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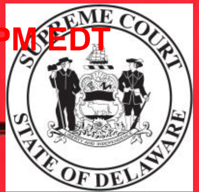

IN THE

Supreme Court of the State of Delaware

EL PASO PIPELINE GP COMPANY, L.L.C.,

Defendant Below,
Appellant/Cross-Appellee,

and

EL PASO CORPORATION, DOUGLAS L. FOSHEE, JOHN R. SULT, RONALD L. KUEHN, JR., D. MARK LELAND, ARTHUR C. REICHSTETTER, WILLIAM A. SMITH AND JAMES C. YARDLEY,

Defendants Below,
Cross-Appellees,

and

EL PASO PIPELINE PARTNERS, L.P.,

Nominal Defendant Below,

v.

PETER R. BRINCKERHOFF, TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR. U/A DTD 10/17/97,

Plaintiff Below,
Appellee/Cross-Appellant.

No. 103, 2016

COURT BELOW:
COURT OF CHANCERY OF THE STATE OF DELAWARE
C.A. NO. 7141-VCL

APPELLEE'S ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S OPENING BRIEF ON CROSS-APPEAL

(caption cont'd.)

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NATURE OF PROCEEDINGS

This is an appeal from a final judgment entered against defendant El Paso Pipeline GP Company L.L.C. ("GP" or the "General Partner"), the general partner of El Paso Pipeline Partners, L.P. (the "Partnership" or "El Paso MLP"), for breach of the El Paso MLP limited partnership agreement ("LPA").[1] After a three day trial, the Court of Chancery found that the GP breached the LPA when it approved the November 2010 sale of 49% of the Elba liquid natural gas terminal and associated pipeline ("Elba") from El Paso Corporation ("Parent") to El Paso MLP (the "Fall Dropdown").[2]

The November 2014 trial followed the Court of Chancery's June 12, 2014 decisions granting defendants' motion for summary judgment as to Parent's March 2010 sale to El Paso MLP of 51% of Elba (the "Spring Dropdown"),[3] and denying defendants' motion for summary judgment for the Fall Dropdown.[4]

In April 2015, the trial court issued its Trial Opinion finding that GP's conflicts committee (the "Committee") did not issue "Special Approval" for the

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[1] *See* November 21, 2007 First Amended and Restated Agreement of Limited Partnership of El Paso Pipeline Partners, L.P. (A842-966) (JX11).

[2] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, Mem. Op. (Del. Ch. Apr. 20, 2015) ("Tr. Op." or "Trial Opinion"), attached at Exhibit B to Appellant's Opening Brief ("OB") at 3.

[3] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, Mem. Op. (Del. Ch. June 12, 2014) ("SJ Op."), attached as Exhibit A hereto.

[4] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, Order (Del. Ch. June 12, 2014) ("SJ Order"), OB Ex. A, at ¶ 8.

Fall Dropdown in good faith, and accordingly GP had breached the LPA (the "Liability Award"). The trial court found that the damages resulting from GP's breach were $171 million, and awarded pre- and post-judgment interest.[5]

After the trial, El Paso MLP and GP's indirect parent, Kinder Morgan, Inc. ("KMI"), completed a merger (the "Merger"). GP then moved to dismiss the case for lack of standing. The Court of Chancery denied that motion and found that GP should pay the unaffiliated Partnership unitholders their *pro rata* share of the Liability Award.[6] Final judgment was entered on February 4, 2016, and this appeal followed.[7]

The central issue tried was whether the Committee members subjectively believed the Fall Dropdown was in the Partnership's best interests. The trial court's finding on that issue was based on its determination of the Committee members' credibility.[8]

Prior to trial, the court made clear:

> This is really . . . largely a credibility case because it deals with the good faith of the directors involved . . . . I'm going to come away with

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[5] Tr. Op. 3.
[6] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, slip op. (Del. Ch. Dec. 2, 2015) ("St. Op." or "Standing Opinion"), OB Ex. C.
[7] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL (Del. Ch. Feb. 4, 2016) ("Final Judgment"), OB Ex. D.
[8] Tr. Op. 2.

> a sense of whether these guys acted in good faith or whether they didn't.[9]

Notably, after the trial, the trial court remarked that prior to the trial, it expected to rule for defendants "from the bench."[10] But after observing defendants and their witnesses,[11] the trial court found that the bad faith evidenced by the testimony and demeanor of the Committee members was "fairly astounding."[12]

> I expected that at trial, the Committee members and their financial advisor would provide a credible account of how they evaluated the Fall Dropdown, negotiated with Parent, and ultimately determined that the transaction was in the best interests of El Paso MLP. It turned out that in most instances, the Committee members and their financial advisor had no explanation for what they did. The few explanations they had were conclusory or contradicted by contemporaneous documents.[13]
>
> * * *
>
> The evidence at trial ultimately convinced me that when approving the Fall Dropdown, the Committee members went against their better judgment and did what Parent wanted . . . .[14]
>
> * * *
>
> Under the [LPA], each Committee member had an affirmative duty to conclude that the Fall Dropdown was "in the best interests of the Partnership." LPA § 7.9(b). In this case, an accretion of points creates a picture. Standing alone, any single error or group of errors can be

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[9] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, Del. Ch., C.A. 7141-VCL, Tr. at A524, Laster, V.C. (Sept. 9, 2014) [hereinafter, "Prompt Trial Arg. Tr."].

[10] *In re Kinder Morgan Inc. Corp. Reorg. Litig.*, C.A. No. 10093-VCL, Tr. at 93, Laster, V.C. (Del. Ch. June 12, 2015).

[11] The Court heard some 800 pages of testimony, and also considered testimony of two additional witnesses by deposition, 175 exhibits, and more than 90 pages of post-trial briefing.

[12] *Kinder Morgan* Tr. at 93.

[13] Tr. Op. 2.

[14] *Id.* at 3.

excused or explained. But at some point, the story is no longer credible. This was such a case.[15]

* * *

Because the Committee members disregarded their known duty to determine that the Fall Dropdown was in the best interests of El Paso MLP, they did not act in good faith. Consequently, the General Partner breached the [LPA] by engaging in the Fall Dropdown.[16]

Tellingly, despite the trial court's detailed and devastating findings concerning the malfeasance and nonfeasance of the Committee members, defendant has not challenged even one of those factual findings.

Instead, defendant seeks to deprive plaintiff of standing and erase all of defendant's liability. Defendant claims that the post-trial Merger, orchestrated by defendant's affiliate, in which the Partnership's limited partners received nothing for the valuable claims in this litigation, required dismissal of plaintiff's breach of contract claim. The Court of Chancery disagreed and correctly found that dismissing plaintiff's claims "would generate a windfall for the General Partner," that was not warranted under Delaware law, and that the GP would escape liability for its wrong-doing, "at the expense of the unaffiliated limited partners."[17] The trial court recognized that plaintiff's contract claim "is best viewed as having a dual nature, so the plaintiff can continue to pursue it, and this court can implement

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[15] Tr. Op. 54.
[16] *Id.* at 55.
[17] St. Op. 2.

the Liability Award through a *pro rata* recovery in favor of the limited partners at the time of the Merger who were not affiliated with the General Partner."[18]

The Court of Chancery's decision is consistent with a long line of Delaware cases holding that, as a result of the direct and derivative nature of contract claims, including LP agreement claims,[19] a plaintiff may continue such claims directly post-merger.[20] This rule recognizes that while El Paso MLP suffered an injury, the limited partners also were injured individually when the GP breached the LPA. The trial court also recognized that in the Fall Dropdown, GP shifted value from the limited partners to itself. Consistent with Delaware's public policy, the Standing Opinion remedies that harm by providing El Paso MLP's unaffiliated unitholders with the benefit of their bargain while denying the wrongdoer any recovery.

Attempting to avoid the trial court's well-supported holding, defendant borrows improperly from corporate law, ignores the contractual nature of plaintiff's claims, and seeks to dodge the Court of Chancery's equitable powers. Defendant reaped many benefits from the purely contractual relationship it created with the unitholders, and cannot now recharacterize the breach of contract to avoid the dual and direct nature of that claim. Nor can defendant claim prejudice or

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[18] St. Op. 3.

[19] "LP agreement" refers to a generic limited partnership agreement.

[20] *See* Point II, *infra*.

support any estoppel. The GP knew that a *pro rata* recovery was always available to plaintiff, and was given the opportunity to take and submit additional evidence both during and after the trial. Defendant, an adjudicated wrongdoer, cannot now complain that the Merger, orchestrated by itself and its affiliates, enables defendant to escape liability. Well-settled Delaware law (indeed, there is no contrary decision) and public policy dictate that plaintiff's valuable contract claim should not vanish as a result of the Merger, in which plaintiff and other unaffiliated unitholders received nothing for their share of the $171 million (plus interest) claim.

Finally, plaintiff cross appeals from the trial court's grant of summary judgment to defendants dismissing all claims relating to the Spring Dropdown. For the Spring Dropdown, General Partner breached the implied covenant of good faith and fair dealing by failing to disclosure material facts to the Committee. Further, just as with the Fall Dropdown, there were triable issues of fact concerning the Committee's good faith in granting Special Approval. Those questions deserve to be tried.

SUMMARY OF ARGUMENT FOR APPEAL

I. Denied. The trial court correctly found that Parent's post-trial Merger with the Partnership did not divest plaintiff of standing to pursue his claim for breach of contract. The trial court correctly applied the applicable precedent, and provided three alternative grounds for plaintiff to maintain his claim following the Merger: (1) the claim was direct because it involved plaintiff's personal contract rights; (2) the claim was dual natured because unitholders suffered direct injury to their contract rights; and (3) the claim was dual natured because unitholders suffered economic expropriation at the hands of the GP. Any one of these grounds supports entry of the Final Judgment. *See* Point II, *infra.*

II. Denied. The trial court's ruling that a portion of the Liability Award should be paid directly to El Paso MLP's unaffiliated unitholders *pro rata* was not an abuse of discretion. This was the same remedy that plaintiff proved at trial, just distributed differently as a result of simple math. *See* Point III, C.1., *infra.*

III. Denied. The trial court properly held that GP breached the LPA by engaging in the Fall Dropdown without obtaining Special Approval in good faith. The trial court found the testimony by the Committee members was not credible, and determined they did not subjectively believe that the Fall Dropdown was in the best interests of the Partnership. The Court of Chancery correctly held that GP was not entitled to a conclusive presumption of good faith because Section 7.9(a)'s

standard for conflict transactions applied. In addition, applying a "conclusive presumption" of good faith under Section 7.10(b), in the factual circumstances of this case, would violate the implied contractual covenant of good faith and fair dealing ("Implied Covenant"). *See* Point I, *infra*.

IV. Denied. The trial court's ruling to award damages to unitholders as of the date of the Merger was not an abuse of its discretion. Any claim held by a unitholder as of the date of the Fall Dropdown passed when that unitholder sold its interest to a successor. The trial court correctly exercised its discretion to calculate the amount of the damages award based on the unaffiliated unitholders' equity ownership without taking into account some percentage of operating revenue flowing to the Parent. *See* Point III, C.2., *infra*.

STATEMENT OF FACTS FOR APPEAL

A. The Dropdowns.

The Factual Background section of the Trial Opinion describes in detail the facts relating to the Spring and Fall Dropdowns. We respectfully invite this Court's attention to that section for a thorough statement of the relevant facts.[21] We highlight below some of the evidence which shows, that in granting Special Approval for the Fall Dropdown, the members of the Committee abandoned their own views to yield to Parent's interest, and failed subjectively to believe the transaction was in the best interest of the Partnership. For example:

1. In early September 2010, the Committee members expressed to each other their belief that the Partnership should not purchase more very risky[22] liquid natural gas ("LNG") assets. On September 2, 2010, Kuehn emailed Reichstetter "it seems to me after thinking about it some that it is really not in the best interests of [El Paso MLP] to have too much of its assets tied up in the LNG trade . . . it might make sense just to take on more of an interest in [a different type of asset.]"

[21] In its Trial Opinion, the Court of Chancery described: A. The Parties; B. The Pattern of Dropdowns; C. The Spring Dropdown Proposal; D. The Gulf LNG Transaction; E. The Committee's Work On The Spring Dropdown – 1) The February Meetings; 2) The March 2 Meeting; 3) Reichstetter Bargains With Sult; 4) The Committee Approves The Spring Dropdown; F. Developments After The Spring Dropdown; G. The Summer Dropdown; H. The Fall Dropdown Proposal – 1) The First Two Meetings; 2) The October 26 Meeting; 3) Reichstetter Bargains With Sult, Who Restructures The Deal; and 4) The November Meetings.

[22] Elba, when built, was intended to be used to import natural gas. But because of the huge subsequent increase in the production of domestic shale gas, by 2010 the market to import natural gas had virtually disappeared.

Reichstetter responded, "[i]t is as though you are reading my mind."[23] But then, in the Fall Dropdown, the Committee disregarded that concern and agreed to have the Partnership purchase nearly one billion dollars more in LNG assets.

2. The Committee members never determined the price the Partnership would pay in the Fall Dropdown for Elba. As the Court of Chancery wrote:

> During their depositions and at trial, Reichstetter and Sult still had no idea what price El Paso MLP paid for the balance of Elba or how it compared to the Spring Dropdown . . . . [Kuehn] did not know for sure . . . . Notably, the price of at least $931 million that El Paso MLP paid [in the Fall Dropdown for 49% of Elba] was *more* than the $900 million that Smith and Reichstetter agreed on [before Parent changed the terms of the deal] . . . The Committee members never figured that out . . . .[24]

3. For the Fall Dropdown, the Committee readily agreed to a higher price than it had determined was appropriate. In analyzing the Spring Dropdown, "Kuehn's range [8½ and 9 times EBITDA] equated to a price of $725 to $780 million, well below Parent's asking price [for the Spring Dropdown] of $1,053 million… [Reichstetter] and Sult quickly agreed on $963 million, approximately 26% higher than the Committee members' assessment."[25] For the Fall Dropdown,

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[23] Tr. Op. 20; *see* September 2, 2010 email exchange between Kuehn and Reichstetter, JX 90 (B343).
[24] Tr. Op. 30-31 (emphasis in original).
[25] *Id.* at 15, 44; *see also* JX 57 (B311).

the Partnership paid at least $931 million,[26] namely, an amount about $150-$200 million more than the Committee estimated would be a fair price.[27]

4. The Committee never determined any comparable price for the Elba assets. The Committee also failed to determine whether the price that the GP had declined to pay for the comparable Gulf LNG assets was more or less than the Committee agreed to pay for the Partnership's interest in Elba.[28] In fact, the Committee knew that Tudor's presentations did not contain an analysis of any comparable LNG transactions, such as Gulf LNG. In November 2010, no one on the Committee or at Tudor claimed that the Gulf LNG transaction was not comparable.[29]

5. The Committee had instructed Tudor to obtain information about recent LNG transactions, but when Tudor reported it lacked sufficient information to value those transactions, the Committee simply abandoned the issue. The

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[26] Tr. Op. 30-31. The Committee Members did not know the exact price paid for the remaining Elba assets in the Fall Dropdown, Kuehn believed the price was approximately $925 million and Sult believed that the price was based on the value of the Spring Dropdown. *Id.* at 31.

[27] Tr. Op. 15, 30.

[28] "[Parent's] analysis of the Gulf LNG deal ... showed an implied multiple of 9.1x 2010 EBITDA. The indication of what a sophisticated arm's length purchaser would pay for LNG assets contrasted with Parent's higher proposal of 11x 2010 EBITDA. After reviewing the analysis, Sult sent an email to Leland offering his blunt assessment of the Gulf LNG opportunity: 'Not a pretty picture.' [For Gulf LNG,] Parent declined to exercise its right of first refusal." Tr. Op. 11-12; *see also* JX30 (B243-57).

[29] Tr. Op. 47-48; *see also* Reichstetter 107:13-19 (A578); Kuehn 479:20-480:3 (A700-01), 522:2-12 (A711); Smith 377:7-379:5 (A675), 386:6-9 (A677).

Committee never told Tudor to obtain the necessary valuation information, which was readily available from Parent.[30]

6. The Committee members testified that the most important measure of value was a DCF analysis. The Committee, however, failed to determine the method -- if any -- Tudor used to calculate a discount rate, and thus approved the Fall Dropdown without understanding that the DCF analysis was fundamentally flawed. As the trial court found: "Tudor did not provide information to the Committee, and the Committee did not ask any questions about [the DCF analysis]."[31]

7. The Committee ignored the fact that its banker had simply lopped off the top of the range of discount rates it had previously presented. If those higher discount rates had been included, they would have shown that the price the

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[30] Reichstetter 105:7-12 (A578):

> "Q: Now, did TPH tell the committee that it didn't have enough data to compare these two transactions to the drop-down of 49 percent of SLNG and Elba X?
> A: At some point that's exactly what they told me."

Reichstetter 110:12-15 (A579):

> "Q: So when Tudor Pickering said it couldn't get the information, could anyone on the committee tell Tudor Pickering to go ask El Paso?
> A: Not to my recollection."

Kuehn 478:7-9 (A700):

> "Q: But you didn't ask for it, did you?
> A: I don't remember asking for more information ...."

Smith 378:22-379:1 (A675):

> "Q: And, Mr. Smith, you didn't ask Tudor to get the information from El Paso Corp., did you?
> A: I did not and I'm not aware that the special committee did either."

[31] Tr. Op. 51-52.

Partnership was going to pay was grossly in excess of a fair price. The Court of Chancery stated:

> When analyzing the Spring Dropdown, Tudor's build-up method [for a discount rate] produced a range from 8% to 13.8% . . . . Although Tudor claimed to have used the same inputs for the Fall Dropdown, Tudor cut off the upper bound at 12%. Tudor could not provide any explanation for this move . . . Every one of Tudor's judgments benefitted Parent not El Paso MLP.[32]

8. In February 2010, Tudor presented the Committee with a "Valuation Summary," valuing a minority interest in Elba of between $700-$757 million.[33] In the fall, however, when the Committee was actually buying a minority interest in Elba, Tudor did not present the $700-$757 million valuation range. The Committee members never asked Tudor for the value Tudor had presented in the spring for a minority interest in Elba, a price approximately $170 million less than the Committee in the fall agreed to pay.[34]

9. During consideration of the Fall Dropdown, "Tudor made numerous changes to its methodologies [and] Tudor did not identify or explain any of its methodological changes to the Committee, and the Committee did not notice

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[32] Tr. Op. 52-53.

[33] JX47 p.40 (B297).

[34] Tr. Op. 48-49. In fact, the $700-$757 million valuation range comported almost exactly with Kuehn's spring 2010 statement of a fair price for the LNG assets. Kuehn 458:21-460:12 (A695-96). Kuehn wrote then that El Paso MLP should pay between an 8.5x and 9x multiple for the LNG assets. Kuehn 452:12-453:2 (A694). At his deposition, Kuehn said this was just an "opening offer." However, using Tudor's 2010 EBITDA of $86.5 million, adjusted for 49%, at a 9x multiple results in a value of $747 million; and 8.5x multiple results in a value of $706 million. Tr. Op. 43-44.

them."[35] Reichstetter, the banking expert, claims he did not notice anything amiss in Tudor's books: "Q. 'Okay. Now, what happened to that minority interest analysis for the fall drop-down of 49 percent of SLNG and ElbaX? Can you tell me?' A. 'No idea.'"[36]

10. For the Fall Dropdown, the Committee ignored the market's negative reaction to the announcement of the price the Partnership paid in the Spring Dropdown for 51% of the same asset. The trial court found:

> For the Fall Dropdown, however, the Committee members had the benefit of a costly education about Elba. The market reaction indicated that El Paso MLP had overpaid, and the Committee understood that. Kuehn wrote to his fellow Committee members saying, "The next time we will have to negotiate harder." . . . [The members of the Committee] consciously disregarded their own independent and well-considered views . . . even after the market had confirmed their views.[37]

But instead of negotiating harder, just as in the Spring Dropdown, the Committee "caved in to Sult."[38]

11. The Committee members could not identify a single fact Tudor provided to help them negotiate a better price for the Fall Dropdown, even though Tudor was retained to provide facts that the Committee could use to negotiate

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[35] Tr. Op. 53.
[36] Reichstetter 67:18-21 (A568).
[37] Tr. Op. 44-46.
[38] *Id.* at 38.

against Parent.[39] Simmons of Tudor candidly conceded that Tudor had not provided a single such fact.[40]

12. Reichstetter, an investment banker, testified that he did not think Tudor had an obligation to highlight its methodological changes, and, inexplicably, admitted he would not have asked why Tudor changed its methodology from one presentation to the next.[41] This admission is particularly significant since the trial court found that "[e]very one of Tudor's [changes in] judgments benefitted Parent, not El Paso MLP."[42]

13. As Tudor has admitted, the Committee never had an "apples-to-apples comparison ...for the final price," and indeed "[n]o one knows what the final price is . . . for ElbaX."[43]

14. For the Fall Dropdown, El Paso MLP paid Parent a price that exceeded the fair value of Elba by $171 million, and that was the measure of damages determined by the trial court.[44]

On this appeal, defendant does not dispute any of these facts.

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[39] Simmons 684:1-5 (A782); *see also* Reichstetter 218:8-219:24 (A606).
[40] Simmons 684:6-685:23 (A782).
[41] Reichstetter 94:4-15 (A575).
[42] Tr. Op. 53.
[43] Simmons 719:6-16 (A791); *see also* Tr. Op. 45-46.
[44] *Id.* at 60.

B. This Litigation.

1. Pre-trial rulings.

Defendants filed a motion to dismiss, and in October 2012, the court denied the motion in large part. The court rejected defendants' argument that in determining whether Special Approval was given in good faith, Committee members were entitled to a conclusive presumption under Section 7.10(b) of the LPA. It held that Section 7.9(a), the specific provision of the LPA that governs conflict transactions, created only a rebuttable presumption.[45]

After the close of discovery, defendants moved for summary judgment, and plaintiff moved for summary judgment as to liability. On June 12, 2014, the Court of Chancery denied plaintiff's motion and granted the defendants' motion as to the Spring Dropdown.[46] As to the Fall Dropdown, the court held:

> Questions of fact exist requiring a trial as to the state of mind of the members of the Conflicts Committee . . .. Viewed in the light most favorable to the plaintiffs, the evidence could support an inference that the members of the Conflicts Committee and their advisors consciously ignored the comparable transactions and the differences between the Drop-Down Transactions with the bad faith intent of approving a transaction that would provide excessive value to the General Partner. This is not the only possible inference, nor even

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[45] *See Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 7141-CS, Tr. at B52 (Del. Ch. Oct. 26, 2012) [hereinafter, Oral Argument, Plaintiff's Motion to Dismiss and the Court's Ruling, "MTD Tr."].

[46] SJ Op. 51.

necessarily the strongest inference, but it is an inference to which the plaintiffs are entitled on summary judgment.[47]

On August 10, 2014, KMI announced the proposed Merger.[48] Defendants' Definitive Schedule 14A, filed with the SEC on October 22, 2014 (the "Proxy"), disclosed that the General Partner's conflicts committee established for purposes of the Merger, was comprised of the same individuals, Kuehn, Smith and Reichstetter, who comprised the Committee for the Spring and Fall Dropdowns at issue in this case. The Merger committee was also advised by Tudor, the same financial advisor that advised the Committee with respect to the Spring and Fall Dropdowns.[49]

The Proxy made clear that the Merger price was determined without any consideration of the value of the claims asserted in this lawsuit.[50] Defendants also conceded in the Proxy that they made no "adjustments" to the Merger consideration on account of plaintiff's claims.[51] Defendants did not undertake any third-party analysis and/or valuation of plaintiff's claims in connection with the

[47] SJ Order ¶ 8.
[48] JX 169 (B485-90); *see also* St. Op. 10.
[49] Proxy at 30, 31 (B545-47); *see also* St. Op. 11-12.
[50] Proxy at 45-46 (B560-62) (conflicts committee did not consider this litigation until the day before the Merger was approved and after the Merger consideration had been set).
[51] *Id.* ("the value of the [claims in this and other pending derivative actions] to EPB that might be extinguished as a result of the [Merger] was not sufficiently material such that they would merit adjustments to the EPB merger consideration or otherwise affect the determinations made by the [El Paso MLP Merger conflicts committee] with respect to the [Merger]"); *see also id.* at 54 (B569-70).

Merger.[52] The Proxy failed to disclose sufficient information for any unitholder to have acquiesced in the extinguishment of his or her rights.[53]

2. Plaintiff moved for and the Court of Chancery held a trial.

Trial had been scheduled for March 2014 but defendants sought to have it rescheduled over plaintiff's objection. The case was reassigned when Chancellor Strine was elevated to the Supreme Court, and the trial delayed pending the resolution of the summary judgment motions. In August 2014, after the summary judgment decisions and after the Merger was announced, defendants argued that the Merger would result in plaintiff losing his derivative standing and resisted scheduling a trial date for the Fall Dropdown. Plaintiff immediately moved to schedule a trial, arguing that his standing would not be extinguished and post-Merger, the case could continue. Plaintiff noted that the case had been pending for nearly four years and urged the Court to set a trial date.[54]

At the hearing on plaintiff's motion to set a trial date, the Court instructed

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[52] Proxy at 45-46 (B560-62); *see also id.* at 54 (B569-70); St. Op. 12. In contrast, in *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC,* 986 A.2d 370, 392 (Del. Ch. 2010) [hereinafter, "*Teppco*"], the Special Committee for that merger hired financial and legal experts to value the pending derivative claim.

[53] The Merger was subject to a number of conditions, including a majority vote of the Partnership's unitholders. At the time of the Merger announcement (and at the time of the Merger), KMI owned approximately 40% of the Partnership's common units. There was no majority of the minority condition. Proxy at 6 (B520-21), 21 (B536-37); *see also* JX169 (B485-90).

[54] A467-505. Contrary to defendant's suggestion, plaintiff always maintained that were the Merger completed, plaintiff would continue to have standing. *See also* OB 4.

the parties to secure a date in November.[55] At that point, the Merger had not been consummated, and any "standing" issues were premature.[56] The Court of Chancery specifically reminded the parties that "the way a complaint pleads [the claims] isn't binding on the Court," and provided fair notice that it could "decide that the remedy should operate on the unitholder level."[57]

On November 6, 2014, the parties filed their joint pre-trial order (the "Pre-Trial Order"). Plaintiff specifically contended therein that: "[i]n the event that the Partnership is merged into another entity... plaintiff's claims can continue to be prosecuted as quasi-class claims."[58]

Trial was held November 12, 13, and 17, 2014. Both sides presented evidence directed to whether the General Partner breached its contractual duty in the Fall Dropdown to obtain Special Approval in good faith and adduced expert testimony as to the measure of damages.

3. The post-trial findings of subjective bad faith.

In its Trial Decision, the trial court found that the Committee members failed to act in good faith, but instead acceded to Parent's wishes for the Fall Dropdown. As noted above, the trial court found: "*[the] Committee members did not want to*

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[55] Prompt Trial Arg. Tr. at A523.

[56] Because the Merger did not close until after trial, the court below committed no error in hearing the evidence before determining standing. *See* OB 22.

[57] Prompt Trial Arg. Tr. at A520, A522.

[58] Pre-Trial Order at 15 (A541); *see also id.* at 16 (A542) (Defendant's contrary request).

acquire the balance of Elba and believed doing so was not in the best interests of El Paso MLP."[59] Rather than saying no to acquiring the rest of Elba, "Kuehn and [Reichstetter] sought to achieve [Parent's] objective."[60] For these reasons, among many more, the trial court concluded that Special Approval was not obtained in good faith.[61]

The court found that the Committee members' explanation of their behavior at trial "could not [be] credit[ed]."[62] "In the context of the Fall Dropdown, the judgments that the Committee made in the official transaction documents stood in tension with their privately expressed views."[63] Moreover, the Court of Chancery found that "[t]he composite picture that emerged was one in which the Committee members went through the motions. *They did not subjectively believe that approving the Fall Dropdown was in the best interests of the Partnership*."[64]

The Court of Chancery also found that the Committee turned blind eyes to Tudor's changes in its analyses. The Committee failed to carry out its known contractual obligation to determine whether the Fall Dropdown was in the best interests of El Paso MLP, and instead fixated myopically on accretion to the

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[59] Tr. Op. 38 (emphasis added).
[60] *Id.*
[61] *Id.* at 55.
[62] *Id.* at 39.
[63] *Id.* at 36.
[64] *Id.* at 37 (emphasis added).

holders of the common units.[65] The trial court concluded that the actions of the members of the Committee "*evidenced conscious indifference to their responsibilities to El Paso MLP*."[66]

Based on all of the testimony and documentary evidence, the court found that the General Partner breached Section 7.9(a) of the LPA, because the Committee failed to form a subjective belief that the Fall Dropdown was in the best interests of El Paso MLP, but instead acceded to "something Parent wanted."[67]

As a remedy for the General Partner's wrongful breach, the court sought to compensate the limited partners for the "benefit of [their] bargain" by determining the amount El Paso MLP overpaid for Elba.[68] While both parties filed motions *in limine*, the court considered all of the expert testimony introduced at trial and excluded no damages testimony. Ultimately, the trial court held the General Partner liable for $171 million, plus pre- and post-judgment interest.[69]

4. The post-trial motion to dismiss.

On November 26, 2014 -- after this case was tried -- the Merger closed.[70]

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[65] *Id.*
[66] *Id.* at 46 (emphasis added).
[67] *Id.* at 54; *see also id.* at 3, 55.
[68] *Id.* at 56.
[69] *Id.* at 3, 56, 59-60.
[70] *See* B494-95. Although the Partnership temporarily survived as a wholly owned subsidiary of KMI, on December 31, 2014, KMI caused the Partnership to be merged into another KMI-related entity: Kinder Morgan Energy Partners, L.P. ("KM Partners"). That same day, KMI also *(cont'd)*

KMI became the indirect successor to both the Partnership's interest in, and the General Partner's liability for, the $171 million Liability Award.[71]

On December 2, 2014, defendant moved to dismiss plaintiff's action on standing grounds. Defendant argued that the Liability Award should pass to KMI in the Merger,[72] even though that result meant that the $171 million Liability Award would effectively vanish.[73] The Court invited the GP to explain whether any post-trial discovery or a further evidentiary hearing was required to address the standing motion.[74] The GP declined that offer.

The Court denied defendant's motion to dismiss, and found that the Liability Award should be distributed *pro rata* post-Merger because of the direct and dual nature of plaintiff's claim for breach of the LPA.[75]

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caused the General Partner to be merged with and into KM Partners. *See* Certificates of Merger (B780-81).

[71] St. Op. 13-14.

[72] Defendant's mechanistic argument was that once the Merger closed, plaintiff lost control over his claim and that control passed to an affiliate of the General Partner that had "no interest in enforcing the Liability Award against itself." St. Op. 15. As the trial court explained: "Under the General Partner's view of the world, it does not matter that Brinckerhoff proved at trial that the General Partner breached its contractual obligations under the [LPA]. Nor does it matter that by breaching the [LPA], the General Partner shortchanged the Partnership by $171 million and conferred an unwarranted benefit on El Paso Parent in the same amount. It also does not matter that the Merger attributed no value to that claim. Brinckerhoff and the other unaffiliated limited partners in El Paso MLP are 'out of luck.'" *Id.* at 15-16.

[73] *See* B491-93.

[74] *See* B501-02.

[75] St. Op. 2, 87, 110.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT THE GENERAL PARTNER BREACHED THE LPA BY CONSUMMATING THE FALL DROPDOWN

A. Question Presented.

Did the trial court's factual findings, based on its determination of witness credibility, that the members of the Committee "disregarded their known duty to determine that the Fall Dropdown was in the best interest of El Paso MLP"[76] and "did not subjectively believe that the Fall Dropdown was in the best interests of the Partnership,"[77] compel the conclusion that GP did not obtain Special Approval of the Fall Dropdown in good faith and, therefore, breached the LPA? A536-38; A1192-1212 (question presented below).

B. Scope of Review.

Findings of facts based on determinations of the credibility of live witness testimony will be upheld.[78] The deferential "clearly erroneous" standard applies to findings of fact, and legal conclusions are reviewed *de novo*.[79]

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[76] Tr. Op. 55.
[77] *Id.* at 37
[78] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 50 (Del. 2006); *Hudak v. Procek*, 806 A.2d 140, 150 (Del. 2002); *see also Quereguan v. New Castle Cnty.*, 19 A.3d 302 (Del. 2011) ("This Court will not interfere with the Court of Chancery's discretionary determinations of witness credibility….").
[79] *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chi.*, 75 A.3d 101, 108-09 (Del. 2013).

C. Merits of Argument.

1. Background.

Limited partnerships are created by contracts, and Delaware law encourages maximum freedom of contract.[80] Limited partnerships, such as El Paso MLP, inform investors that the partnership is likely to engage in conflict of interest transactions with its parent. LP agreements typically provide a variety of mechanisms, if followed, to authorize those conflict of interest transactions and protect the parent and general partner from liability, including "Special Approval." In the case of El Paso MLP, that meant approval by a majority of the General Partner's Conflict Committee, acting in good faith.[81]

Delaware limited partnership law allows for strong protections for general partners. But Delaware law will not sanction masquerades. Directors of Delaware entities, including entities that act as general partners, cannot merely act out a script: attend meetings, hire advisors, and prepare minutes, when these actions have no substance.[82]

The Court of Chancery acknowledged that it had presumed, prior to trial,

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[80] 6 *Del. C.* § 17-1101(c) ("It is the policy of [the Limited Partnership Act] to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."); *Culverhouse v. Paulson & Co. Inc.*, --- A.3d ---, 2016 WL 304186, at *4 n.15 (Del. Jan. 26, 2016); *Elf Atochem N. Am. v. Jaffari, Inc.*, 727 A.2d 286, 290 (Del. 1999) ("The policy of freedom of contract underlies both the [LLC] Act and the LP Act.").

[81] LPA § 7.9(a) (A922-23).

[82] As noted, the trial court found: "The Committee members and Tudor went through the motions, but the substance was lacking." Tr. Op. 54.

that defendants could show they had acted in subjective good faith, and therefore expected to enter judgment for them "from the bench."[83] But after three days of trial, the court characterized what it saw and heard as "fairly astounding."[84] The Committee was, as they say in Texas: "All hat and no cattle."

At trial, the court observed all the members of the Committee testify and heard their protestations of good faith. The trial court also considered their contemporaneous communications in which the Committee members conceded that they knew what they needed to do (*see* examples, Statement of Facts for Appeal *infra*), and what they should do.[85] But when the Committee members negotiated and approved the Fall Dropdown, they repeatedly ignored their own judgment, as evidenced by these communications, and, instead acted to appease Parent. When pressed to explain those inconsistencies, the Committee could not do so.

Rather than questioning Tudor concerning its presentations,[86] the Committee members covered their eyes, ears and mouths. As the trial court wrote, point after point eventually created a compelling cumulative picture of bad faith:

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[83] *Kinder Morgan* Tr. at 93.

[84] *Id.*

[85] Kuehn 445:24-446:4 (A692).

> "Q: So would you agree with me that for El Paso Partners to pay more than a fair price for 49 percent of SLNG and Elba X would not have been in EPB's best interest? A: Yes."

[86] Tr. Op. 53; *see* Simmons Tr. 696, 699-700 (A786). "Every one of Tudor's judgments benefitted Parent, not El Paso MLP." Tr. Op. 53.

> None of these problems, standing alone, would have supported a finding that the Committee members did not act in subjective good faith. Even a combination of problems would not have been sufficient to overcome the presumption of good faith and the testimony of the Committee members. Indeed, the Fall Dropdown could have suffered from many flaws as long as the Committee members reached a rational decision for comprehensible reasons. The fact that the plaintiff might object to what the Committee did or argue that the Committee should have proceeded differently would not undermine the Committee's subjective good faith.
>
> Unfortunately, when confronted with the problems in the record, the defense witnesses had little to offer. They had few specific recollections of the Fall Dropdown, and they testified instead about what they typically did or generally would have done when responding [to] a dropdown. In the context of the Fall Dropdown, the judgments that the Committee made in the official transaction documents stood in tension with their privately expressed views. The Committee's and Tudor's actions also contrasted with how they approached the Spring and Summer Dropdowns. Most notably, the Committee members consciously disregarded the learning they supposedly gained from engaging in the Spring Dropdown, which involved the same core asset—approximately half of Elba.[87]

The testimony at trial, and the court's observation of the witnesses' demeanor, compelled the trial court to reverse its admitted inclination prior to trial to rule in favor of defendants, and to conclude that, based on the preponderance of evidence, the Committee had acted in bad faith.

2. <u>The contractual standard.</u>

The trial court applied the correct standard when finding that defendant breached the LPA. Section 7.9(b) of the LPA states that "[w]henever the General

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[87] Tr. Op. 36-37.

Partner makes a determination or takes or declines to take any other action . . . then, unless another express standard is provided for in this Agreement, the General Partner . . . shall make such determination or take or decline to take such action in good faith, and shall not be subject to any other or different standard . . . ."[88] Section 7.9(a) provides the other "express standard," applicable to conflict of interest transactions[89] between the General Partner or any of its affiliates, on the one hand, and the Partnership, on the other.[90] General Partner relied upon Special Approval as the sole basis for its approval.[91]

The LPA defines "Special Approval" as approval by a majority of members of the Committee "acting in good faith."[92] Section 7.9(b) also provides that whenever the Conflicts Committee makes a determination it shall make such determination in good faith, and not be subject to any other standard. Section 7.9(b) defines the requisite good faith standard as a belief that an action is in the "best interests of the Partnership."[93] In *Allen v. Encore Energy Partners, L.P.*, this Court held that under a substantially similar Section 7.9(a) provision:

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[88] LPA Section 7.9(b) (A923); MTD Tr. 7.
[89] LPA Section 7.9(a) (A922-23); SJ Op. 24.
[90] SJ Op. 24.
[91] Pre-Trial Order at 15 (A541) (Defendants' "Statement Of Relief Sought" at ¶¶ 1,2)
[92] LPA Section 1.1 (definitions) (A869).
[93] SJ Op. 24. Section 7.9(b) of the LPA defines "good faith" as: "the Persons or Persons making such determination or taking or declining to take such other action must believe that the determination or other action is in the best interests of the Partnership." A923.

> A plaintiff is free to argue that the Conflicts Committee did not approve a transaction in accordance with its contractual duty of good faith, meaning that the Conflicts Committee failed to grant "Special Approval." But, the plaintiff must rebut the presumption created by Section 7.9(a)—that the Conflicts Committee members acted in good faith when they approved the transaction.[94]

Relying on this Court's earlier decision in *Norton*,[95] Defendant argues that Section 7.9(a) of the LPA provides a safe harbor for the General Partner and not a contractual commitment.[96] The LPA in *Norton* was different than the LPA here. As this Court in *Encore* noted, *Norton*'s Section 7.9(a) did not have the rebuttable presumption language present here.[97] Regardless, there is no dispute that the standard under both Section 7.9(a) and (b) is subjective good faith, a standard that was breached in this case. Defendant did not contend below or put on any evidence that, absent "Special Approval," GP met the good faith standard.

The trial court recognized the presumption of good faith accorded the Committee under Section 7.9(a), and determined that to establish a breach of the contractual standard, plaintiff bore the burden of proving by a preponderance of the evidence that the Committee members did not, in fact, hold the necessary subjective belief that the transaction was in the best interest of the partnership.[98]

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[94] 72 A.3d 93, 102-03 (Del. 2013).
[95] *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 362-63 (Del. 2013).
[96] OB 56 (citing cases referring to *Norton*).
[97] *Encore,* 72 A.3d at 102-03.
[98] Tr. Op. 36, *see also id.* at 34 n.4, which states, "[*s*]*ee* LPA § 7.9(a) (placing the burden of proof on the plaintiff to overcome a presumption of good faith); *Estate of Osborn v. Kemp*, 2009 *(cont'd)*

"Under this standard, [the plaintiff] is not required to prove its claims by clear and convincing evidence or to exacting certainty. Rather, [the plaintiff] must prove only that it is more likely than not that it is entitled to relief."[99]

The Supreme Court has instructed that a trial court, "may need to make credibility determinations about [each] defendant's subjective beliefs by weighing witness testimony against objective facts."[100] The trial court followed this instruction, and its determination as to the Committee's lack of credibility was based on detailed factual findings, with many record citations that supported its ultimate ruling. As noted, the trial court found that "in this case, an accretion of points creates a picture. Standing alone, any single error or group of errors can be excused or explained. But at some point, the story is no longer credible. This was such a case."[101]

The relevant inquiry is set forth in *Encore*[102] which the Court of Chancery quoted:

WL 2586783, at *4 (Del. Ch. Aug. 20, 2009) ('Typically, in a post-trial opinion, the court evaluates the parties' claims using a preponderance of the evidence standard.'), *aff'd*, 991 A.2d 1153 (Del. 2010)."

[99] *Triton Constr. Co. v. Eastern Shore Elec. Servs.,* 2009 WL 1387115, at *6 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010). "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not." *Id.* at *6.

[100] *Encore,* 72 A.3d at 106.

[101] Tr. Op. 54.

[102] 72 A.3d at 106.

> One way that the plaintiff could make the necessary showing was through persuasive evidence that the Committee members subjectively intended to act 'against [the Partnership's] best interests' when approving the transaction. *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 106 (Del. 2013). This type of conduct involves 'subjective bad faith,' or conduct 'motivated by an actual intent to do harm.' *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64 (Del. 2006) '[S]uch conduct constitutes classic, quintessential bad faith . . ..'[103]

The plaintiff also could make the necessary showing through persuasive evidence that the Committee members "intentionally fail[ed] to act in the face of a known duty to act, demonstrating a conscious disregard for [their] duties."[104] In this case, Section 7.9(b) established a known duty: the Committee members had to form a subjective belief that the Fall Dropdown was in the best interests of the Partnership. The plaintiff could prove breach by showing that the Committee members disregarded their known duty to make that determination.[105]

The Court of Chancery further observed that:

> [w]hen evaluating whether the plaintiff carried its burden, this court "must focus on the subjective belief of the specific directors accused of wrongful conduct." [*Encore*, 72 A.3d] at 107. "Trial judges should avoid replacing the actual directors with hypothetical reasonable people." *Id.* Trial judges, however, are not telepaths. Objective facts therefore remain relevant to the extent they permit an inference that

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[103] Tr. Op. 34-35. This Court has relied on cases addressing the concepts of good faith and bad faith for purposes of the duty of loyalty when fleshing out the meaning of good faith in the limited partnership context. *See, e.g., DV Realty*, 75 A.3d at 110 (using formulations of bad faith from *Disney*); *Brinckerhoff v. Enbridge Energy Co.*, 67 A.3d 369, 373 (Del. 2013) (using a formulation from *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243, 1246 (Del. 1999)).

[104] Tr. Op. 34-35.

[105] *Encore*, 72 A.3d at 106.

> the defendants lacked the necessary subjective belief. *Id.* at 106-07. Where, as here, the Committee members testified that they believed the Fall Dropdown was in the best interests of El Paso MLP, the trial judge must "make credibility determinations about [each] defendant's subjective beliefs by weighing witness testimony against objective facts." *Id.* at 106. The credibility determination turns in part on "the demeanor of the witnesses whose states of mind are at issue. *Johnson v. Shapiro,* 2002 WL 31438477, at *4 (Del. Ch. Oct. 18, 2002).[106]

The Court of Chancery concluded that the Committee members' own trial testimony established that they did not "subjectively believe that the Fall Dropdown was in the best interests of the Partnership," but rather, "[The Committee members] viewed El Paso MLP as a controlled company that existed to benefit Parent by providing a tax-advantaged source of inexpensive capital. They knew that the Fall Dropdown was something Parent wanted, and they deemed it sufficient that the transaction was accretive for the holders of common units."[107] Defendants and their witnesses could not credibly explain their behavior, and "the number of problems reached a tipping point. The composite picture that emerged was one in which the Committee members went through the motions."[108]

While the Committee members focused on accretion resulting from the Fall Dropdown to justify their decision, the Court rejected their testimony on accretion as "over-prepared and artificial" and "[a]fter evaluating their testimony against the

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[106] Tr. Op. 35-36.
[107] *Id.* at 54.
[108] *Id.* at 37.

record, [the Court] could not credit their assertions."[109] The Committee "did not perceive their job to be evaluating whether the Fall Dropdown was in the best interests of El Paso MLP as an entity," and instead focused on the dropdown "from the point of view of the holders of common units, not El Paso MLP."[110] By focusing on accretion -- just a product of the manner by which El Paso MLP financed the transaction -- the Committee failed to evaluate whether El Paso MLP was paying Parent a fair price, or an excessive price, and so "failed to carry out their known contractual obligation to determine whether the Fall Dropdown was in the best interests of El Paso MLP."[111]

On the issue of accretion, defendant disagrees with the trial court's detailed factual findings and credibility determinations. Defendant argues generally that although it is undisputed that (1) the Partnership overpaid in the Fall Dropdown by $171 million; and (2) "accretion … says nothing about whether the buyer is paying a fair price,"[112] this Court should reverse the trial court's decision and endorse the Committee's selection of "accretion" to the limited partners, as a substitute standard to measure whether the Fall Dropdown was in the Partnership's best interests.

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[109] *Id.* at 39.
[110] *Id.* at 39-40.
[111] *Id.* at 42.
[112] OB 58.

But the trial court found the Committee had focused on accretion *instead* of concluding the Fall Dropdown was in the best interests of the Partnership,[113] and that focus was only one of many points that finally led the trial court to conclude that the Committee had failed to reach a subjective conclusion that the Fall Dropdown was in El Paso MLP's best interests, but instead "went against their better judgment and did what Parent wanted." The trial court tried to muster the Committee members' good faith but found it missing in action.

3. <u>The trial court properly determined that the overpayment for Elba in the Fall Dropdown was $171 million.</u>

The Court of Chancery recognized that "so long as the court has a basis for a responsible estimate of damages, and plaintiff has suffered some harm, mathematical certainty is not required."[114] "[T]he standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*."[115] Here, the measure of damages is the difference between the transaction price and what a 49% interest in Elba was worth.

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[113] Defendant erroneously places undue emphasis on the trial court's observation that accretion is not relevant to a determination of fair price. OB 58 (citing Tr. Op. 56). By making this observation, the court did not impose an incorrect standard. Throughout its opinion, the court consistently, in evaluating the Committee's conduct, applied the correct standard of subjective good faith.

[114] Tr. Op. 55 (citing *Thorpe v. CERBCO, Inc.*, 19 Del. J. Corp. L. 942, 963 (Del. Ch. Oct. 29, 1993) (Allen, C.)).

[115] Tr. Op. 56 (citing *Duncan v. TheraTx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001)).

In determining what Elba was worth, the Court of Chancery relied upon the analysis prepared by plaintiff's economics expert, Dr. Zachary Nye, PhD. Dr. Nye's analysis was based on accepted economic principles[116] and was confirmed by two cross checks.[117] On appeal, defendant does not raise any issue concerning Dr. Nye's damages analysis, his calculations, or the trial court's reliance on Dr. Nye's work in reaching the Liability Award. The Court's finding on damages was well supported by the record and should be affirmed.[118]

4. Defendant cannot rely on the "Conclusive Presumption" of good faith under Section 7.10(b) of the LPA.

When the Court of Chancery in October 2012 denied defendants' motion to dismiss, the Court held that the "conclusive presumption" of good faith for the General Partner in Section 7.10(b) did not apply because the LPA expressly provides for a different standard of approval of a conflicted transaction. Here, Section 7.9(a) provides that when Special Approval is sought, it shall be presumed that the Committee acted in good faith, but that presumption is rebuttable. The Court of Chancery correctly found that Section 7.10(b) did not apply under these circumstances.[119]

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[116] A998-1032.
[117] A1037.
[118] Tr. Op. 55-60.
[119] *See* MTD Tr. at B11, B20-1, B53-7.

The Court of Chancery also found that in the context of a conflict of interest transaction, since Section 7.9(a) creates a rebuttable presumption standard, it would be unreasonable for the Committee's opinion to be a basis for the General Partner (the counter-party with whom the Committee was negotiating) to enjoy a "conclusive presumption" of good faith and so preclude any review of the Committee's good faith, simply because the Committee had retained Tudor. The Court reasoned that Section 7.10(b) was meant to apply where the General Partner followed a course of action in reliance on an expert's advice (such as tax advice), and not in conflict of interest cases.[120]

Defendant fails to acknowledge the Court of Chancery's MTD decision on this issue.[121] Defendant erroneously criticizes the Vice Chancellor for not revisiting then-Chancellor Strine's MTD decision in the summary judgment ruling. The Vice Chancellor implicitly recognized that the issue had been decided by the Court of Chancery's earlier decision.

[120] *See id.* at B11, B20-1, B53-5.

[121] Defendant followed that same strategy at the summary judgment stage, despite plaintiff's argument that the court's earlier reasoning was sound and should be the law of the case. *See* The El Paso Defendants' Opening Brief in Support of Their Motion for Summary Judgment, dated Oct. 30, 2013 at A204-59; The El Paso Defendants' Reply Brief in Further Support of Their Motion for Summary Judgment and Answering Brief in Opposition to Plaintiff's Motion for Summary Judgment, dated Jan. 10, 2014 at A330-80.

As noted, defendant's reliance on this Court's decision in *Norton* is misplaced.[122] This Court in *Encore,* decided after *Norton*, made specific reference to the Court of Chancery's ruling in this case, concluding that, in the case before it, the Court did not have to address "whether a general partner may rely upon a *conclusive* presumption of good faith under Section 7.10(b)'s generally applicable terms when Section 7.9(a) establishes a system of *rebuttable* presumptions expressly applicable to conflict transactions."[123]

Even were Section 7.10(b) to apply in a conflict of interest transaction, which it does not, under the facts here, General Partner is still not entitled to a "conclusive presumption" of good faith here for three reasons:

First, the Tudor opinion, which specifically disclaims any reliance on its provisions to justify approval of the Fall Dropdown, did not opine that the transaction was fair to the Partnership.[124] Tudor opined only that the Fall Dropdown was fair to the unaffiliated unitholders. Thus, Section 7.10(b) is inapplicable. There was no "act taken or omitted to be taken" in reliance on the

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[122] OB at n.177. As noted, the LPA in that case did not provide for a rebuttable presumption.

[123] *Encore*, 72 A.3d at 109 n.58. The Court of Chancery's recent decision in *Brinckerhoff v. Enbridge Energy Co.*, 2016 WL 1757283 (Del. Ch. Apr. 29, 2016), is distinguishable for the same reason. The LPA in that case also did not provide for a rebuttable presumption. This Court's *Gerber* decision, decided before *Encore*, did not reach the argument that Section 7.10(b) was inapplicable because of the presumption language in Section 7.9(a), but instead focused its decision on the Implied Covenant claim. *Gerber v. Enterprise Prods. Holdings, LLC*, 67 A.3d 400 (Del. 2013) [hereinafter, "*Gerber II (Sup. Ct.)*"].

[124] Tr. Op. 17-18

Tudor opinion, which does not opine as to the fairness of the transaction to the Partnership, and specifically disclaims reliance for the very "act" taken here -- approval of the Transaction.[125]

Second, just as in this Court's decision in *Gerber II (Sup. Ct.)*, the Tudor opinion here did not separately opine as to the fairness of the Elba sale, and addressed only the combined sale of Elba and SNG.[126] As this Court explained in *Gerber II (Sup. Ct.)*, under the Implied Covenant, "the parties would not have agreed that the [Conflicts] Committee could obtain and rely on a fairness opinion so flawed."[127] Section 7.10(b) could not apply when the banker failed to opine with regard to the very asset plaintiff alleges was purchased in breach of the LPA.

Third, the facts plaintiff proved at trial show a breach of the Implied Covenant. Tudor's actions match the example this Court gave in *Gerber II (Sup. Ct.)* of such a breach:

> This was a case in which "the financial advisor, eager for future business . . ., compromises its professional valuation standards to achieve the controller's unfair objective."[128]

Thus, even were Section 7.10(b) to apply, which it does not, that provision does not and could not in this case absolve defendant's breach of the LPA.

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[125] *Gelfman v. Weeden Investors, L.P.*, 859 A.2d 89, 117, and n.30 (Del. Ch. 2004); *Miller v. Am. Real Estate Partners, L.P.*, 2001 WL 1045643, at *11 (Del. Ch. Sept. 6, 2001); *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 2011 WL 3505355, at *31 (Del. Ch. Aug. 8, 2011).
[126] *Gerber II (Sup. Ct.)*, 67 A.3d at 406; Tr. Op. 29; B351; B782-85.
[127] *Gerber II (Sup. Ct.)*, 67 A.3d at 424.
[128] Tr. Op. 48 (citing *Gerber II (Sup. Ct.)*, 67 A.3d at 420-21).

II. THE COURT BELOW PROPERLY FOUND THAT, BECAUSE OF THE DUAL DERIVATIVE AND DIRECT NATURE OF PLAINTIFF'S CLAIM, PLAINTIFF HAD STANDING TO REDUCE THE LIABILITY AWARD TO JUDGMENT.

A. Question Presented.

Should this Court affirm the Court of Chancery's holding that plaintiff had standing post-Merger to pursue his dual derivative and direct claim for breach of the LPA? *See* A1258-1353 (question presented below).

B. Scope of Review.

The Standing Opinion implicates questions of law that this Court reviews *de novo*.[129]

C. Merits of the Argument.

In recognition that limited partnerships are creatures of contract, plaintiff pled and proved his claims as breach of contract claims.[130] The trial court correctly concluded this injury to plaintiff's contract rights gave rise to a direct injury. Moreover, in breaching the LPA, the GP conferred a $171 million unwarranted benefit upon Parent. This created a value expropriation at the expense of the

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[129] *Schoon v. Smith*, 953 A.2d 196, 200 (Del. 2008).

[130] *See, e.g.*, A115-48 (Compl. C.A. No. 7306 ¶¶ 95, 105, 106, 114); Pre-Trial Order at A530, A536; *see also* A118 (Compl. ¶ 6) (alleging that defendants orchestrated the Fall Dropdown to benefit Parent at the expense of "plaintiff and the other nonaffiliated limited partners" and caused El Paso MLP to act in conscious disregard for the best interests of El Paso MLP's "non-affiliated partners"); Pre-Trial Order at A528 ("Plaintiff alleges for purposes of trial that EPB GP breached its duties to EPB <u>and its public unitholders</u>") (emphasis added); *see also* St. Op. 41 ("The claim that resulted in the Liability Award was a claim for breach of the [LPA]."); A848 (JX11) (anyone who becomes a limited partner is a party to the LPA).

public limited partners, who suffered an injury distinct from other partners and the Partnership. Delaware courts have long held that breach of contract and value expropriation claims can be asserted both directly and derivatively. Delaware courts have also consistently held that a merger does not extinguish standing to pursue such dual-nature claims. As noted, defendant fails to cite any Delaware case that, following a merger, granted a motion to dismiss claims arising from an alleged breach of a LP agreement and ruled the claims could not proceed on behalf of the public unitholders. There is no such case.

Moreover, the Partnership and the defendant now have been merged into a wholly owned subsidiary of KMI, which will not sue itself. But the defendant's bad faith actions have not been remedied and the harm to the limited partners still exists. Under these circumstances, and consistent with Delaware's established case law and public policy, the Court of Chancery properly permitted plaintiff to reduce his valuable contract claim to judgment on behalf of El Paso MLP's public unitholders.

1. Plaintiff's contract claim is dual natured.

The test for determining whether a claim is direct or derivative considers: "(1) who suffered the harm; and (2) who would receive the benefit of any recovery

or other remedy."[131] "Although each question is framed in terms of exclusive alternatives (*either* the [entity] or the [stakeholders]), some injuries affect *both* the [entity] *and* the [stakeholders]."[132] Those claims have a dual nature and can be brought both directly and derivatively.[133] The trial court properly found "the claim that supported the Liability Award is best understood as having dual aspects such that Brinckerhoff can continue to litigate his claim."[134]

a. *Tooley's* first prong: direct harm

i. The unitholders suffered direct harm because their individual contract rights were breached.

Plaintiff contended -- and the Court of Chancery found after trial -- that the GP breached Section 7.9(a) of the LPA. The trial court concluded, "[t]aking the contractual injury into account makes the *Tooley* analysis relatively straightforward: the limited partners suffered a *distinct* injury in the form of breach of their contract rights, and that injury can be remedied at the limited

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[131] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

[132] *Carsanaro v. Bloodhound Tech., Inc.*, 65 A.3d 618, 655 (Del. Ch. 2013); *see also In re Nine Sys. Corp. S'holder Litig.*, 2014 WL 4383127, at *22 (Del. Ch. Sept. 4, 2014) (*Tooley* test is not a binary choice).

[133] *See generally Loral Space & Commc'ns Inc. v. Highland Crusader Offshore P'rs, L.P.*, 977 A.2d 867, 868 (Del. 2009) (noting that where facts give rise to both derivative and direct claims, "both types of claims can be litigated"); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1268 (Del. 2007) ("[T]he claims before us are not exclusively derivative and could be brought directly."); *Gentile v. Rossette*, 906 A.2d 91, 99 n.19 (Del. 2006) ("It is legally possible for a claim to have such a dual character."); *see also* St. Op. nn.41-42 and authorities cited therein.

[134] St. Op. 17.

partner level."[135] The Standing Opinion correctly applied well-established precedents and should be affirmed.[136]

As the Court of Chancery explained, the conclusion that a breach of an LP agreement gives rise to an individual injury is consistent with this Court's teachings in *Tooley* and other Supreme Court authorities.[137] The *Tooley* Court rejected a post-merger standing challenge to a breach of contract claim, reasoning

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[135] St. Op. 58 (emphasis added).

[136] *Id.* at 41-56, 58 and cases collected therein; *see also Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097, 1109 (Del. Ch. 2014) (finding a claim alleging breach of the same section of the same LPA could be asserted both directly and derivatively and noting "if a limited partnership agreement prohibits the actions that were taken, then the limited partners have standing to enforce the limited partnership agreement directly"); *Teppco*, 986 A.2d at 383 ("The wrongs challenged in the Derivative Action thus gave rise to both a derivative right of action on behalf of Teppco and a direct right of action by the limited partners for breach of the limited partnership agreement."); *Anglo Am. Sec. Fund LP v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 151 (Del. Ch. 2003); *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *3 (Del. Ch. Jan. 27, 2000). Defendant addresses these cases only half-heartedly in a footnote. OB n.114. Defendant cannot distinguish *Teppco* and *Allen* (which involved the same LPA), but argues they should not be relied upon because (1) they were not appealed; and (2) were decided in a procedural posture not worthy of sufficient dignity. That *Teppco* was decided in the context of settlement and *Allen* in the context of class certification fails to make them distinguishable. Although *Teppco* was not appealed, this Court has cited it with approval on at least two occasions. *See, e.g.*, *Gerber II (Sup. Ct.),* 67 A.3d at 423 n.61; *Norton*, 67 A.3d at 354. As to *Cencom* and *Anglo-American*, defendant claims they are pre-*Tooley* and decided on "unique facts." OB n.114 (citing *Agostino v. Hicks*, 845 A.2d 1110, 1125 (Del. Ch. 2004)). But the precise fact *Agostino* referenced as unique was that *Cencom* involved an alternative entity. 845 A.2d at 1125. That is not a distinction here. Moreover, both pre- and post-*Tooley* cases have recognized, in the corporate context, stockholders may state a direct claim when their contract rights are violated. *See Allen*, 90 A.3d at 1105-08 (collecting cases). Thus, that these cases were pre-*Tooley* is no basis for distinction.

[137] St. Op. 25, 47-48. The court below properly analogized plaintiff's contract right to a right of stockholders in a corporation to bring direct claims under the DGCL, the certificate of incorporation and bylaws, which together constitute a multi-party contract. *Id.* at 25-26.

such a claim implicated individual harm because it affected stockholders *directly*, even if all stockholders possessed the same right and suffered parallel injuries.[138]

The Court of Chancery properly rejected defendant's mistaken attempt to recast plaintiff's claim as a generic partnership overpayment claim,[139] devoid of any contractual basis.[140] Plaintiff alleged, and the court below correctly found, the General Partner breached Section 7.9(a) of the LPA, which placed a contractual

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[138] *See* 845 A.2d at 1039; *see also* St. Op. 47-48; *Allen*, 90 A.3d at 1105-09. Allowing LP agreement claims to proceed directly does not in any way, as defendant suggests (OB 29), run afoul of *Tooley*'s rejection of the "special injury" term. 845 A.2d at 1035. As the court below explained, *Tooley* did not alter the long-standing principle that stockholders suffer direct injury when their contract rights are breached. *See* St. Op. 47-48; *see also Allen*, 90 A.3d at 1105-09. *Tooley* held stockholders suffered direct injury, and can sue individually, when they invoke their statutory or contractual rights, even if all stockholders possess the same right. St. Op. 48; *see also NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 180 (Del. 2015), and cases cited at St. Op. n.33.

[139] OB 25-26. Defendant errs by conflating the remedy plaintiff seeks with the harm alleged. To the extent defendant's argument rests on an estoppel theory, the trial court properly rejected that contention. *See* Point III.C.1., *infra*.

[140] *See* St. Op. 43 ("A claim for breach of a specific contractual provision [is not merely an overpayment claim but is] a claim for breach of contract."). Defendant's overpayment cases suffer from the same problem. OB nn.83-84. *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006); *Protas v. Cavanagh*, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012) and *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008) all involved breach of fiduciary duty, not contract, claims. *Gerber v. Enterprise Prods. Holdings, LLC*, 2012 WL 34442 (Del. Ch. Jan. 6, 2012) [hereinafter, "*Gerber II (Ch. Ct.)*"], *aff'd in part, rev'd in part*, 67 A.3d 400 (Del. 2013), involved a partnership but, is of no help to defendant. First, the trial court did not address the contractual nature of the claim in its direct v. derivative analysis. Second, Vice Chancellor Noble merely stated "as a general rule, those types of claims would be derivative." *Id.* at *6. He observed there is reason not to apply the general rule where, as here, "the disappearing company in a merger possesses claims against the surviving company or its affiliate. In that very specific situation, the company that obtains ownership of the claims is the same company against which claims had been asserted. It is unlikely that a company would sue itself." *Id.* On appeal, the Supreme Court did not question the direct nature of the case and, ultimately, it was settled on a class-wide basis. *Gerber II (Sup. Ct.)*, 67 A.3d at 413; *Gerber v. Enterprise Prods. Holdings, LLC*, Del. Ch., C.A. No. 5989-VCN, Noble, V.C., Tr. at 23 (July 1, 2014) [hereinafter, "*Gerber Settlement*"].

limit on the GP's authority to engage in conflict transactions and which the limited partners had a right to enforce.[141]

Defendant's position that plaintiff's contract claim is *solely* derivative is contradicted by the LPA.[142] Defendant ignores the language of the LPA, which clearly provides that both the limited partners and the Partnership can enforce Section 7.9(a). It states: "in any proceeding brought by any Limited Partner . . . or the Partnership . . . challenging such [Special] approval," and then continues to set forth the applicable burden of proof.[143] The "good faith" language of Section 7.9(b) defendant cites is immaterial to the issue of to whom the duties are owed.[144] It merely sets the standard for the Committee.[145] The standard of good faith cannot eliminate plaintiff's right to enforce his claims under the LPA.

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[141] *See* Tr Op. 55; St. Op. 42-44. The trial court's blocking rights hypothetical illustrates this point well. *Id.* at 43-44.

[142] OB 32-33.

[143] A922-23.

[144] The teachings of *Allen*, 90 A.3d 1110, where the Court of Chancery found the limited partners of the same partnership had standing to enforce an individual claim based on the same exact provision of the EBP LPA, also confirm this. Defendant's citations to the *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167 (Del. Ch. 2014), *aff'd*, ---A.3d---, 2015 WL 803053 (Del. Feb. 26, 2015) (the liability decision) and *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 WL 4975270, at *7 (Del. Ch. Aug. 20, 2015), *aff'd*, ---A.3d---, 2016 WL 912184 (Del. Mar. 10, 2016) (OB 32) miss the mark. Those cases address only whether the LP agreement standard was breached, not to whom the duty was owed.

[145] For example, parties to an LP agreement could specify that the general partner could take no action unless it was fair to the Emperor of China. If this contractual standard were breached, the limited partners -- as parties to the agreement -- could still enforce it directly. That Section 7.9(b)'s "good faith" language is merely definitional is reinforced by the heading of Section 7.9: "*Resolution of Conflicts of Interest* [referring to Section 7.9(a)]; *Standards of Conduct* [referring to Section 7.9(b)] and *Modifications of Duty*." A922-23.

Defendant also argues that plaintiff has not pled a *direct* claim because he has not pled or proved a harm *distinct* or *independent* from that the Partnership suffered.[146] Defendant argues that a claim must be either direct or derivative. But Delaware courts have recognized that some claims, like the one at issue here, can be dual natured. As to those claims, the injury can affect both the entity and the unitholders.[147] The court below, therefore, correctly rejected defendant's distinct harm argument.[148]

Defendant's reliance on *Gerber v. EPE Holdings LLC*,[149] is also misplaced.[150] At most, *Gerber I MTD* stands for the proposition that certain MLP claims, like this one, are best pled derivatively absent a merger.[151] But, *Gerber I*

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[146] OB 30-32.

[147] *See supra*, at nn.132-33; *see also Nine Sys.*, 2014 WL 4383127, at *22 ("the *Tooley* test is not necessarily a binary choice."); *Carsanaro*, 65 A.3d at 655-56 (explaining that "some injuries affect *both* the [entity] *and* the [unitholders]" and finding a dual-natured claim where "the first question in the *Tooley* test—who suffered the alleged harm (the corporation or the suing stockholders, individually)-can be answered either way"); *Rhodes v. Silkroad Equity, LLC*, 2007 WL 2058736, at *5 (Del. Ch. July 11, 2007) (noting *Tooley* does not end the analysis and allowing for dual-natured claims where the harms fell on both the entity and its minority equity holders).

[148] St. Op. 56-57.

[149] 2013 WL 209658, at *12 (Del. Ch. Jan. 18, 2013) [hereinafter, "*Gerber I MTD*"].

[150] OB 31. The two other cases cited by defendant -- *Agostino*, 845 A.2d at 1110 and *Manzo v. Rite Aid Corp.*, 2002 WL 31926606 (Del. Ch. Dec. 19, 2002) -- were both pre-*Tooley* cases that could not have recognized, yet alone addressed, the possibility of a dual-natured claim in the context of the *Tooley* framework. Both were in the corporate arena and neither involved a contractual claim similar to plaintiff's LPA claim. *See, e.g., Agostino*, 845 A.2d at 1123 ("Nor is there any claim that the preclusion of alternative, value-maximizing transactions implicates a contractual right of plaintiff.").

[151] No case has held otherwise. In this regard, the holding is akin to Vice Chancellor Laster's suggestion that at the outset of a dual-natured case, derivative aspects should be prioritized. St. Op. 2-3, 74-75; *see also infra*, at n.177. In *Gerber I MTD*, Vice Chancellor Noble found demand *(cont'd)*

MTD recognized that *once the partnership no longer survived post-merger*, the claims could be alleged on a class-wide basis (and that was how the claims were settled).[152]

Defendant resorts to a "slippery slope" hypothesis, arguing that a holding that a breach of an LP agreement can be asserted directly (or dually) will lead to the conclusion that *all* intra-entity LP disputes will be direct claims. This is wrong, as the court below explained.[153] Delaware cases have distinguished between suits for breach of the LP agreement and suits challenging the discretion afforded to the general partner.[154] The latter must still be brought derivatively.

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excused so the court's characterization of the claims was of no practical significance. 2013 WL 209658, at *13.

[152] 2013 WL 209658, at *12 ("if the partnership is in liquidation—and not surviving in a post-merger form as EPE is here—the reason for a derivative action's demand requirement is difficult to justify"); *Gerber Settlement*, Tr. at 23. Defendant points to four other Court of Chancery decisions in which the court allegedly found claims for breach of an LP agreement to be derivative. OB 27-28. In one of them, plaintiff conceded his claims (including those for breach of fiduciary duty) were derivative and the court *never addressed* the issue. *DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *24-25 (Del. Ch. Sept. 30, 2013). *TIFD III-X LLC v. Fruehauf Prod. Co., LLC*, 883 A.2d 854, 860 (Del. Ch. 2004) also involved a claim for which the proponent "acknowledge[d] the essentially derivative nature" and did not seek direct damages. In the third case, as in *Gerber I MTD*, the court noted things would have been different had there been a merger. *Brinckerhoff v. Enbridge Energy Co.*, 2011 WL 4599654, at *6 (Del. Ch. Sept. 30, 2011) (citing *Teppco* with approval and explaining "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" a direct claim will lie), *aff'd*, 67 A.3d 369 (Del. 2013); *Gerber II (Ch. Ct.)*, is addressed *supra*, at n.140. Thus, in three of the five cited cases, the Court of Chancery indicated it would have allowed a limited partner's derivative claim to continue post-merger.

[153] St. Op. 50-55. That this case was brought derivatively further undermines defendant's claim.

[154] *See, e.g., Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 15-16 (Del. Ch. 1992); *Cencom*, 2000 WL 130629, at *3; *Anglo Am.*, 829 A.2d at 151; *Allen*, 90 A.3d at 1109.

In contractual, alternative entity arrangements, more claims may be deemed direct than in the corporate context.[155] But that is a consequence of the election Parent made in organizing the Partnership and substituting contractual fiduciary duties for common law fiduciary duties.[156] That choice provided defendant substantial benefits.[157] Absent the LPA, defendant would be required to show that the Fall Dropdown was entirely fair. The GP cannot take advantage of the contractual benefits the LPA provided it while ignoring the ramifications of a contractual regime -- plaintiff's breach of the LPA claim is a direct claim.[158]

Defendant ties its slippery slope argument to a "parade of horribles" claim, asserting that "an expansion of unitholder standing would undermine the sound

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[155] Plaintiff is not arguing, as defendant suggests, that there is a "contract exception" to *Tooley* for dual-natured claims. OB 29. Rather, as the Vice Chancellor insightfully observed, "[g]enerally speaking, the test for distinguishing between direct and derivative claims in the limited partnership context is substantially the same as in the corporate context but the answers that test gives when applied to a contractual entity are different." St. Op. 55.
[156] *Cencom*, 2000 WL 130629, at *2 ("Mechanistically applying the corporate common law rules surrounding derivative claims can sometimes defeat efficient resolution of claims made in other context . . .."); *cf. Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *19 (Del. Ch. Sept. 14, 2007) ("Because the conceptual underpinnings of the corporation law and Delaware's limited partnership law are different, courts should be wary of uncritically importing requirements from the DGCL into the limited partnership context."); *see also 2009 Caiola Family Tr. v. PWA, LLC*, 2015 WL 6007596, at *1 (Del. Ch. Oct. 14, 2015) ("[A]n alternative entity . . . is not the same thing as a corporation.").
[157] *See, e.g., The Haynes Family Trust v. Kinder Morgan G.P., Inc.*, 2016 WL 912184, *2 (Del. Mar. 10, 2016) (dismissing claims against affiliates to the parties represented here relating to the Merger and noting defendants' enjoyed the "limitation of looking to the contract as the exclusive source of protective rights"). The Standing Opinion identified these numerous benefits, including limiting the number of possible primary defendants and placing contractual restrictions on investor litigation. *See* St. Op. 53-55 (citing numerous authorities from case law, statutes and scholarly literature).
[158] *Id.* at 56.

policies of internal-dispute resolution and protection against excessive litigation that this Court and the General Assembly have advanced by embracing the demand requirement" and undermine the parties' expectations regarding the availability of derivative suits in the alternative entity context.[159] Defendant's concern is unwarranted.[160] At this stage in the litigation, insisting on treating this case only as derivative would not serve any of the policy goals that defendant purports to champion.[161] It will not deter meritless filings.[162] Rather, it would terminate a claim determined to be meritorious to the extent of $171 million. Since the Partnership no longer exists, there is no need to push plaintiff to pursue intra-partnership decision making.[163] In these circumstances, refusing to allow the case to continue based on rigid adherence to the demand requirement serves no policy purpose and makes "no sense."[164]

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[159] OB 36-37.

[160] Indeed, defendants never raised demand futility arguments in response to plaintiff's complaint. And Vice Chancellor Laster's suggested jurisprudential development of treating a dual-natured claim as derivative for purposes of claim initiation would put an end to any legitimate concern that the rule plaintiff advocates would undermine the purposes of the demand requirement. *See* St. Op. 24-25; *see also infra*, at n.177.

[161] OB 37.

[162] *See Cencom*, 2000 WL 130629, at *5.

[163] *Id.* This is particularly true here where, post-Merger, KMI (indirectly) succeeded to the rights and obligations of *both* the Partnership and the General Partner.

[164] *Id.* at *4; *see also id.* at *5; *Anglo Am.*, 829 A.2d 143 (holding that limited partners plead direct claims because treating them as derivative claims at that stage would "serve no legitimate purpose"). Likewise, the purpose of the continuous ownership rule -- "to ensure that the plaintiff prosecuting a derivative action has an economic interest aligned with that of the corporation and an incentive to maximize the corporation's value" (*Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 939 (Del. Ch. 2008)) -- is not undermined here. Plaintiff was stripped of his *(cont'd)*

ii. The unitholders individually suffered direct harm because the Fall Dropdown expropriated value from the unaffiliated limited partners to Parent.

The trial court provided an alternative basis to its finding that the *Tooley* test was satisfied: the Fall Dropdown reallocated value from the unaffiliated limited partners to the Parent such that the limited partners, individually and distinctly, suffered harm.[165] The insider (Parent) used its control of the Partnership to transfer to itself value that far exceeded its share of the loss resulting from the $171 million overpayment. The unaffiliated limited partners, on the other hand, suffered the loss without any offsetting benefit. They alone were left with too little.[166] This Court has acknowledged such "cash-value" expropriation as giving rise to an individual injury and the trial court properly recognized it as supporting a dual-natured claim.[167]

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limited partnership units in a post-trial, involuntary merger. The Partnership is now wholly owned by the same entity that owns the General Partner, and the General Partner has already been found a wrongdoer. If anyone has lost its incentive to prosecute this lawsuit, it is KMI. Conversely, plaintiff has the most incentive to maximize the collective recovery. Plaintiff successfully secured a post-trial finding that the GP is liable for $171 million.

[165] St. Op. 62-71. The Court of Chancery illustrated this point in detail at St. Op. 61-62. Defendant appears to concede, to the extent legally cognizable, this aspect of plaintiff's harm is independent and distinct from the Partnership. OB 38-41.

[166] St. Op. 61-71. *See*, in particular, the cases cited *id.* at nn.46-50, including without limitation *Gentile*, 906 A.2d at 99-100 and in *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 79 (Del. Ch. 1999).

[167] *See, e.g., In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 330 (Del. 1993); *see also* St. Op. 66-71 and cases cited therein.

That this expropriation of economic value to a controller was not coupled with any voting-rights dilution is immaterial, as the Vice Chancellor logically concluded.[168] Other Delaware cases have also applied the *Tri-Star* exception where minority stockholders did not suffer equity or voting right dilution (as no additional stock was issued).[169] Moreover, such an argument misapplies *Tri-Star*, which the trial court correctly analyzed.[170] The Vice Chancellor explained the *Tri-Star* Court treated the voting-right dilution injury separate from the value-expropriation injury and "concluded that in light of '*the singular economic injury to minority interests alone*, the minority have stated a cause of action' that was direct and survived the third party merger."[171] Finally, voting-rights dilution does not apply in the MLP context.[172] Thus, even absent a stock issuance, the

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[168] St. Op. 65 (citing *Gaylord*, 747 A.3d at 79 and explaining "the expropriation principle actually applies to insider transfers generally, regardless of whether the nature of the consideration received by the insider is cash, stock, or other corporate property. Whenever the value of the transfer to the insider exceeds the share of the loss that the insider suffers through stock ownership, the insider transfer expropriates value from the unaffiliated investors."); *see also id.* at 69-70. Additionally, as the Vice Chancellor explained, the *Tri-Star* Court could have characterized the injury as one for "dilution" but chose to use the broader term of "extraction or expropriation." *Id.* at 64 (quoting *Tri-Star*, 906 A.2d at 102 n.26).

[169] *SilkRoad*, 2007 WL 2058736, at *5-6.

[170] St. Op. 66-70.

[171] *Id.* at 68 (quoting *Tri-Star*, 634 A.2d at 332) (emphasis added). While the voting-right dilution may have been "equally relevant" to the *Tri-Star* Court, as defendant points out (OB n.135), it was still an *independent* ground for the Court's direct determination.

[172] Voting rights in an MLP do not have the significance that they do in a corporation. *See* John Goodgame, *Master Limited Partnership Governance*, 60 BUS. LAW 471, 493 (2005). For this reason, defendant's reliance on *Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592 (Del. Ch. Sept. 28, 2015) -- a corporate decision that has never been relied upon by any Delaware case -- is inapplicable. Defendant's fear of expanding the scope of claims that can be brought dually is addressed *supra* at 45-47.

unaffiliated unitholders suffered a distinct expropriation of value at the hands of the controlling GP that satisfies the *Tooley* test.

b. *Tooley's* second prong: the unitholders should receive the benefit of the remedy for defendant's breach of contract

In overpayment cases where the general partner is proven to have breached the LP agreement (as was proven here), the Court of Chancery correctly held that relief can be awarded alternatively to the class of innocent unitholders.[173] Defendant's position -- namely, that the Partnership, which no longer exists, or its successor, who owns the GP and would not collect the judgment, should "recover"[174] -- means that no one would receive the benefit. This argument makes no sense and both this Court and the court below have properly rejected it.[175]

c. Delaware cases have held without exception that limited partners' contract claims can survive a merger.

Delaware cases have held that, because of the dual nature of a contract claim in the partnership context, a plaintiff may directly continue a contract action post-merger.[176] These authorities compel the conclusion that the court below correctly

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[173] St. Op. 71-73; *see also Allen*, 90 A.3d at 1110.

[174] OB 25.

[175] *Gentile*, 906 A.2d at 103 (finding dual natured claim where "because [entity] no longer exists, . . . there is no corporate entity to which a recovery . . . could be paid," "the sole relief that is presently available" should benefit "only the minority stockholders"); St. Op. 75.

[176] *Teppco*, 986 A.2d at 383; *Brinckerhoff v. Texas Eastern Prods. Pipeline Co., LLC*, Del. Ch., C.A. No. 2427-VCL, Laster, V.C., Tr. at 21-26 (Oct. 12, 2009); *Gerber v. EPE Holdings, LLC*, 2011 WL 4538087, at *3 (Del. Ch. Sept. 29, 2011) [hereinafter, "*Gerber I MTA*"]; *see also (cont'd)*

found plaintiff maintained standing following the Merger. It is worth repeating that defendant has not, and cannot, point to *any case* in which Delaware Courts have held a merger extinguished entirely a limited partnership unitholder's right to pursue contract claims for breach of an LP agreement.

d. Allowing plaintiff's contract claim to survive post-merger is consistent with well-established public policy and avoids a forfeiture.[177]

The trial court's holding that plaintiff's contract claim continues after the Merger will promote public policy. Allowing parties to an LP agreement to enforce the agreement as a contract is consistent with this State's policy of giving

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Gerber II (Sup. Ct.), 67 A.3d at 400 (sustaining, following merger of limited partnership, limited partners' class claims). In *Teppco*, the Court of Chancery addressed a case involving a breach of a LP agreement that was (1) styled as a derivative claim; and (2) sought relief on behalf of the partnership. The court explained: "In light of the dual nature of the claim, I would see no reason why the plaintiffs could not have continued their action post-Merger as a *de facto* class action on behalf of holders of Teppco LP units as of the effective time." 986 A.2d at 383 (emphasis added). In *Gerber I MTA*, defendant claimed that "nothing has changed to give rise to a class action claim related to the Transaction" three years after filing the complaint originally designed derivative. The court disagreed. "Something, however, has changed," it explained. "EPE, the entity upon whose behalf the claims in the Complaint were brought, no longer exists." *Id.* at *3. Citing *Teppco* with approval, the Vice Chancellor permitted plaintiff to assert formerly derivative claims directly post-Merger. *Id.*

[177] The Standing Opinion discusses "further jurisprudential developments" the trial court believed warranted. St. Op. 73-87; *see also id.* at 2-3, 21-22. While these remarks advance the progress of the law and have been adopted by other Delaware courts since, *see, e.g.*, *Calesa Assoc., L.P. v. Am. Capital, Ltd.*, 2015 WL 770251, at *9 (Del. Ch. Feb. 29, 2016) (finding the court below's suggested jurisprudential developments "self-evidently reasonable and efficient"), they were admittedly not necessary to the Court of Chancery's holding. *See* St. Op. n.8 (characterizing that this aspect of the decision, "dicta"); *see also id.* at 74. Therefore, plaintiff does not address them directly.

maximum effect to the principle of freedom of contract.[178] Allowing plaintiff's value-proven claims to evaporate by a Merger defendant arranged would also disincentivize entity monitoring behavior, which Delaware law seeks to promote:

> At the same time, the risk that a plaintiff would invest resources in a viable claim only to lose standing through a merger dis-incentivizes stockholders from engaging in monitoring . . ..”[179]

The rule that plaintiff advocates further promotes the State's goal of accountability by controllers of Delaware entities.[180]

More importantly, the result plaintiff urges avoids forfeiture and assures an adjudicated wrongdoer will not escape liability. When the Partnership was operational, a derivative remedy made sense.[181] Post-Merger, however, the Partnership no longer exists.[182] KM Partners will not sue itself. The Proxy recognizes that the Merger consideration did not include any value for the claims that resulted in the Liability Award.[183] Were defendant's logic accepted, and plaintiff's standing extinguished, a $171 million claim would be forfeited and the

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[178] *Elf Atochem*, 727 A.2d at 290; St. Op. 27, 41-42.
[179] *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1206 (Del. Ch. 2010) (citing *Bird v. Lida, Inc.*, 681 A.2d 399, 403 (Del. Ch. 1996)); *see also* St. Op. 76 (citing same).
[180] *Id.* at 75.
[181] *See id.* at 58, 72 (noting an entity-level remedy was the “most obvious” and “made the most practical sense” so long as El Paso MLP remained a separate entity); *id.* at 86 (“for as long as El Paso MLP retained its separate legal existence, it was preferable for the action to proceed in the name of El Paso MLP and for any remedy to run through El Paso MLP”).
[182] *See Gentile*, 906 A.2d at 103 (finding dual natured claim where there was no corporate entity to receive the recovery and noting that although the claim could be brought derivatively under *Tooley*, “as a practical matter, the only claim available . . . is a direct action”).
[183] Proxy at 45-46 (B561-62); *id.* at 54 (B569-70).

Parent would get a windfall.[184] Delaware courts have recognized the resulting inequity (even in the corporate context):

> "If derivative actions promote firm value, even marginally, then a rule that forecloses some number of both meritorious and meritless derivative actions will, all things being equal, inherently transfer some degree of wealth from corporations to the individuals who commit corporate wrongs." . . . The resulting wealth transfer confers a windfall on faithless fiduciaries and creates perverse incentives for misbehavior.[185]

Defendant argues that there is no inequity in eliminating this adjudicated claim because (1) the claim should have been valued in the Merger, which unitholders could have challenged; (2) unitholders acquiesced in forfeiting this

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[184] St. Op. at 86. These facts point to yet another legal reason for dismissing defendant's appeal: the doctrine of equitable standing. *Shaev v. Wyly*, 1998 WL 13858 (Del. Ch. Jan. 6, 1998), *reargument denied*, 1998 WL 118200 (Del. Ch. Mar. 6, 1998). In *Shaev*, then-Vice Chancellor Steele allowed a plaintiff to continue a derivative suit even though he did not technically meet the requirements of the *contemporaneous* ownership rule, invoking the Court of Chancery's equity powers. The court reasoned: (1) the purpose behind the contemporaneous ownership rule was not served by denying plaintiff standing; (2) plaintiff was not a participant to the transaction that denied him standing; rather, it was foist upon him involuntarily; and (3) "to deny standing on these facts would insulate defendants from potential liability for their alleged misdeeds." *Id.* at *4. Each of these factors is met here in spades. Indeed, the present case presents an even more compelling application of the doctrine of equitable standing as defendant is attempting to insulate itself from adjudicated, rather than "potential," liability. *Id. at* *4.

[185] *Hamilton Partners*, 11 A.3d at 1206 (citation omitted); *see also Anglo Am.*, 829 A.2d at 152-53; *Quadrant Structured Prods. Co. v. Vertin*, 115 A.3d 535, 554 (Del. Ch. 2015) (noting a standing deficiency would create a "'failure of justice' because the conflicted fiduciaries could prevent the corporation and its stockholders from pursuing valid claims") (quotation omitted), *clarification denied*, 2015 WL 2256327 (Del. Ch. May 13, 2015). Plaintiff knows of no case from the past 45 years, and defendant has cited none, in which Delaware courts have found derivative standing extinguished by a merger in which the defendant buys the derivative entity plaintiff.

claim when they collectively approved the Merger;[186] and (3) any resulting inequity is outweighed by the benefits of certainty.[187] Defendant is wrong.

As to its first argument, unitholders were not paid in the Merger for this claim[188] and resort to a second, duplicative litigation is no recompense for the loss of the $171 million Liability Award after a successful trial.[189] For all the reasons the Vice Chancellor noted, allowing claims like this to proceed post-merger better reflects the economic realities of a merger,[190] avoids "the graceless creature of a suit within a suit," and results in a more efficient litigation framework.[191] This is especially so because there is substantial disincentive for an acquirer, especially an interested one like KMI, not to pay for and never assert the sorts of "Internal Claims" involved here.[192]

Defendant's attempt to shift the blame to the innocent unitholders and invoke equity through an *ipse dixit* acquiescence argument also fails.[193] First, this

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[186] OB 37, 41-44, 59.
[187] *Id.* at 31, 42, 51.
[188] Proxy at 45-46 (B561-62); *id.* at 54 (B569-70).
[189] *See Parnes*, 722 A.2d at 1243; *Merritt v. Colonial Foods, Inc.*, 505 A.2d 757 (Del. Ch. 1986).
[190] *See* St. Op. 84-85 (noting that a *Parnes/Merritt* suit involves an additional defense that the potential recovery on the extinguished claim was immaterial, which defense may insulate insider transfers and divert significant wealth from investors).
[191] *Id.* (citation omitted). Additionally, in the corporate context, stockholders of a merged entity may be able to value derivative claims in an appraisal proceeding. Such may not be the case in an alternative entity setting. *See* 6 *Del. C.* § 17-212.
[192] *See* St. Op. 78-87 (noting the premise that an Internal Claim should transfer to the acquirer is counter-factual).
[193] Defendant cites *Lewis v. Anderson*, 477 A.2d 1040, 1044-46 (Del. 1984) and *Strategic Asset Mgmt., Inc. v. Nicholson*, 2004 WL 2847875, at *2 (Del. Ch. Nov. 30, 2004). OB n.139. But *(cont'd)*

argument was never raised below.[194] In any event, facts sufficient to establish such a judicial forfeiture are absent.[195] Acquiescence is a narrow equitable doctrine arising only when a party has "full knowledge of his [or her] rights and all material facts."[196] Here, unitholders only knew the Merger conflicts committee, in their self-interested judgment, did not ascribe any value to the claims.[197] They did not know the true value of the claim was $171 million, or even receive an opinion from an independent third party.[198] They did not know KMI would argue standing to pursue the claim should be extinguished by their vote in favor of the Merger.[199]

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neither of those cases addresses acquiescence. Also, contrary to defendant's suggestion (OB 37), this is not a situation where plaintiff seeks to have the court "save" the unitholders from their own decision to waive rights in the Partnership's governing documents; there is nothing in the LPA that would make the unaffiliated limited partners aware of the specific injustice defendant seeks to inflict on them. If anything, a fair read of the LPA would have alerted unitholders here to their right to enforce Section 7.9(a) directly. *See* LPA § 7.9(a) (A922) (referring to "any proceeding brought by any Limited Partner" challenging special approval).

[194] *See* Sup. Ct. R. 8 (only issues fairly presented below may be presented for review).

[195] *Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 171 (Del. 1991) (even cases cited by GP recognize the doctrine operates to force a forfeiture and will only be applied where the petitioning party's conduct is "totally inconsistent with the seeking of equitable relief").

[196] *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *9 (Del. Ch. Mar. 23, 2012), *rev'd on other grounds*, 59 A.3d 418 (Del. 2012); Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 11.04 (2015); *see also Kahn*, 591 A.2d at 176. That the LPA may require only limited disclosures in the context of a merger does not relieve defendant of its obligation to prove all of the common law acquiescence elements, if it seeks to invoke such a defense.

[197] Proxy at 45, 46 (B561-62).

[198] *Id.* at 45-46 (B561-62), 54 (B569-70).

[199] *See id.* at 45-46 (B561-62) (certain unspecified claims "might" be extinguished); *id.* at 54 (B569-70) (same). The Proxy lumped together all of the Partnership claims that had ever been brought on a class-wide or derivative basis.

Unitholders lacked sufficient information to consent to extinguishing the Liability Award.[200]

Nor does the result plaintiff advocates promote any uncertainty, let alone uncertainty sufficient to outweigh the policy concerns noted herein.[201] Alternative-entity planners have long been aware of the teachings of *Teppco* that plaintiff seeks to enforce here. Reinforcement of the *Teppco* rule will only further promote, not undermine, the goal of certainty.[202]

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[200] Defendant seeks to impose this "acquiescence" on *all* unaffiliated unitholders as a group, not just the specific limited partners that may have actually voted in favor of the Merger. Defendant attempts this despite the fact that there was no majority of the minority vote requirement, only 9.6% of the unaffiliated unitholders had to vote in favor of the Merger for it to be approved (Proxy at 53) (B568), and the approval process had the aura of inevitability. Delaware courts have never allowed a foreordained vote to have such a sweeping liability precluding effect. *See, e.g., Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015) (a fully informed majority of the minority vote can have a burden shifting effect on a corporate merger but it will not extinguish the claim); *cf. Kahn*, 591 A.2d at 176-77 (case relied upon by GP did not ban all liability); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *21-22 (Del. Ch. Aug. 18, 2006) (same). Just as importantly, the Merger vote was not specifically addressed to the extinguishment of the claims at issue in this suit. *See Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009) (ratification must be addressed to specific issue for which it is sought). Thus, this Court should not construe a vote in favor of the Merger as assent to an abandonment of the unitholders' right to any recovery in this suit.

[201] *Compare* OB 42.

[202] Defendant's assertion that KMI's expectations would be frustrated by allowing this case to continue directly because KMI consummated the Merger with the "reasonable belief under existing law" it owned the claim should not be credited. OB 50. First, this claim is belied by the Proxy, which concedes that the parties understood there was only a possibility the Merger extinguished standing. Proxy at 46, (B561-62) 54 (B569-70) (KMI's proxy also included the same language). Second, such a belief was unreasonable and directly contradicted by *Teppco*. As noted, no Delaware case in the last 45 years has endorsed such an inequitable result. Third, KMI's "expectation" that it could use the self-interested Merger to avoid having to pay $171 million in determined liability should be irrelevant to this Court's standing analysis. If anything, the only party's whose expectations would be defeated are the unaffiliated unitholders, given the pervasive Court of Chancery case law mandating this case should proceed directly post-merger. *See* Part II.C.1.c, *supra*.

The faithless GP's attempted resort to equity and policy fails. There is no good reason to strip the limited partners of the Liability Award or to excuse the GP from paying the judgment. Allowing plaintiff's claim to continue prevents a windfall, forecloses a forfeiture and preserves appropriate incentives against misbehavior.[203]

2. Plaintiff's contract claim is direct.

Were the Court to credit defendant's faulty assertion that the unitholders did not suffer a distinct injury and refuse to acknowledge a dual-natured claim under the circumstances, it does not follow that plaintiff's claim is derivative. This Court should, like the trial court, follow the reasoning in *NAF* and find plaintiff's claim direct.[204] As the Court of Chancery explained, *Tooley* does "not obviate the need to address an 'important initial question: [D]oes the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?'"[205] The answer here (again, if plaintiff's claim is not dual-natured) is that plaintiff seeks to enforce his own personal contract rights, not those of the Partnership.[206] As set

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[203] It is also consistent with a general derivative remedy and the notion that in exceptional cases, *pro rata* recovery was always available even for derivative cases. St. Op. 89-103; *see infra*, at 62.
[204] St. Op. 24 (citing *NAF,* 118 A.3d at 180).
[205] *Id.* (quoting *NAF*, 118 A.3d at 180).
[206] St. Op. 29.

forth above, Section 7.9(a) provides the express standard that applies to conflicted transactions, and creates a right that can be enforced by a limited partner.[207]

Although the contract in *NAF* was a commercial one, that is no difference. Nor should it affect the result here, as the court below found.[208] This Court has repeatedly instructed that LP agreements are contracts and that contractual rights provided for in LP agreements can and will be enforced. As a party to the LPA bound by that contract's limitations, the limited partners should equally have the right to insure that the GP adheres to its remaining contract obligations.[209]

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[207] Whether that right gives rise to damages (and in what magnitude) is not a standing issue and addressed in the next section.

[208] St. Op. n.18 (discussing *NAF* and noting that the "additional degree of separation [between a commercial agreement and a constitutive entity agreement, such as an LP agreement] makes the contract right easier to identify, but the underlying rationale applies equally to the right that an investor possesses under a constitutive entity agreement"). The Court's recent *Culverhouse* decision held that *Tooley* applied to an MLP. But *Culverhouse* did not address direct claims (in the absence of dual-natured claims) by limited partners against a general partner for breach of a LP agreement. 2016 WL 304186.

[209] Defendant's argument that *Tooley* applies regardless of whether a plaintiff's claim arises from contract or fiduciary duties relies on Court of Chancery decisions that pre-date *NAF* and miss the mark. OB 26-27. Nothing in *Tooley* eliminates the right to sue on a personal claim. St. Op. 24 (*Tooley* does not stand for the proposition that plaintiff loses standing to pursue a personal claim just because some component of plaintiff's loss could be framed as being suffered indirectly). Moreover, the outcome is the same under *Tooley*. Where the plaintiff seeks to enforce personal contract rights, the plaintiff suffers harm for purposes of *Tooley*'s first prong.

III. THE COURT OF CHANCERY PROPERLY EXERCISED ITS DISCRETION BY ALLOCATING DAMAGES *PRO RATA* TO THE UNAFFILIATED UNITHOLDERS AT THE TIME OF THE MERGER.

A. Question Presented.

In ruling that the $171 million in damages that plaintiff proved at trial should be awarded *pro rata* to the unaffiliated El Paso MLP unitholders at the time of the Merger, did the Court of Chancery properly exercise its discretion? *See* A1311-19 (question presented below).

B. Scope of Review.

This Court reviews damage awards under an abuse of discretion standard.[210] This Court does not substitute its own notions of what is right for those of the trial judge if the trial court's judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness.[211]

C. Merits of the Argument.

1. The Court of Chancery did not abuse its discretion in awarding the damages plaintiff proved at trial *pro rata* to the unaffiliated unitholders.

The court below properly held that the Liability Award could be allocated and distributed *pro rata*.[212] Delaware courts have recognized that where a general partner is proven to have breached an LP agreement the Court of Chancery may

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[210] *RBC Capital Mkts., LLC v. Jarvis*, 129 A.3d 816, 866 (Del. 2015).

[211] *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012) (citing *William Penn P'Ship v. Saliba*, 13 A.3d 749, 759 (Del. 2011)).

[212] St. Op. 103.

award the remedy to the innocent class of unitholders.[213] For example, in *Gaylord*, then-Vice Chancellor Strine refused to award damages to an entity in which the alleged wrongdoers owned a significant stake.[214] If defendants were proven to be wrongdoers, he asked, "should [they] be entitled to recover damages for the economic injury they inflicted on themselves"?[215] He reasoned, "because of the fact that they created the harm, this factor would support awarding relief to the class of innocent stockholders, not the corporation."[216] The trial court correctly adopted the Chief Justice's reasoning in this case.[217] There was no abuse of discretion.

Defendant argues that because the injury *proved* was to the Partnership, any benefit must be paid to the Partnership, even though it no longer exists.[218]

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[213] *See Gaylord*, 747 A.2d 71; *see also Allen*, 90 A.3d at 1110 (noting availability of *pro rata* damages); *Cencom*, 2000 WL 130629, at *5 (same); *Fischer v. Fischer*, 1999 WL 1032768, at *4 (Del. Ch. Nov. 4, 1999) (noting availability of damages to plaintiff individually where other interests in entity were owned by defendants and instructing "[e]quity's appropriate focus should be the alleged wrong, not the nature of the claim [as direct v. derivative], which is no more than a vehicle for reaching the remedy for the wrong . . . equity will not suffer a wrong without a remedy"); *Boyer v. Wilm. Mat'ls, Inc.*, 754 A.2d 881, 903 (Del. Ch. 1999) (awarding plaintiff *pro rata* value of entity where other defendants purchased corporate assets and continued business to the exclusion of plaintiff). Moreover, the Court of Chancery has remedied the generally derivative harm that a corporation suffered by altering rights at the stockholder level. *See In re Loral Space and Communications, Inc.*, 2008 WL 4293781, at *32 (Del. Ch. Sept. 19, 2008); *Linton v. Everett*, 1997 WL 441189, at *7 (Del. Ch. July 31, 1997).

[214] *Gaylord*, 747 A.2d 71.

[215] *Id.* at 80.

[216] *Id.*

[217] St. Op. 104. Defendant's characterization of MLPs as pass through entities reinforces the appropriateness of this remedy. *See* OB 14.

[218] OB 25, 45-52. The fact that the Partnership no longer exists further supports the trial court's decisions to distribute *pro rata*. *See Gentile*, 906 A.2d at 103.

Defendant resorts to a claim of "unfairness."[219] Below, defendant attempted to support its position, claiming an "estoppel."[220] The trial court properly rejected this attempt by a wrongdoer to resort to equity, and correctly held defendant had failed to show any justifiable reliance or prejudice.[221]

The trial court further held that the GP lacked any reliance interest in plaintiff's original "derivative" characterizations of either his claim or his remedy because "Delaware law makes clear that [any such characterizations] are not binding on the Court."[222] This holding was supported by numerous authorities and was not arbitrary.[223]

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[219] OB 47.

[220] More to the point, the GP relied below on *judicial* estoppel. St. Op. 87; A1260-66. While the trial court evaluated the claim more broadly, it is clear that the doctrine of judicial estoppel does not apply. That doctrine "is not appropriate in all situations; . . . only those arguments that persuade the court can form the basis for judicial estoppel." *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 859 (Del. 2008); *La Grange Communities, LLC v. Cornell Glasgow, LLC*, 2013 WL 4816813, at *4 (Del. Sept. 9, 2013). Plaintiff's request for *pro rata* recovery does not represent a "change in position" that would satisfy the requirements of judicial estoppel. At no time did the Court determine that plaintiff's claims were purely derivative. Moreover, plaintiff merely sought the same damages it proved at trial, albeit distributed differently.

[221] St. Op. 87-104.

[222] St. Op. 88-90. Even if the Complaint were the sole determinant of the nature of plaintiff's claims, plaintiff could not have included allegations regarding the Merger until after trial, when the Merger occurred. *Gerber I MTA*, 2011 WL 4538087, at *3; *see also Agilent Tech., Inc. v. Kirkland*, 2009 WL 119865, at *4 (Del. Ch. Jan. 20, 2009).

[223] *See, e.g., Lipton v. News Int'l, Plc*, 514 A.2d 1075, 1078 (Del. 1986) ("To determine whether a complaint states a derivative or an individual cause of action, [a court] must look to the nature of the wrongs . . . , not to the plaintiff's designation or stated intention."); *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 500 (Del. 1981) ("The choice of relief to be accorded a prevailing plaintiff in equity is largely a matter of discretion with the Chancellor . . ., and Delaware, with its long history of common law equity jurisprudence, has followed that tradition."), *overruled on other grounds, Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Texas Instruments Inc. v. Tandy Corp.*, 1992 WL 103772, at *6 (Del. Ch. May 12, 1992) (Allen, C.) (The "protean power
(cont'd)

The court below also found no prejudice to defendant from a *pro rata* recovery because that remedy always could have been awarded in a derivative action.[224] The Court of Chancery surveyed over 100 years' of applicable precedents and numerous other legal authorities.[225] It then explained that, here, a *pro rata* award was possible, even pre-Merger, because an entity-level remedy would have benefited the GP by preserving its control over funds it wrongfully expropriated and would have benefited the "guilty."[226] The trial court's holding that the GP was not prejudiced by the implementation of a post-Merger remedy was correct and was not an abuse of discretion.[227]

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of equity" allows a court to fashion appropriate relief," and a court "will, in shaping appropriate relief, not be limited by the relief requested by plaintiff."); *see also* St. Op. 88-90 and authorities cited therein.

[224] St. Op. 90.

[225] St. Op. 90-103; *see e.g., Eshelman v. Keenan*, 194 A. 40, 43 (Del. Ch. 1937) (Wolcott, C.), *aff'd*, 2 A.2d 904, 912 (Del. 1938); *Cencom*, 2000 WL 130629, at *1-3; *Gaylord*, 747 A.2d at 82; *Boyer*, 754 A.2d at 903; Henry Winthrop Ballentine, *Ballentine on Corporations* § 1243, at 336 (Rev. ed. 1946) ("In certain situations recovery may be allowed by the plaintiff of his individual damages in a representative suit on a corporate right of action in lieu of corporate recovery."); 2 George D. Hornstein, *Corporation Law & Practice* § 602, at 101 (1959) (citing examples where court gave an individual recovery to stockholders on a derivative claim and concluding that "[t]he moral to be drawn is that treatment of the corporation as a separate legal entity will not be permitted if it will interfere with the court's doing justice to human beings").

[226] St. Op. 103-04 (citing *Gaylord*, 747 A.2d at 80).

[227] In an attempt to support its claim that damages should revert to the non-existent Partnership, Defendant repackages the same certainty and acquiescence arguments that it makes over and over again. OB 49-52. These claims are disposed of *supra*, at 53-56. Defendant also seeks to invoke the due process rights of the unaffiliated unitholders as a basis for denying them any recovery. Specifically, it repeatedly points to the lack of class certification, (OB at 1, 2, 52). But that is not an issue. Class notice is not required. Ct. Ch. R. 23(b)(1), (b)(2), (c)(2); *see also In re Activision Blizzard, Inc. S'holder Litig.*, 2015 WL 2438067, at *25 (Del. Ch. May 21, 2015). Defendants have already deposed (and cross-examined at trial) plaintiff and found no reason to challenge his adequacy as a representative. *See generally Youngman v. Tahmoush*, 457 A.2d *(cont'd)*

The trial court never changed the "rules of the game."[228] Prior to trial, the Court of Chancery specifically warned defendant about a *pro rata* recovery.[229] As soon as the proposed Merger was announced, plaintiff filed a motion arguing that, unlike in the corporate arena, post-Merger plaintiff's action would convert to a quasi-class case.[230] Then, in the parties' joint Pre-Trial Order, plaintiff repeated his position, namely, that any post-Merger recovery should be distributed on a quasi-class basis.[231]

Supporting a claim for *pro rata* damages, or defending against such a claim, required no additional evidence or testimony. The damages awarded were the same damages plaintiff proved, just apportioned differently.[232] Simple math converted the Liability Award to damages in favor of the unaffiliated

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376, 379 (Del. Ch. 1983) (plaintiff adequacy factors are the same in class and derivative actions). Defendant's claimed concern regarding *res judicata* (OB n.172) was addressed by the Final Order and Judgment, which indicates that payment is in full satisfaction for all claims that were or could have been brought by any payee and specifically references its *res judicata* affects. OB Ex. D ¶ 8.

[228] OB 48.

[229] Prompt Trial Tr. at A520-22 (trial court indicated that it could "decide the remedy should operate on the unitholder-level" and "[t]he way a complaint pleads [a claim as either direct or derivative] . . . is not binding on the Court.").

[230] A467-77; A495-505.

[231] A541. Delaware cases recognize that a party's preservation of an issue in a pre-trial stipulation, such as plaintiff did here, is sufficient to negate any estoppel claim. *In re First Interstate Bancorp Consol. S'holder Litig.*, 729 A.2d 851, 859 (Del. Ch. 1998) (finding no estoppel where "the record shows that defendants have consistently reserved (and did not waive) their right to argue the derivative nature of plaintiff Bradley's claims"); *cf. Vonfeldt v. Stifel Fin. Corp.*, 1999 WL 413393, at *3-4 (Del. Ch. June 11, 1999) (specifically referencing the fact that defendants did not preserve the issue in the pre-trial order as basis for finding estoppel).

[232] In this regard, this case is distinguishable from *In re JP Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766 (Del. 2006) the one case defendant cited over and over; it involved a direct claim for injury to voting rights. OB at nn.152, 153, 154, 155.

unitholders.[233] Moreover, the trial court invited post-trial discovery and an evidentiary hearing,[234] but defendant declined this offer. Finally, paying the Liability Award for which the GP has been adjudicated liable is not a legally cognizable harm to the GP. If anything, as a result of the *pro rata* recovery, defendant is paying a lesser amount of total damages.[235] Given that the Court of Chancery advised the parties that there could be *pro rata* recovery, excluded no evidence and, indeed, invited the GP to submit additional evidence post-trial, defendant's amorphous claims of "unfairness" do not warrant reversal of the Vice Chancellor's damage findings.

In sum, the GP breached its obligations under the LPA, shortchanged the Partnership by $171 million, conferred an unwarranted benefit on Parent, orchestrated the Merger by which it claimed plaintiff lost standing and attributed

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[233] St. Op. App. A.

[234] A1218-19. Defendant's only attempt support to its ginned-up claim of unfairness with any specificity comes in a footnote. OB n.159. It argues in hindsight (and for the first time on appeal) the loss of the opportunity to submit evidence regarding the effect of no transaction. But such evidence would have been relevant to the Conflict Committee's good faith and the GP did not seek to present it. Defendant also claims it would have submitted expert testimony regarding the GP's IDR rights. Those rights are a matter of contract construction and require no expert testimony. Regardless, the trial court allowed defendant an additional evidentiary hearing and the GP eschewed the opportunity (and instead addressed the IDR issue only in a footnote in its post-trial brief).

[235] St. Op. 104. And no doubt, there is countervailing prejudice and inequity to plaintiff, who will forfeit a substantial judgment. This inequity is compounded by the fact that all of then-existing case law consistently held that -- even if initially pled derivatively -- plaintiff could continue its breach of LP agreement claims directly after a merger. *See, e.g., Teppco*, 986 A.2d at 383 ("although styled as derivative claims, . . . I would see no reason why the plaintiffs could not have continued their action post-Merger as a de facto class action on behalf of holders of Teppco LP units as of the effective time"); *Gerber I MTA*, 2011 WL 4538087, at *3.

no value in that Merger to plaintiff's valuable claims. The trial court did not abuse its discretion in allowing the unaffiliated unitholders to recover *pro rata* the damages that plaintiff proved at trial.

2. The Court of Chancery's determination that the limited partners' *pro rata* share should be based on their percentage interest (58.6%) at the time of the Merger was not an abuse of its discretion.

In exercising its discretion, the court below carefully considered, and rejected, defendant's arguments that: (1) the limited partners' percentage interest should be based upon such interest at the time of the Fall Dropdown; and (2) the trial court should have further reduced the Liability Award by subtracting amounts that would have flowed to the General Partner through the provisions of the LPA concerning the distribution of "Operating" revenues.[236]

Again, defendant cannot show any abuse of discretion. It argues on appeal that the *pro rata* percentage payable to the common unitholders should be based on the identities of the unitholders (and their percentage interest) at the time of the Fall Dropdown, not at the time of Merger.[237] But, the trial court correctly reasoned (and the defendant does not contest) that the claim of the unitholders whose contract rights were violated "arose out of that limited partners' status as a holder

[236] St. Op. 104-09. The trial court found that pre-Merger, the limited partners unaffiliated with the GP held 58.6% of the Partnership. *Id.* at 104.
[237] OB 62-64.

of common units and passed to that limited partner's successor when the partner sold its common units," and therefore, the owners of the common units at the time of the Merger have the right to recover on the direct claim.[238]

With respect to newly issued shares between the time of the Fall Dropdown and the time of the Merger, and the corresponding increase in ownership percentage, the trial court determined that the price paid by purchasers of newly issued shares to the Partnership reflected: (1) the loss in value to the Partnership resulting from the Fall Dropdown; and (2) the asset value of the contingent recovery that plaintiff was pursuing. The trial court explained that "allowing those units to participate therefore does not confer a windfall but rather allows those holders to receive the payoff for an element of contingent value that they paid for when they purchased their units."[239] Under these circumstances, the trial court concluded that it was reasonable to use the higher percentage of ownership, as

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[238] St. Op. 105; *see also Schultz v. Ginsburg*, 965 A.2d 661, 667-68 (Del. 2009); *see also Activision*, 2015 WL 2438067, at *20 & *20 n.13 (citing authorities, including *In re Sunstates Corp. S'holder Litig.*, 2001 WL 432447, at *3 (Del. Ch. Apr. 18, 2001) and 6 *Del. C.* § 8-303(a)); *Gerber Settlement*, Tr. at 23 (approving a plan of allocation for settlement of three partnership-related claims challenging two transactions and a merger that allowed for payment to only unitholders as of the merger date because, among other things, "the claims attributable to the conduct in 2007 and 2009 would theoretically have been included in the transfer of EPE units to subsequent buyers" who held as of the merger date).
[239] St. Op. 107-09.

opposed to denying relief to those unitholders altogether and conferring that benefit on the General Partner and its affiliates.[240]

Contrary to defendant's argument, the trial court did not "conflate" two principles, but instead determined that providing compensation for potential losses associated with the newly issued shares was more appropriate than providing a windfall to the General Partner. In reaching that result, the court below based its decision on conscience and reason as opposed to arbitrariness or capriciousness. The trial court was fully aware of the lower percentage of limited partnership units owned by the limited partners at the time of the Fall Dropdown.[241] The trial court acted well within its discretion in determining that it was reasonable to award a recovery to the holders of newly issued units, rather than provide a windfall to the General Partner.[242]

Defendant also erroneously argues that the trial court "improperly assumed without analysis or support that the funds representing the overpayment would have been distributed by the GP if returned to the Partnership," and that if a distribution was made, the trial court erred by not taking into account the share payable to the General Partner on account of its IDR interest.[243] Not so. The trial

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[240] *Id.*
[241] *Id.* at 61.
[242] *Id.* at 107.
[243] OB 64.

court did not assume the overpayment would be distributed by the GP. It properly concluded that "[once] the defendants engaged in the Merger, however, the calculus changed."[244] At that point, the Merger consideration "fairly valued the bundles of rights held by the holders of common units at the time of the Merger, except for their share of the claim for the breach of the LP Agreement."[245] "Because the only right left to be valued is the entitlement to a *pro rata* share" of the Liability Award, the trial court determined it could and should be awarded to the limited partners at the time of the Merger.[246] This decision was also based on conscience and reason, as opposed to arbitrariness or capriciousness.

Defendant further argues that the distribution should be treated and distributed as operating surplus, but fails to cite any section of the LPA that provides for the General Partner to share in damages that the General Partner has been ordered to pay public unitholders. To the contrary, Section 7.8(a) of the LPA, which discusses the General Partner's liability to limited partners for a breach of the LPA, might have provided for a reduction of such damages by IDR payments, but it does not. Since the GP authored the LPA, any ambiguity should be interpreted against its interest.[247] Finally, defendant's reliance on Section 6.4 of

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[244] St. Op. 109.
[245] *Id.*
[246] *Id.*
[247] *Norton*, 67 A.3d at 360.

the LPA and characterization of the Liability Award as "operating surplus" is wrong.[248] Receipt by the unaffiliated limited partners of a damage award as a result of the Partnership having overpaid for a capital asset (especially after the Partnership has been merged out of existence) is most analogous to a distribution of "Capital Surplus" not "Operating Surplus."[249] The LPA provides that distributions of Capital Surplus will be based on the "Percentage Interest" of the partners and that "[t]he Percentage Interest with respect to an Incentive Distribution Right shall at all times be zero."[250] Thus, the LPA amply supports the Court of Chancery's damages analysis. There was no abuse of discretion.

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[248] OB 63-64. That the GP would have elected to distribute the proceeds from a debt and equity offering is completely speculative and unsupported by any part of the record, even though defendants were given the opportunity to supplement the record on damages post-trial. *See* A1218-19

[249] *See* LPA (JX11) Sections 1.1 (definition of "Operating Surplus") (A864), 6.3 (A908), 6.4 (A909) & 6.5 (A911).

[250] LPA (JX11) Section 1.1 (A866).

<u>SUMMARY OF ARGUMENT FOR CROSS-APPEAL</u>

The Court of Chancery erred by granting summary judgment for defendants and dismissing plaintiff's claims arising out of the Spring Dropdown. The Court of Chancery was mistaken when it held that in seeking Special Approval, General Partner had no duty to disclose material non-public information to the Committee. The Court of Chancery also erred in resolving the issue of whether the Committee held a subjective belief that the Spring Dropdown was in the best interests of the Partnership without a trial.

STATEMENT OF FACTS FOR CROSS-APPEAL

In the Spring Dropdown, which closed in March 2010, Parent sold to the Partnership a 51% interest in Elba. At the same time, Parent was declining its right of first refusal ("ROFR") to purchase an interest in similar LNG assets, the Gulf LNG terminal, at a price reflecting a significantly lower EBITDA multiple.[251] Even at that lower price, the prospect of a further investment in similar LNG assets was "not a pretty picture."[252] However, for the Spring Dropdown, GP did not disclose to the Committee the contemporaneous Gulf LNG transaction.

Many of the Committee's acts of malfeasance and nonfeasance committed in granting Special Approval for the Fall Dropdown were simply repeats of the Committee's bad faith approval of the Spring Dropdown. Just as in the Fall Dropdown, the Committee bargaining strategy was "inexplicable." It acted to appease Parent, rather than in the Partnership's best interest. The trial court erred in concluding that no reasonable person could conclude that the Committee's approval of the Spring Dropdown was the result of the same bad faith that the Court of Chancery found in connection with the Fall Dropdown.

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[251] SJ Op. 14-15; *see also* JX26 (B209-32); JX 28 (B233-42); JX24 (B208); JX47 (B290) (multiple of 2010 EBITDA of 12.2); Parent determined to decline its ROFR the *exact same day* it proposed El Paso MLP by the similar Elba LNG assets.
[252] JX 30 (B243).

CROSS-APPEAL ARGUMENT

I. THE COURT OF CHANCERY ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING ALL CLAIMS RELATED TO THE SPRING DROPDOWN

A. Question Presented.

Did the trial court err when it held that: (1) as a matter of law, the GP, in seeking Special Approval of a conflict of interest transaction, did not breach the Implied Covenant because it had no duty to disclose to the Committee material facts, known solely to the GP;[253] and (2) there was insufficient evidence to raise even an issue of triable fact that, in granting Special Approval for the Spring Dropdown, the Committee had not acted in good faith.[254] A284-327 (question presented below).

B. Scope of Review.

A trial court's ruling granting summary judgment is subject to *de novo* review.[255] When reviewing a grant of summary judgment, the Court must "treat all facts in a light most favorable to the non-moving party."[256]

C. Merits of Argument.

1. The trial court erred when it held that the GP could withhold material non-public facts from the Committee.

At the same time as Parent was selling an interest in Elba to the Partnership,

[253] SJ Op. 41-49.
[254] *Id.* at 25-34.
[255] *Sanders v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2921832, at *2 (Del. Dec. 16, 2004).
[256] *Stroud v. Grace,* 606 A.2d 75, 81 (Del. 1992).

Parent refused to exercise its ROFR and buy, at a far lower price (multiple), an interest in a comparable LNG terminal, the Gulf LNG terminal. The Court of Chancery held that GP had no duty to disclose to the Committee that (1) Parent had just *declined* to purchase an interest in the Gulf LNG Terminal at a 9.1x EBIDTA multiple, while Parent's proposed selling Elba to the partnership at an 11x EBIDTA multiple;[257] and (2) even at the lower price, the GP, considered the prospective Gulf LNG purchase to be "not a pretty picture."[258]

Significantly, the Court of Chancery did find that the facts the GP failed to disclose *were material.*[259] If Parent had a duty of disclosure to the Committee, Parent's purported excuses for not disclosing non-public material facts "would require a trial."[260]

> If the Conflicts Committee or its advisors knew about the Gulf LNG data point contemporaneously with the Drop-Down, then the pricing disparity might be sufficient to support an inference of bad faith when evaluated under the current procedural standard. Such a ruling would not mean that the defendants would lose and be held liable, only that *a*

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[257] SJ Op. 41.

[258] JX 30 (B243).

[259] SJ Op. 41. In denying from the bench defendants' motion to dismiss plaintiff's claim relating to the Spring Dropdown, then Chancellor Strine's decision appeared to presume for the purposes of the motion that the facts relating to the Gulf LNG were material:

> The absence of any candid dealing with [these facts] and the explanation of why they're distinct, and the pricing of the transaction at a multiple that the plaintiffs pleaded was exceedingly disparate, does to my mind create a pleading stage inference. It is not 'the' inference. It's a permissible inference.

MTD Tr. at B58.

[260] SJ Op. 41.

> *trial would be necessary* [as to the Spring Dropdown] to resolve a disputed question of fact as to their intent.[261]

In *Gerber II (Sup. Ct.)*, this Court explained that the implied covenant of good faith and fair dealing seeks to enforce the parties' contractual bargain by asking what the parties would have agreed to had they considered the issue at the time of contracting.[262] Following this authority, the trial court recognized the LPA had a "gap" as it did not specifically address whether, in seeking Special Approval for a conflict transaction, the GP was obliged to disclose material, non-public information to the Committee. The LPA was "silent . . . on what happens without a request [by the Committee]" for information.[263]

The trial court recognized that, in a common law fiduciary relationship, the GP would have a duty of disclosure when seeking Special Approval for a conflict transaction.[264] But the trial court concluded that fiduciary duties were eliminated by Section 7.9(e) of the LPA so there was no duty of disclosure.[265]

The Court of Chancery's determination that the GP had no duty to disclose non-public, but material information misapplied this Court's decision in *Gerber II*

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[261] SJ Op. 31 (emphasis added).
[262] *Gerber II (Sup. Ct.)*, 67 A.3d at 420.
[263] SJ Op. 41. Needless to say, when the relevant information is not public, the Committee could not know to request it.
[264] SJ Op. 41
[265] SJ Op. 47-48. Later, in 2015, in its Standing Opinion, the trial court altered somewhat its approach. It noted that the LPA eliminated all "common law duties, including fiduciary duties" (St. Op. 5) and "substituted contractual commitments" (*id.* at 6).

(Sup. Ct.).[266] There, this Court observed that if "the controller . . . intentionally concealed material information that, if disclosed, would require the advisor to opine that the transaction price is in fact not fair," such conduct that might frustrate the parties' bargain and give rise to an Implied Covenant claim.[267]

The Court of Chancery held that this Court's example in *Gerber II (Sup. Ct.)* was merely dicta.[268] The trial court's reading of *Gerber II (Sup. Ct.)* was overly constrained.[269] This Court's example makes clear that when a controller withholds material non-public facts when seeking approval of a conflict transaction, it breaches the Implied Covenant. The Court of Chancery found that is exactly what happened here.[270]

Also, there was ample evidence in the record that would support an "expectation at the time of contracting that the GP would have to volunteer information to the Conflicts Committee,"[271] including the facts that GP exercised *de jure* and *de facto* control, the Partnership had no employees, and the Partnership had no personnel resources or expertise that would have come close to the

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[266] *Gerber II (Sup. Ct.)*, 67 A.3d at 420.
[267] *Id.*
[268] SJ Op. 45.
[269] *Id.* The trial court conceded that its interpretation "may not accurately reflect the Delaware Supreme Court's intent." *Id.*
[270] *Id.* at 31.
[271] *Id.* at 49.

resources and expertise of the Parent.[272] It is unrealistic to expect that the Committee consisting of three non-employee directors would be in an equal bargaining position with GP absent full disclosure.

The parties' expectation of disclosure is reinforced by the Partnership's prospectus, which represents to unitholders that the GP "is accountable to us . . . as a fiduciary."[273] Under these circumstance, nothing in Section 7.9(e) of the LPA is inconsistent with the limited partners' expectation that when seeking Special Approval for a conflict of interest transaction the GP had a duty to disclose non-public material facts to the Committee.[274]

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[272] SJ Op. 2-3.

[273] El Paso Pipeline Partners, LP,'s Prospectus, dated November 15, 2007 ("MLP Prospectus") (JX10) at 150-151 (B204-05) states:

> Our general partner is accountable to us and our unitholders as a fiduciary. Fiduciary duties owed to unitholders by our general partner are prescribed by law *and the partnership agreement*. The Delaware Act provides that Delaware limited partnerships may, in their partnership agreements, expand, restrict or eliminate the fiduciary duties otherwise owed by a general partner to limited partners and the partnership.
>
> Our partnership agreement contains various provisions *modifying and restricting the fiduciary duties* that might otherwise be owed by our general partner. (emphasis added).

Similarly, El Paso MLP's SEC Form 10-K, for year ended December 31, 2012 ("MLP 10-K") (JX 151) at 18-19 (B391-92) acknowledges: "Our partnership agreement limits our general partner's fiduciary duties to holders of common units . . .." But, even then, it represents: "[O]ur general partner has a fiduciary duty to manage us in a manner beneficial to us and our unitholders . . .." The trial court's decision never addressed these representations by the GP in the Prospectus or in the 10-K. While the LPA modified and restricted fiduciary duties, there is no statement in the MLP Prospectus or the MLP 10-K that fiduciary duties had been eliminated.

[274] At best § 7.9(e) is ambiguous. Section 7.9(e) fails to say clearly that all fiduciary duties are "eliminated" and fails to disclose whether the duties in the LPA are "fiduciary duties" or not. Rather, § 7.9(e) says the LPA replaces fiduciary duties with those duties "expressly set forth in this Agreement." JX11 (A924); *see also id.* (the parties agree that the "provisions of this *(cont'd)*

The Court of Chancery gave five reasons why there was no duty of disclosure. On close examination, none of the five support the court's conclusion.[275]

First, the trial court concluded that because of its belief that the LPA eliminated fiduciary duties, the drafters would likely have eliminated a duty to disclose if they had considered it.[276] But this reasoning was circular. The LPA did not eliminate fiduciary duties, it replaced common law fiduciary duties with contractual fiduciary duties.[277] The replacement of fiduciary duties with the duties

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Agreement" replace any other duties). Delaware law requires that restrictions on, let alone elimination of, fiduciary duties must be set forth explicitly. *Kuroda v. SPJS Holdings, LLC*, 2010 WL 925853, at n.28 (Del. Ch. Mar. 16, 2010); *Gelfman*, 859 A.2d at 111 & n.30; *Miller*, 2001 WL 1045643. Further, any ambiguities in a contract must be interpreted against the interest of the drafter, namely, here, against the interests the GP. *Norton*, 67 A.3d at 360.

While we respectfully disagree with the Court of Chancery's interpretation of § 7.9(e), this Court need not reach a conclusion about the meaning of § 7.9(e) to rule that the Implied Covenant in this case mandates disclosure. Other provisions of the LPA confirm the parties' expectation of a fiduciary relationship: Section 2.1 ("duties (including fiduciary duties) . . . shall be governed by the Delaware Act") (A873); Section 7.5(e) ("restricting [rather than 'eliminating'] fiduciary duties") (A919); and that certain specific acts by the GP: Section 13.2 (amendments) and Section 14.2 (mergers), provide that the GP can act "free of any fiduciary duty" (A942 & A947). The notion that the LPA "eliminates all fiduciary duties" would strip these specific provisions of meaning.

[275] SJ Op. 45-50.

[276] SJ Op. 46.

[277] In its opinion, the Court of Chancery never addressed this Court's and the Court of Chancery's statements in many cases that a limited partnership agreement such as the LPA *substitutes* contractual fiduciary duties for common law fiduciary duties. In *Encore,* this Court explained: "Encore GP . . . *only owe[s] the fiduciary duties expressed in the LPA*; they do not owe common law fiduciary duties." 72 A.3d at 100-101 (emphasis added). Similarly, this Court wrote in *Norton*: "Section 7.10(d) eliminates any duties that otherwise exist and replaces them with a *contractual fiduciary duty*." 67 A.3d at 362 (emphasis added); *see also DV Realty*, 75 A.3d at 109 (which referred to this Court's decision in *Gerber II (Sup. Ct.)* as considering claims within the context of a "contractual *fiduciary* duty."); *Auriga Capital Corp.*, 59 A.3d at 1217 ("Here, the Court of Chancery made factual findings, rooted solidly in the record, that firmly
(cont'd)

set forth in the LPA does not inform the parties' expectations in the event of a gap in contractual language. There is reason to believe the drafters, had they thought of it, would have required a duty of disclosure. As noted, the parties believed that they were in a "fiduciary relationship" (and the GP's language in the Prospectus should estop it from claiming otherwise). The Special Approval process also could not function if conflicts committees did not have access to non-public, material information, particularly information that only their counterparty, GP has available to it.[278]

Second, the trial court noted that the LPA contemplates that the Committee would be "a sophisticated and similarly situated negotiating adversary for the General Partner."[279] However, without disclosure of non-public, material facts, the parties would not be "similarly situated."

Third, the trial court observed that it "seems unlikely that the same drafters would expect the General Partner to owe an implicit contractual obligation to

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support its conclusion that in breaching his *contractual fiduciary obligation*, Gatz acted in bad faith") (emphasis added).

[278] *In re Dole Food Co.,* 2015 WL 5052214, at *29 (Del. Ch. Aug. 27, 2015) ("[A]n important element of an effective special committee is that it be fully informed in making its determination. In order to make a special committee structure work, it is necessary that a controlling shareholder . . . disclose fully all the material facts and circumstances surrounding the transaction.") (citing *In Re Tele-Commc'ns, Inc. S'holders Litig.,* 2005 WL 3642727, at *10 (Del. Ch. Dec. 21, 2005) and *Kahn v. Tremont Corp.*, 1996 WL 145452 at *15 (Del. Ch. Mar. 21, 1996)).

[279] SJ Op. 46-47.

volunteer information when negotiating with the Conflicts Committee."[280] The trial court rested its conclusion on its own holding in *Lonergan v. EPE Holdings, LLC*,[281] that "the implied covenant cannot support a generalized duty to disclose all material information reasonably available." The key difference here is that the material information about LNG was *not* reasonably available; it was non-public information that only Parent knew. Certainly, the GP need not provide information that is readily available to a sophisticated committee; it is entirely different when that material information is known to the GP only.

The *fourth* factor the trial court relied upon was the LPA's specific exclusion of the GP's obligation to disclose opportunities to the Partnership.[282] This factor, however, undermines the trial court's conclusion. The fact that the drafters expressly excluded this particular fiduciary duty shows that when fiduciary duties needed to be excluded, they needed to be excluded specifically, not *sub silentio*.

The *fifth* factor cited by the trial court was that another partnership agreement specifically conditioned Special Approval upon the general partner disclosing known material facts. Such a provision was absent from the LPA.[283] Nothing in the record shows that this particular contract was considered by the

[280] *Id.* at 48.
[281] 5 A.3d 1008, 1025 (Del. Ch. 2010)
[282] SJ Op. 48-49.
[283] *Id.* at 42, n.7.

drafters of the LPA. The best inference from this exemplar is that where parties to an LP agreement specifically consider the question of committee access to information, they include a term mandating disclosure.

Thus, the Court of Chancery erred by finding the GP had no duty to disclose the material information in its possession to the Committee in connection with seeking Special Approval for the Spring Dropdown. Plaintiff deserves a trial on the issue of whether the GP breached this duty in the Spring Dropdown.

2. The Court of Chancery erred when it held there were no material issues of fact as to the Committee's failure to act in good faith in connection with the Spring Dropdown.

Whether the members of the Committee acted in good faith when they granted Special Approval for the Spring Dropdown required the trial court to assess the Committee members' credibility. The trial court should not have made that determination summarily, but should have observed and heard defendant's witnesses and the Committee members' testimony.

Fairly said, there were certain differences between the Spring and Fall Dropdowns. For the Spring Dropdown, Committee members had not yet seen the market's negative reaction to the announcement of the unfairly high Spring Dropdown price, and in the spring (unlike the fall), the Committee members did know the price El Paso MLP paid for the interest in Elba. However, as the trial court found, no single fact rendered the Committee members' testimony incredible.

There was substantial evidence to show that the testimony the trial court would have heard at a trial concerning the Spring Dropdown would have been just as "astounding" as the testimony the Court heard concerning the Fall Dropdown.[284]

In granting summary judgment for the Spring Dropdown, the trial court over-credited defendants' arguments and deposition testimony. The Committee members' trial testimony concerned, in the trial court's words, what they "typically did or generally would have done."[285] With respect to both the Spring and Fall Dropdowns, the Committee's *post hoc* rationales contradicted its members' actions and views expressed in contemporaneous documents. As noted, the trial court wrote in its post-trial decision concerning the Fall Dropdown: "In most instances, the Committee members and their financial advisor had no explanation for what they did. The few explanations they had were conclusory or contradicted by contemporaneous documents."[286] A trial would have led to the same result for the Spring Dropdown, but the court below erred and declined to hold one.

In the spring (as in the fall), the Committee's bargaining strategy was once again "inexplicable."[287] For example, in the spring, after noting that a cash flow multiple of 8.5-9 seemed to generate a fair price, the Committee *opened* its

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[284] *See Kinder Morgan* Tr. at 93.
[285] Tr. Op. 36.
[286] *Id.* at 2.
[287] *Encore,* 72 A.3d at 107.

negotiations with a price that translated to a multiple of 10.5.[288] This was not merely "bad bargaining," but bad faith.[289] And, in the spring, just as in the fall, when Tudor generated its range of discount rates, Tudor simply lopped off the top of its ranges to justify the Committee's intent to pay Parent an unfair price.[290] And, just as in the fall, the Committee failed to raise any questions about this manipulation of the data, all designed to favor Parent's interests over the Partnership.[291]

In approving both the Spring and the Fall Dropdowns, the Committee members acted to appease Parent. Their actions in both instances were more than sufficient to raise (at least) material issues of fact as to the Committee's bad faith. Thus, a trial should have been held concerning the credibility of the Committee members' contention that they approved the Spring Dropdown in good faith.

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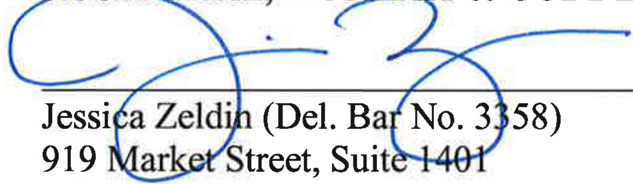
[288] Tr. Op. 16-17; *see also* JX57 (B311).
[289] *Encore*, 72 A.3d at 109.
[290] Tr. Op. 52-53; *see also* JX 74 (B312-42) and JX 130 (B344-70).
[291] Tr. Op. 48-49, 52-53; *see also* JX47 (B312-42).

CONCLUSION

For the reasons set forth above, the Court should affirm the trial court's Final Judgment as to liability, damages and standing; reverse the Final Judgment as to the dismissal of claims arising out of the Spring Dropdown; and remand the Spring Dropdown claims for trial.

ROSENTHAL, MONHAIT & GODDESS, P.A.



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