(d), which authorizes a limited partnership agreement to expand, restrict, or eliminate the duties (including fiduciary duties) that any person may owe to either the limited partnership or any other party to the limited partnership agreement, "provided that the partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing." Although on a motion to dismiss, "[t]he complaint generally defines the universe of facts that the trial court may consider,"[33] the Court "may rely upon exhibits attached to a motion to dismiss if the plaintiff's

[31] Moreover, even if EES is viewed as an agent of Enbridge, EES would still not owe any duties to EEP because EES has no actual or apparent authority: "Enbridge, not EEP or Enbridge Management, establishes the salaries and other compensation for all of EES's employees." Compl. ¶ 31.

[32] Although 6 *Del. C.* § 17-1101(d) allows a limited partnership agreement to expand the duties a person owes to the limited partnership, that provision only applies "[t]o the extent that, at law or in equity, a . . . person has duties . . . to a limited partnership." EES does not owe any common law duties to EEP. A limited partnership agreement cannot impose duties on a person that neither owes common law duties to the partnership nor signed the limited partnership agreement.

[33] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (citations omitted).

claims are based upon them."[34] The Complaint does not contain the entire LPA, and the LPA was not attached to the Complaint as an exhibit. The LPA, however, was attached to the DB. The LPA forms the basis for several of Brinckerhoff's claims, and therefore, the Court may look to it.

The LPA directly addresses transactions, such as the JVA, that involve an agreement between EEP and a related party. Article 6.6(e) of the LPA provides: "[n]either . . . [EEP GP] nor any of its Affiliates shall sell, transfer or convey any property to, or purchase any property from, the Partnership, directly or indirectly, except pursuant to transactions that are fair and reasonable to the Partnership." A transaction will be deemed to have been fair and reasonable to EEP if the terms of that transaction "are no less favorable to the Partnership than those generally being provided to or available from unrelated third parties."[35]

The LPA states that "'Affiliate' means, with respect to any Person, any other Person that directly or indirectly controls, is controlled by or is under common control with, the Person in question."[36] Enbridge is alleged to control EEP GP, and thus, for the purposes of a motion to dismiss, Enbridge is an "Affiliate" of EEP GP.

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[34] *Great-West Investors*, 2011 WL 284992, at *6 (citation omitted).
[35] LPA, Art. 6.6(e)(ii).
[36] *Id.* at Art. 2.

The LPA, however, does not stop there. It broadly limits the duties Enbridge and the other Defendants owe EEP and its unit holders. Article 6.8(a) of the LPA provides:

> [n]otwithstanding anything to the contrary set forth in this Agreement, no Indemnitee shall be liable for monetary damages to the Partnership, the Limited Partners, the Assignees or any other Persons who have acquired interests in the Units, for losses sustained or liabilities incurred as a result of any act or omission if such Indemnitee acted in good faith.

The LPA defines "Indemnitee" to include "[EEP GP,] any Person who is or was an Affiliate of [EEP GP] . . . , [and] any Person who is or was an officer, director, employee, partner, agent, or trustee of [EEP GP]. . . ."[37]

Read together, Article 6.8(a) and the LPA's definitions of "Indemnitee" and "Affiliate" provide that the only duty that EEP or its unit holders may successfully hold the Defendants monetarily liable for is a breach of the duty to act in good faith. The LPA's definition of "Indemnitee" includes EEP GP, EEP GP's Board, and "Affiliates" of EEP GP. As mentioned above, Enbridge is an "Affiliate" of EEP GP because Enbridge is alleged to control EEP GP. Moreover, Enbridge Management is an "Affiliate" of EEP GP because it is alleged to be "under common control with" EEP GP. Thus, EEP GP, EEP GP's Board, Enbridge, and Enbridge Management is each an "Indemnitee" for purposes of the LPA, and

[37] *Id.*

Article 6.8(a) explicitly states that an "Indemnitee" will not be liable to EEP or its unit holders for any actions taken in good faith.

Article 6.10(b) further limits the liability of EEP GP, providing:

> [EEP GP] may consult with . . . investment bankers and other consultants and advisers selected by it, and any act taken or omitted in reliance upon the opinion . . . of such Persons as to matters that [EEP GP] reasonably believes to be within such Person's professional or expert competence shall be conclusively presumed to have been done or omitted in good faith and in accordance with such opinion.

Article 6.10(b), however, only applies to EEP GP. No other defendant is entitled to its conclusive presumption.

E. *Count I*

Count I alleges that all of the Defendants breached their duties under the LPA. As discussed above, EES does not owe any fiduciary duties to EEP; therefore, the claims in Count I against EES are dismissed. With regard to the other Defendants, EEP or its unit holders may only, under the LPA, successfully hold them monetarily liable for a breach of the duty to act in good faith. Thus, in order to survive the Defendants' motions to dismiss, Brinckerhoff must plead facts suggesting that the Defendants acted in bad faith.[38]

[38] *Gelfman v. Weeden Investors, L.P.*, 792 A.2d 977 (Del. Ch. 2001). In *Gelfman*, § 6.11(b) of the limited partnership agreement, at issue there, abrogated the entire fairness standard that would typically apply in a conflict transaction, and "substitut[ed, in its place,] a primarily scienter-based standard of loyalty that depend[ed] on a showing that the [g]eneral [p]artner either engaged in wanton and willful misconduct or acted in bad faith . . . ." *Id.* at 987 (internal quotations and citation omitted). The Court in *Gelfman* explained that "[g]iven the operation of

Under the LPA, EEP GP is conclusively presumed to have acted in good faith when it acts in reliance upon the opinion of an investment banker. EEP GP only entered into the JVA after Tudor, the investment banker advising its Special Committee, opined that the terms of the JVA were representative of an arms length transaction. Therefore, EEP GP is conclusively presumed to have acted in good faith in entering into the JVA, and, as to EEP GP, Brinckerhoff has failed to meet his burden of pleading facts that suggest bad faith.

On its face, Article 6.10(b) of the LPA does not provide EEP GP's Board with a conclusive presumption. That Article only mentions EEP GP. It may nevertheless be the case that if a limited partnership agreement expressly permits a corporate general partner to take certain action, that the board of that general partner cannot be found to have acted in bad faith for causing the general partner to take the expressly permitted action. The Court need not address that issue now, however, because even assuming EEP GP's Board is not entitled to rely on Article 6.10(b), Brinckerhoff has failed to plead facts suggesting that EEP GP's Board acted in bad faith.

When Enbridge approached EEP about involvement in the ACP, EEP GP's Board formed the Special Committee to negotiate with Enbridge, and the facts suggest that the Special Committee was independent of Enbridge. Although the

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§ 6.11(b), the plaintiffs must plead facts that suggest that the [g]eneral [p]artner acted in a manner prohibited by . . . [that section]." *Id.* at 989.

Complaint alleges that the Special Committee did not have the authority to refuse to approve an agreement with Enbridge, the Special Committee's assigned tasks were to (1) determine whether the JVA was fair and reasonable to EEP, and (2) make a recommendation to EEP GP's Board as to whether EEP should enter into the JVA. The Special Committee could have determined that the JVA was not fair and reasonable to EEP and/or recommended that EEP not enter into the JVA. But it did not. The Special Committee met several times to consider the JVA, and hired legal and financial advisors to help it with the process. Moreover, when Tudor suggested that EEP retain more equity in the ACP, the Special Committee sought and obtained more equity in the Project.

Brinckerhoff complains that Tudor's fairness opinion, upon which the Special Committee relied in recommending the JVA, was flawed because Tudor failed to use a discounted cash flow analysis in valuing the ACP, and compared the JVA to dissimilar transactions. The valuation methodology and comparable transaction analyses that an investment banker undertakes, however, are properly within the discretion of the investment banker. Moreover, although the Complaint alleges that EEP possessed enough capital to undertake the ACP on its own and that the capital markets had improved between the time when the JVA was negotiated and when it was approved, EEP publicly represented that the JVA was necessary because of conditions in the financial markets. In 2009, the capital

markets were in turmoil, and at that time it would seem reasonable for EEP GP's Board not to want to put a large majority of EEP's capital into a single venture.

Regardless of EEP GP's Board's rationale for not causing EEP to undertake the ACP on its own, the facts pled in the Complaint suggest that the independent Special Committee hired financial and legal advisors, and, with their counsel, advised EEP GP's Board that the JVA was a good option for EEP. Then EEP GP's Board adopted the JVA. Those facts do not suggest that EEP GP's Board acted in bad faith.

Under the LPA, Enbridge, as an "Affiliate" of EEP GP, could only enter into the JVA if the terms of the JVA were either as favorable to EEP as the terms of the transactions generally available from unrelated third parties, or otherwise fair and reasonable to EEP. Even if the terms of the JVA were not as favorable as a third party transaction or otherwise fair, however, Enbridge would only be liable to EEP for money damages if Enbridge acted in bad faith. Brinckerhoff has failed to allege facts demonstrating that Enbridge acted in bad faith.

Article 6.6(e) of the LPA contemplates related party transactions. Enbridge negotiated the JVA with the Special Committee, which was independent of Enbridge. Moreover, when during negotiations, the Special Committee sought

more of an equity stake in the ACP; Enbridge agreed. Those facts do not suggest that Enbridge acted in bad faith.[39]

Brinckerhoff has also failed to plead facts suggesting that Enbridge Management acted in bad faith. EEP GP has delegated to Enbridge Management the authority to manage EEP's business and affairs. The Complaint, however, is devoid of any specific facts as to Enbridge Management's role in the JVA. The Complaint describes how Enbridge negotiated with the Special Committee, that the Special Committee recommended that EEP GP's Board approve the JVA, and that EEP GP's Board did so. The Complaint does not suggest that Enbridge Management was required to approve the JVA, or that it facilitated the JVA in any way. Thus, Count I is dismissed because Brinckerhoff has failed to plead facts suggesting that EEP GP, EEP GP's Board, Enbridge, or Enbridge Management acted in bad faith.

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[39] Although on some level the JVA may appear problematic for the simple reason that the controller of a limited partnership's general partner is engaging in a transaction with the limited partnership, the LPA anticipates such transactions. Moreover, if the Court were to determine that Brinckerhoff could state a claim that Enbridge acted in bad faith even though Enbridge negotiated the JVA with an independent special committee, then what would Enbridge have to do to be able to dispose of bad faith claims on a motion to dismiss? Would Enbridge be required, in analogy to *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009), to negotiate a transaction with an independent committee *and* have the transaction approved by a majority of the public unit holders? Requiring Enbridge to put in place those "robust procedural protections," in order to be able to dispose of a bad faith claim on a motion to dismiss, would seem to rewrite the LPA when the Delaware General Assembly has explicitly stated that "[i]t is the policy of [Delaware's Limited Partnership Act] . . . to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." 6 Del. C. § 17-1101(c).

F. *Counts II and IV*

Count II alleges that all of the Defendants except EEP GP aided and abetted EEP GP's breach of its duties, and Count IV alleges that to the extent that Enbridge and EES are not liable for breaching their duties under the LPA, they tortiously interfered with the LPA and were thereby unjustly enriched. A claim for aiding and abetting a breach of duties, as well as a claim for tortious interference with a contract, requires an underlying breach.[40] As discussed above, the LPA was not breached; none of the Defendants breached the duties they owed to EEP. Thus, Counts II and IV are dismissed for failure to state a claim.

G. *Count III*

Count III alleges that all of the Defendants breached the implied covenant of good faith and fair dealing by relying on Tudor's opinion, failing to do a market check, and causing EEP to enter into the JVA. As discussed above, in Subsection D, a limited partnership agreement "may not eliminate the implied contractual covenant of good faith and fair dealing."[41]

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[40] *See Goldman v. Pogo.com, Inc.*, 2002 WL 1358760, at *8 (Del. Ch. June 14, 2002) ("A claim of tortious interference with contractual rights requires, *inter alia*, a contract, a breach of that contract, and an injury."); *Madison Realty Partners 7, LLC v. AG ISA, LLC,* 2001 WL 406268, at *6 n.19 (Del. Ch. Apr. 17, 2001) ("The plaintiffs' claim . . . for aiding and abetting . . . breaches of fiduciary duty must also be dismissed because there is no legally sufficient underlying claim for breach of fiduciary duty . . . .").

[41] 6 *Del. C.* § 17-1101(d).

The implied covenant, however, only potentially binds the parties to an agreement.[42] The only parties to the LPA were EEP GP and EEP's LP unit holders. Thus, the only defendant that could possibly be liable for breaching the implied covenant in the LPA is EEP GP.

Under the actual terms of the LPA, however, EEP GP may be held monetarily liable for acts not taken in good faith. The good faith referred to in the LPA would appear to impose a duty as broad, and likely broader, than the duty imposed by the implied covenant of good faith and fair dealing. Thus, if Brinckerhoff was not able to plead, in Count I, facts suggesting that EEP GP acted in bad faith, then it may be the case that Brinckerhoff necessarily will be unable to plead a claim against EEP GP for breach of the implied covenant.[43]

Assuming it would be possible for Brinckerhoff to plead an implied covenant claim when he is not able to plead a bad faith claim, Brinckerhoff has failed to do so here. The implied covenant "is 'a limited and extraordinary legal remedy' that addresses only events that could not reasonably have been anticipated

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[42] *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (Contract terms will only be implied "when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected. When conducting this analysis, we must assess the parties' reasonable expectations at the time of contracting . . . .") (citations omitted); *see also* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 17 (2007) ("[O]nly parties to the contract can breach the [implied] covenant.") (citing *Castetter v. Del. Dep't of Labor,* 2002 WL 819244, at *5 (Del. Super. Apr. 30, 2002)).

[43] The Defendants appear to make a similar argument: "Defendants have satisfied the contractual provisions governing approval of the J[V]A. Thus, [p]laintiff's claim that they did not act in good faith fails as a matter of law." DB at 23.

at the time the parties contracted."[44] The parties to the LPA thought about related party transactions and EEP GP's reliance upon investment banker opinions, and they explicitly addressed those issues. Therefore, Brinckerhoff cannot plead an implied covenant claim. Count III is dismissed.

V. CONCLUSION

For the foregoing reasons, the Defendants' motions to dismiss the Complaint are granted. An implementing order will be entered.

[44] *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010) (quoting *Nemec*, 991 A.2d at 1128).