THE COURT OF CHANCERY OF THE STATE OF DELAWARE

INTER-MARKETING GROUP USA, INC., Derivatively on Behalf of PLAINS ALL AMERICAN PIPELINE, L.P.,	)	
Plaintiff,	)	
v.	)	C.A. No. 2017-0030-TMR
GREGORY L. ARMSTRONG, HARRY N. PEFANIS, AL SWANSON, BERNARD FIGLOCK, EVERARDO GOYANES, GARY R. PETERSON, JOHN T. RAYMOND, ROBERT V. SINNOTT, J. TAFT SYMONDS, CHRISTOPHER M. TEMPLE, VICTOR BURK, BOBBY SHACKOULS, PAA GP LLC, PLAINS AAP, L.P., PLAINS ALL AMERICAN GP LLC, PLAINS GP HOLDINGS, L.P., and PAA GP HOLDINGS LLC,	)	
Defendants,	)	
and	)	
PLAINS ALL AMERICAN PIPELINE, L.P.,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: October 11, 2019
Date Decided: January 31, 2020

Theodore A. Kittila and James G. McMillan, III, HALLORAN FARKAS & KITTILA LLP, Wilmington, Delaware; Mark C. Rifkin, WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP, New York, New York; *Attorneys for Plaintiff*.

Srinivas M. Raju and Matthew W. Murphy, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Michael C. Holmes, Craig E. Zieminski, Kimberly R. McCoy, Robert Ritchie, and Jeffrey Crough, VINSON & ELKINS LLP, Dallas, Texas; *Attorneys for Defendants and Nominal Defendant*.

MONTGOMERY-REEVES, Justice.[1]

[1] Sitting by designation pursuant to Del. Const. art. IV § 13(2).

Plains All American Pipeline, L.P. ("Plains" or the "Company"), a Delaware master limited partnership that owns thousands of miles of pipelines in North America, moves for the second time to dismiss derivative claims stemming from a disastrous oil spill.

In 2015, a Plains pipeline ruptured and spilled 3,400 barrels of oil into an environmentally sensitive part of the west coast. The oil spill incurred consequences both for the environment and for Plains. In addition to a costly clean-up effort immediately following the oil spill, Plains also faced fines, a federal securities lawsuit, lost revenue, reputational harm, a decline in its stock market price, and criminal convictions. Further still, Plaintiff, a Plains unitholder, filed a derivative suit in February 2017 seeking damages for the above harms to Plains.

In the original derivative complaint, Plaintiff alleged that Plains, related entities, and individual defendants all breached common law fiduciary duties by failing to implement or properly oversee a pipeline integrity reporting system. Plaintiff alleged that demand was futile because a majority of the relevant board of directors faced a substantial likelihood of liability for breaching those fiduciary duties. In March 2017, defendants moved to dismiss the complaint for failure to demonstrate demand futility and for failure to state a claim.

I granted that motion to dismiss, holding that the Plains partnership agreement (the "LP Agreement") eliminated common law fiduciary duties in favor of

contractual duties; thus, no defendant faced a substantial likelihood of liability for breaching any common law fiduciary duties. I also dismissed Plaintiff's breach of contract claims as conclusory allegations. Finally, I granted leave to amend the complaint based on Plaintiff's argument that ongoing developments in California criminal proceedings would materially strengthen the allegations in the complaint.

Plaintiff filed its amended complaint, asserting breach of contract claims and adding additional allegations derived from the California criminal litigation. Defendants again move to dismiss. For the reasons explained herein, I deny Defendants' motion as to the breach of contract claim against PA GP LLC, and I grant the motion as to all other parties and claims.

I. BACKGROUND

I draw all facts from the Verified Amended Unitholder Derivative Complaint (the "Amended Complaint"), the documents attached to it, and the documents incorporated by reference into the Amended Complaint.[2] At this stage of the proceedings, I must take all of Plaintiff's well-pled facts as true and draw all reasonable inferences in its favor.[3]

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[2] *In re Morton's Rest. Gp., Inc. S'holders Litig.*, 74 A.3d 656, 659 n.3 (Del. Ch. 2013) ("To be incorporated by reference, the complaint must make a clear, definite and substantial reference to the documents." (quoting *DeLuca v. AccessIT Gp., Inc.*, 695 F. Supp. 2d 54, 60 (S.D.N.Y. 2010))).

[3] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002).

A. Parties and Corporate Structure

Plaintiff, Inter-Marketing Group USA, Inc., is and at all relevant times has been a unitholder of Plains.[4]

Plains is a publicly traded Delaware master limited partnership headquartered in Houston, Texas, whose units trade on the New York Stock Exchange.[5] Its organizational chart is a hierarchical series of limited partnerships and LLCs, each of which Plaintiff names as defendants in this case. Plains' general partner is PAA GP LLC (the "General Partner").[6] The sole member of the General Partner is Plains AAP, L.P.,[7] which is controlled by its general partner Plains All American GP LLC ("GP LLC").[8] GP LLC's sole member and manger is Plains GP Holdings, L.P.,[9] which, in turn, is controlled by its general partner PAA GP Holdings LLC.[10] This opinion refers to these defendants collectively as the "Entity Defendants."

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4 Am. Compl. ¶¶ 30-31.

5 *Id.*

6 *Id.* ¶ 32.

7 *Id.* ¶ 33.

8 *Id.* ¶ 35.

9 *Id.* ¶ 34.

10 *Id.*

Several directors of the Entity Defendants are also defendants. Defendants Gregory L. Armstrong, Bernard Figlock, John T. Raymond, Robert V. Sinnott, Everardo Goyanes, Gary R. Peterson, J. Taft Symonds, and Christopher M. Temple all served on GP LLC's board of directors.[11] Additionally, Armstrong served as Chairman of the GP LLC board of directors and Chief Executive Officer of Plains.[12] The Amended Complaint also names Defendants Victor Burk and Bobby Shackouls, who served on PAA GP Holdings LLC's board of directors.[13] This opinion refers to these defendants collectively as the "Director Defendants."

Finally, three officers of Entity Defendants are defendants (the "Officer Defendants"). In addition to Armstrong as Plains' CEO, the Officer Defendants include Harry N. Pefanis, President and Chief Operating Officer of GP LLC,[14] and Al Swanson, Executive Vice President and Chief Financial Officer of the General Partner.[15] This opinion refers to Director Defendants and Officer Defendants together as the "Individual Defendants."

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11 Am. Compl. ¶ 42.

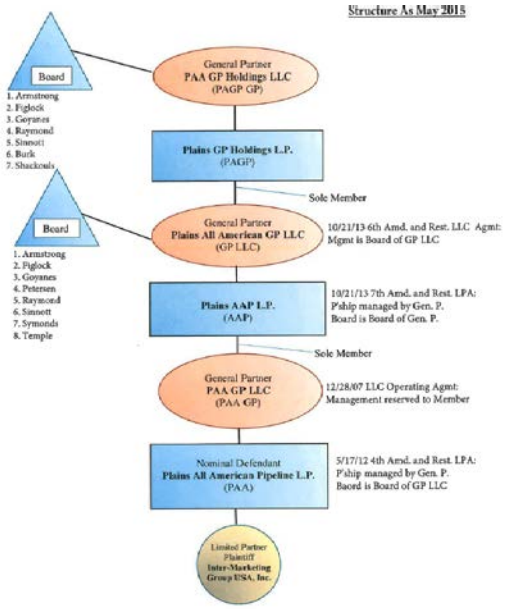
12 *Id.* ¶ 38.

13 *Id.* ¶ 43.

14 *Id.* ¶ 39.

15 *Id.* ¶ 40.

In total, Plains' corporate structure is a confusing nesting doll of related entities, and the Court is sympathetic to any reader struggling to keep track. The important thing to note is that GP LLC is two entities above Plains' General Partner; GP LLC exerts control over the sole member of the General Partner; and the General Partner manages and controls Plains. Functionally, this means that GP LLC's board of directors exercises control over Plains;[16] and, the same Individual Defendants manage GP LLC, the General Partner, and Plains.[17] To assist with clarity, see the below chart:



16 "As of the date of the Santa Barbara Spill, references to Plains' board of directors referred to the eight directors of the board of GP LLC which exercised control over Plains' General Partner." Am. Compl. ¶ 42. This opinion will refer to these board members as "the Board."

17 On November 15, 2016, before Plaintiff filed its Complaint, the Plains entities (including Plains, the General Partner, Plains AAP, L.P., Plains GP Holdings, L.P., and other affiliates) simplified their structure, consolidating their boards of directors into one board with oversight over both the General Partner and Plains. Am. Compl. ¶¶ 42-44.

B. Facts

The Amended Complaint is based on the same underlying facts as the original complaint. Both concern an oil spill from Plains' pipelines in Santa Barbara, California, on May 19, 2015 (the "Oil Spill").[18] The Oil Spill, caused by pipe corrosion,[19] dispersed approximately 3,400 barrels of oil into the Pacific Ocean and environmentally sensitive coastal areas.[20] The consequences were extensive. In the aftermath of the Oil Spill, Plains' revenues fell by approximately 40.5%; its stock price dropped by nearly 40%; and the total coastal cleaning effort cost $257 million.[21]

Additionally, in May 2016, authorities in California indicted Plains on forty-six criminal charges related to the Oil Spill (the "California Action").[22] In that action, Plains CEO Gregory Armstrong testified at length about the Company's actions leading up to and in the aftermath of the Oil Spill, as well as Plains' protocols

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18 *Id.* ¶¶ 1-2.

19 Line 901, the source of the Oil Spill, is a 24-inch diameter pipeline that reaches approximately 10.6 miles from Exxon's onshore oil facilities in Las Flores, California, to Chevron's onshore oil facilities in Gaviota, California, where it meets and joins another pipeline. *Id.* ¶ 9.

20 *Id.* ¶ 18.

21 *Id.* ¶¶ 28, 127.

22 *Id.* ¶ 2.

for reviewing pipeline integrity.[23] Despite the existence of a board-level audit committee charged with overseeing Plains' regulatory compliance, Armstrong did not mention the Board's audit committee in his testimony.[24] Instead, Armstrong testified that an executive board reviewed Plains' pipeline integrity management.[25] Further, Armstrong testified that the Board, of which he was the chairman, did not discuss pipeline integrity policy or procedure.[26]

In 2018, the jury in the California Action found Plains guilty of eight misdemeanors and one felony.[27] The felony conviction was for "the crime of KNOWINGLY DISCHARGING OIL, OR REASONABLY SHOULD HAVE KNOWN THAT ITS ACTIONS WOULD CAUSE THE DISCHARGE OF OIL, INTO THE WATERS OF THE STATE."[28]

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23 Am. Compl. ¶¶ 204, 226.

24 *Id.* ¶¶ 231-33.

25 *Id.* ¶ 204.

26 *Id.*

27 *Id.* ¶ 4.

28 *Id.*

C. Procedural History

Plaintiff filed its original complaint on January 17, 2017.[29] On January 31, 2019, the Court granted Defendants' motion to dismiss the original complaint (the "First Opinion")[30] but granted Plaintiff leave to amend its complaint under Rule 15(aaa).[31]

Plaintiff filed its Amended Complaint on June 3, 2019.[32] On August 8, 2019, Defendants filed a Motion to Dismiss Plaintiff's Amended Complaint (the "Motion"), which the parties fully briefed.[33] On October 11, 2019, the Court heard oral argument on the Motion.[34]

II. ANALYSIS

In the Amended Complaint, Plaintiff alleges that Defendants breached contractual duties they owed to Plains under the LP Agreement when they failed to oversee oil pipeline integrity and maintenance (Count I).[35] Alternatively, Plaintiff

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29 *Id.* ¶ 215.

30 *Inter-Marketing Group USA, Inc. v. Armstrong*, 2019 WL 417849 (Del. Ch. Jan. 31, 2019) (hereafter "First Op.").

31 *Id.* at 24-25.

32 *See* Am. Compl.

33 *See* Defs.' Mot. to Dismiss; Pl.'s Answering Br; Defs.' Reply Br.

34 Oral Arg. Tr. 1.

35 Am. Compl. ¶¶ 273-285.

argues that Defendants breached the implied covenant of good faith and fair dealing (Count II).

Defendants move to dismiss for failure to make demand or plead demand futility under Court of Chancery Rule 23.1 and for failure to state a claim under Court of Chancery Rule 12(b)(6).[36] For the reasons that follow, Defendants' Motion is GRANTED for all claims against all parties except for the breach of contract claim (Count I) against the General Partner.

A. Failure to State a Claim under Rule 12(b)(6)

Typically, a motion to dismiss a derivative action begins with a determination under Rule 23.1 of who, the company or the stockholders, may control the litigation asset. I, however, begin this analysis with the Rule 12(b)(6) motion to determine at the outset which Defendants owed Plains a duty under the LP Agreement because the answer streamlines the remaining analysis.[37]

1. Breach of the contractual duty (Count I)

Plaintiff argues that Defendants breached the contractual duty of good faith they owed to Plains. Because Defendants can only be liable for breaching duties they actually owed, the parties dedicated significant briefing and the majority of oral

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[36] Mot. to Dismiss 1-2.

[37] *See, e.g., Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *9-19 (Del. Ch. Jul. 6, 2018) (addressing Rule 12(b)(6) before Rule 23.1 in order to refine the latter analysis).

argument to the proper scope of the duties imposed by the LP Agreement. Plaintiff argues that the LP Agreement imposed a general duty on all Entity Defendants and Individual Defendants to act in good faith and in the best interests of Plains.[38] Defendants, however, argue the LP Agreement only imposed a duty of good faith on Plains' General Partner.[39] Under Defendants' theory, all other Defendants (including all Individual Defendants and the remaining Entity Defendants) owed no contractual duties to Plains.[40]

Resolving the parties' dispute as to who owed Plains duties under the LP Agreement raises a question of law that this Court may appropriately address at the motion to dismiss stage.[41] "Limited partnership agreements are a type of contract. We, therefore, construe them in accordance with their terms to give effect to the parties' intent."[42] "Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective,

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38 Pl.'s Answering Br. 9.

39 Defs.' Opening Br. 41-43.

40 *Id.*

41 *Majkowski v. American Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 581 (Del. Ch. 2006).

42 *Norton v. K-Sea Transportation P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013).

reasonable third party."[43] Further, contracts are interpreted as a whole, and each provision and term will be given effect as to not render any part "meaningless or illusory."[44]

Plaintiff argues that three provisions of the LP Agreement, Sections 7.10(d), 7.7(a), and 7.8(a), imposed a freestanding contractual duty of good faith on all Defendants.[45] Plaintiff's arguments concerning each of these provisions fail.

a. Section 7.10(d) imposes a duty only on the General Partner

In the First Opinion, I held that Section 7.10(d) eliminates all common law fiduciary duties in favor of a contractual duty under which the General Partner "must reasonably believe that its action is in the best interest of, or not inconsistent with, the best interests of the partnership."[46] Plaintiff argues that the contractual duty imposed by Section 7.10(d) "applies equally to Plains' General Partner and . . . the Entity Defendants and the Individual Defendants."[47] Section 7.10(d) provides:

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43 *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *NBC Universal v. Paxson Commc'ns*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)).

44 *Id.* at 1160 (quoting *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 2010 WL 779992, at *2 (Del. Mar. 8, 2010); *Sonitrol Hldg. Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992)).

45 Pl.'s Answering Br. 2.

46 First Op. 13-18 (quoting *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2015 WL 4975270, at *5 (Del. Ch. Aug. 20, 2015), *aff'd sub nom. Haynes Family Tr. v. Kinder Morgan G.P., Inc.*, 135 A.3d 76 (Del. 2016) (TABLE)).

47 Am. Compl. ¶¶ 217, 219.

> Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited, to the extent permitted by law, as required to permit the General Partner to act under this Agreement or any other agreement contemplated by this Agreement and to make any decision pursuant to the Authority prescribed in this Agreement, so long as such action is reasonably believed by the General Partner to be in, or not inconsistent with, the best interests of the Partnership.[48]

Section 7.10(d) of the LP Agreement mentions only the General Partner, and thus the provision's language, on its face, requires only the General Partner to act "in, or not inconsistent with, the best interests of" Plains.

Moreover, this Court has held that provisions similar to Section 7.10(d) imposed duties exclusively on the general partner named in those provisions. In *Kinder Morgan*, this Court examined language identical to that in Section 7.10(d) and held that, absent language clearly imposing duties on any party except the general partner, "[t]he individual defendants and Parent were parties to the LP Agreement in their capacities as holders of common units representing limited partner interests, but they did not owe the contractual obligations that the Complaint [sought] to enforce."[49] Thus, consistent with the LP Agreement and other opinions of this Court, I find that Section 7.10(d) imposed duties only on the General Partner.

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[48] Defs.' Opening Br. Ex. 1 § 7.10(d) (hereafter "LPA § _").

[49] *Kinder Morgan*, 2015 WL 4975270, at *5. *See also Norton*, 67 A.3d at 362 ("Section 7.10(d) eliminates any duties that otherwise exist and replaces them with

b. Sections 7.7(a) and 7.8(a) impose no duties

Next, Plaintiff argues that even if Section 7.10(d) did not extend a contractual duty to all Defendants, the plain language of Sections 7.7(a) and 7.8(a) imposed a duty of good faith on all Defendants as "Indemnitees."[50]

Section 7.7(a) provides that Plains will indemnify "all Indemnitees" for any civil or criminal penalties incurred as a result of the party's Indemnitee status so long as they "acted in good faith and in a manner that such Indemnitee reasonably believed to be in, or (in the case of a Person other than the General Partner) not opposed to, the best interests of the Partnership."[51] Similarly, Section 7.8(a) provides that "no Indemnitee shall be liable for monetary damages . . . [,] for losses sustained[,] or liabilities incurred as a result of any act or omission if such Indemnitee acted in good faith."[52]

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a contractual fiduciary duty—*namely, that K-Sea GP* [the general partner] must reasonably believe that *its* action is in the best interest of, or not inconsistent with, the best interests of the Partnership.") (emphasis added).

50 "Indemnitee" is defined in the LP Agreement to include the General Partner, any Affiliate of the General Partner, and any director or officer of the General Partner or of any Affiliate. "Affiliate" is defined to include any individual or entity "that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with" the General Partner. LPA § 1.1. The parties agree that all Defendants except the General Partner are "Affiliates" and that all Defendants are "Indemnitees."

51 *Id*. § 7.7(a).

52 *Id*. § 7.8(a).

Because indemnification and exculpation under those two provisions are conditioned on Indemnitees acting in good faith, Plaintiff argues that those provisions must each impose a freestanding duty of good faith on all Indemnities or otherwise imply the existence of such a duty.[53] Plaintiff misinterprets these provisions.

Sections 7.7(a) and 7.8(a) are protective safe harbors designed to insulate Indemnitees from incurring liability in their dealings with Plains. The provisions make entitlement to indemnification and freedom from liability conditional on the Indemnitee acting in good faith. But conditional safe harbor language does not imply a mandatory duty.[54] Therefore, Sections 7.7(a) and 7.8(a) protect Indemnitees from liabilities like those Plaintiff seeks to impose in this suit; they do not impose affirmative obligations.[55]

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53 Pl.'s Answering Br. 13-16.

54 The Supreme Court has found that violating standards in similar limited partnership provisions does not automatically breach a limited partnership agreement because the standards are conditions of a safe harbor, not affirmative duties. *See Norton*, 67 A.3d at 365 (noting that if a limited partnership's general partner "chooses [to] take advantage of [the] safe harbor provisions" and "does not meet that standard," that is "not automatically [a] breach of the LPA"); *Kinder Morgan*, 2015 WL 4975270, at *6 (applying *Norton* and determining that "the [g]eneral [p]artner is not obligated to comply with [a similar safe harbor provision]; it has the choice whether or not to do so").

55 Plaintiff also argues that the Indemnification and Liability provisions would be superfluous if Indemnities did not owe a general duty of good faith under the LP Agreement. Pl.'s Answering Br. 17. This is also incorrect, as Indemnities could still incur liabilities for acts carried out on behalf of Plains or the General Partner

c. *Brinkerhoff* does not hold that language identical to that in Sections 7.10(d), 7.7(a), and 7.8(a) imposes a freestanding contractual duty on Indemnitees and Affiliates

Finally, Plaintiff argues that the Delaware Supreme Court, in a line of cases I will collectively refer to as *Brinckerhoff*,[56] has interpreted language identical to Sections 7.7(a) and 7.8(a) in the LP Agreement to extend the contractual duty of good faith found in Section 7.10(d) to all Defendants as Indemnitees and Affiliates.[57]

In *Brinckerhoff*, a master limited partnership repurchased an asset from its general partner at an allegedly inflated price.[58] The plaintiff sued derivatively and claimed the general partner, its directors, and several related entities all breached their contractual duties when they participated in the conflicted transaction.[59]

The Court of Chancery initially dismissed claims in *Brinckerhoff* against all defendants other than the general partner, reasoning that because affiliate defendants were not "parties" to the limited partnership agreement, they could not be held liable

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that did not arise under the LP Agreement's terms (for example, the federal securities claims filed against Plains).

56 To date, there have been six opinions in the *Brinckerhoff* lineage. This opinion will primarily address *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2016 WL 1757283 (Del. Ch. Apr. 29, 2016) ("Brinckerhoff IV"), *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242 (Del. 2017) ("Brinckerhoff V"), and *Mesirov v. Enbridge Energy Co., Inc.*, 2018 WL 4182204 (Del. Ch. Aug. 29, 2018) ("Brinckerhoff VI").

57 Pl.'s Answering Br. 13-15.

58 *Brinckerhoff V*, 67 A.3d at 245-47.

59 *Id*.

for breaching the contract.[60] The Supreme Court, however, reversed the Court of Chancery's dismissal as it pertained to affiliates, holding instead that claims against those parties would survive dismissal "if the Plaintiff has well-pled that they acted in bad faith."[61]

Plaintiff argues that, because the claims against affiliates survived dismissal in *Brinkerhoff*,[62] the Supreme Court must have held that the *Brinkerhoff* partnership agreement's equivalents to Sections 7.10(d), 7.7(a), and 7.8(a) imposed a duty of good faith on affiliates. And since Plains' LP Agreement and the *Brinkerhoff*

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60 *Brinckerhoff IV*, 2016 WL 1757283, at *9.

61 *Brinckerhoff VI*, 2018 WL 4182204, at *10 (citing *Brinckerhoff V*).

62 *Id.* at *13 ("*Brinckerhoff I* held, and *Brinckerhoff III* and *Brinckerhoff V* (at least implicitly) affirmed, that claims against the Affiliates and Indemnitees under the LPA will survive dismissal if the Plaintiff well-pleads their actions meet 'the definition of bad faith that is . . . incorporated into the Enbridge LPA.'") (internal citation omitted).

agreement share identical provisions,[63] Plaintiff argues that *Brinckerhoff* controls and that the Affiliates in this case also owed a contractual duty of good faith.[64]

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63 Several provisions in Plains' LP Agreement have a direct counterpart in the *Brinckerhoff* agreement. *Compare Brinckerhoff VI*, 2018 WL 4182204, at *4-5 (quoting the limited partnership agreement), *with* LPA §§ 7.8(a), 7.10(d):

Brinckerhoff Section 6.8(a):	Plains Section 7.8(a):
"Notwithstanding anything to the contrary set forth in this Agreement, no Indemnitee shall be liable for monetary damages to the Partnership, the Limited Partners, the Assignees or any other Persons who have acquired interests in the *Units*, for losses sustained or liabilities incurred as a result of any act or omission if such Indemnitee acted in good faith."	"Notwithstanding anything to the contrary set forth in this Agreement, no Indemnitee shall be liable for monetary damages to the Partnership, the Limited Partners, the Assignees or any other Persons who have acquired interests in the *Partnership Securities*, for losses sustained or liabilities incurred as a result of any act or omission if such Indemnitee acted in good faith."
Brinckerhoff Section 6.10(d):	Plains Section 7.10(d):
"Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited as required to permit the General Partner to act under this Agreement . . . and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by the General Partner to be in the best interests of the Partnership."	"Any standard of care and duty imposed by this Agreement or under the Delaware Act or any applicable law, rule or regulation shall be modified, waived or limited, *to the extent permitted by law*, as required to permit the General Partner to act under this Agreement . . . and to make any decision pursuant to the authority prescribed in this Agreement, so long as such action is reasonably believed by the General Partner to be in the best interests of the Partnership."

64 Pl.'s Answering Br. 15-16.

But Plaintiff misreads *Brinckerhoff*. While the operative agreements in *Brinckerhoff* and in this case are near identical, the underlying claims are not. Critically, the *Brinckerhoff* claims stemmed from a conflicted transaction.[65] And in addition to indemnification and liability provisions, Plains' LP Agreement and the *Brinkerhoff* agreement share an identical conflicted-transaction provision. The relevant provision states that "[n]either the General Partner *nor any of its Affiliates* shall sell, transfer or convey any property to, or purchase any property from, the Partnership, directly or indirectly, except pursuant to transactions that are fair and reasonable to the Partnership."[66]

Under this conflicted-transaction provision, both Plains' LP Agreement and the *Brinckerhoff* agreement affirmatively require "Affiliates" to only enter "fair and reasonable" conflicted transactions. Because affiliate defendants in *Brinckerhoff* allegedly engaged in a conflicted transaction, "[t]he contractual fiduciary duty stated in [the conflicted-transaction provision] supplant[ed] any residual fiduciary duties that [affiliate] Defendants might otherwise have owed . . . ."[67]

Further, as indemnitees under the *Brinkerhoff* agreement's liability provision, affiliate defendants were insulated from monetary liability for breaching any

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65 *Brinckerhoff VI*, 2018 WL 4182204, at *3-4.

66 *Id.* at *4 (emphasis added); LPA § 7.6(e).

67 *Brinckerhoff VI*, 2018 WL 4182204, at *13.

provision of the limited partnership agreement so long as they acted in good faith.[68] Thus, while the conflicted-transaction provision imposed a duty on *Brinckerhoff* affiliates to ensure the conflicted transaction was fair and reasonable, the *Brinkerhoff* affiliates only faced liability for breaching that duty if the affiliates failed to act in good faith under the liability provision. Therefore, the Supreme Court reversed dismissal in *Brinckerhoff* because the plaintiff pled that affiliates breached the duty imposed by the conflicted-transaction provision and that they did so in bad faith under the liability provision.[69]

If the present derivative suit concerned a conflicted transaction, *Brinckerhoff* would control and Indemnitees and Affiliates would be similarly situated under the Plains conflicted-transaction and liability provisions.[70] But there is no such transaction in this case. Instead, Plaintiff asserts claims exclusively on the theory of oversight liability, and the specific affirmative duties imposed by the conflicted-transaction provision do not apply to that context. Thus, while a surface-level reading of *Brinckerhoff* might mislead the reader to believe that its result is controlling here, the case does not, in truth, support finding Indemnitees or Affiliates owed Plains a freestanding duty of good faith.

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68 *Id.* at *10.

69 *Id.*

70 LPA §§ 7.6(e), 7.8(a).

To the contrary, *Brinckerhoff* actually supports Defendants' argument that parties only owed those duties specifically articulated in the LP Agreement. Just as *Brinckerhoff* affiliates owed duties because the transaction they undertook was "expressly governed" by the conflicted-transaction provision,[71] the absence of a duty-imposing provision here evidences the absence of any like obligations to Plains. Thus, this Court's finding that the LP Agreement imposed no freestanding contractual duties on Indemnitees or Affiliates is consistent with the Supreme Court's holding in *Brinkerhoff*.

As the LP Agreement's conflicted-transaction provision makes clear, the drafters knew how to impose contractual duties on Indemnities and Affiliates, yet did not do so in Sections 7.10(d), 7.7(a), or 7.8(a). Thus, only the General Partner owed a freestanding contractual duty, and breach of contract claims (Count I) against all Defendants except the General Partner are dismissed for failure to state a claim under Rule 12(b)(6), as they owed no duties under the LP Agreement.

2. Breach of the implied covenant of good faith and fair dealing (Count II)

Alternatively, Plaintiff alleges that, absent liability under the LP Agreement's express terms, Defendants breached the implied covenant of good faith and fair

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71 *Brinckerhoff V*, 159 A.3d at 255.

dealing.[72] The implied covenant attaches to all contracts and "is 'best understood as a way of implying terms in the agreement,' whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions."[73] Contract terms are implied "when the party asserting the implied covenant proves that the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."[74] "[T]he implied covenant 'does not apply when the contract addresses the conduct at issue,' but only 'when the contract is truly silent' concerning the matter at hand."[75]

Plaintiff's implied covenant claims fail because the LP Agreement leaves no gap to fill; its terms clearly set out the rights and obligations of all parties. Plaintiff argues that the implied covenant "arises from Defendants' contractual duty to ensure that they neither cause nor preside over Plains' participation in criminal activities," a reference to Plains' conviction in the California Action for "knowingly"

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72 Am. Compl. ¶¶ 279-285.

73 *Oxbow Carbon & Minerals Hldgs., Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 507 (Del. 2019) (quoting *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)).

74 *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (citations omitted);

75 *Id.* (quoting *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 896 (Del. 2015); *Allied Capital Corp. v. GC–Sun Holdings, L.P.*, 910 A.2d 1020, 1033 (Del. Ch. 2006)).

discharging oil.[76] But the LP Agreement was not silent as to criminal activity. To the contrary, Section 7.10(d) imposed a contractual duty that directly governed the General Partner's conduct alleged in the Amended Complaint and addressed in the California Action.[77] Further, the LP Agreement also contemplated the rights and obligations of Defendants outside the General Partner; Section 7.7(a) and Section 7.8(a) insulated those Defendants from liability for actions taken in good faith, and Section 7.6(e) assigned a specific standard of care for conflicted transactions.[78]

The breadth and specificity of these provisions evidence a contract that leaves no room for gaps, and all rights and obligations of the parties relevant to this litigation are addressed by the LP Agreement. Plaintiff has not shown that the LP Agreement is "truly silent" on any matter that could not have been reasonably anticipated at the time of contracting.[79] Therefore, as the LP Agreement leaves no gap for the implied covenant to fill, Plaintiff's implied covenant claims are dismissed as to all Defendants for failure to state a claim under Rule 12(b)(6).

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76 Pl.'s Answering Br. 43.

77 LPA § 7.10(d).

78 *Id*. §§ 7.7(a), 7.8(a), 7.6(e).

79 The implied covenant "is 'a limited and extraordinary legal remedy' that addresses only events that could not reasonably have been anticipated at the time the parties contracted." *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010) (quoting *Nemec*, 991 A.2d at 1128).

B. Demand Futility Under Rule 23.1

With all claims but the breach of contract claim against the General Partner dismissed, I turn now to whether demand is futile as to the remaining claim against the General Partner. Under the Delaware Limited Partnership Act, a limited partner may bring a derivative suit on behalf of a limited partnership "if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed."[80] Further, Court of Chancery Rule 23.1 requires a plaintiff asserting claims on behalf of a limited partnership to (1) make pre-suit demand or (2) show demand futility.[81] In the case of a master limited partnership, "the demand excusal inquiry focuses on the general partner itself (as an entity), rather than on its board of directors."[82] Consequently,

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80 6 *Del. C.* § 17-1001.

81 Ct. Ch. R. 23.1(a); *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988).

82 *Wenske*, 2018 WL 3337531, at *18 (citing *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 1998 WL 832631, at *5 (Del. Ch. Nov. 10, 1998) ("I hold that [the limited partner plaintiff] must plead the futility of presuit demand [on] . . . the corporation acting as general partner.")). Presumably relying on this Court's dicta in *Gotham* that "the presence of a majority of interested directors within a corporate general partner might be one way of demonstrating demand futility as to the corporate general partner," Plaintiff's original complaint focused entirely on the liability of individual directors and argued that they faced a substantial likelihood of liability for breach of common law fiduciary duties. *Gotham*, 1998 WL 832631, at *5. I held that Section 7.10(d) eliminated common law fiduciary duties and dismissed the complaint for failure to make demand. Here again, relying on *Gotham*, the vast majority of Plaintiff's demand futility briefing for its Amended Complaint focuses on whether the directors faced a substantial likelihood of liability. But that argument fails because the directors face no individual liability. *See* discussion *infra*

when plaintiffs fail to make pre-suit demand on the general partner, as is the case here,[83] the Court must dismiss the complaint "unless it alleges particularized facts showing that demand would have been futile."[84]

"This court has recognized, despite the statutory basis for demand in the limited partnership context, that 'the issues in determining demand futility for partnership law appear identical to those in corporation law' and, therefore, has applied the familiar test for corporate demand futility."[85] This opinion also turns to well-established demand futility principles in corporate law to analyze the demand futility question here.

Two Delaware Supreme Court cases articulate the tests for demand futility. In abbreviated form, the rule is as follows: *Rales v. Blasband*[86] applies when the plaintiff challenges an action not taken by the general partner that would consider

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Section II.A. This time, however, Plaintiff also argues that "the General Partner itself, like the Director Defendants, faced a substantial likelihood of liability and was disabled from considering a demand." Pl.'s Answering Br. 21 n.8. Because Plaintiff briefed and argued the General Partner's likelihood of liability, I will now address that argument.

83 Am. Compl. ¶ 216.

84 *Ryan v. Gursahaney*, 2015 1915911, at *5 (Del. Ch. Apr. 28, 2015), *aff'd*, 128 A.3d 991 (Del. 2015).

85 *Litman v. Prudential-Bache Prop., Inc.*, 1993 WL 5922, at *3 (Del. Ch. Jan. 4, 1993); *see also Ishimaru v. Fung*, 2005 WL 2899680, at *12 (Del. Ch. Oct. 26, 2005) (quoting *Litman*, 1993 WL 5922, at *3).

86 634 A.2d 927, 934 (Del. 1993).

the demand; *Aronson v. Lewis*[87] applies when the plaintiff challenges an action taken by the general partner that would consider the demand. Because Plaintiff alleges the Company was harmed by the General Partner's inaction, the parties agree *Rales* applies to the instant case.

To successfully plead demand futility under *Rales*, plaintiffs in the limited partnership context must allege particularized facts raising a reasonable doubt that "the [general partner] could have properly exercised its independent and disinterested business judgment" in response to the demand.[88] Plaintiff here focuses its allegations on showing that the General Partner has a disabling interest. One way of showing "a disabling interest for pre-suit demand purposes" is to demonstrate that the general partner "faces a 'substantial likelihood' of liability in connection with the derivative claim(s) asserted against it."[89] The primary demand futility inquiry in this case, then, is whether it is substantially likely that Plaintiff's claims would subject the General Partner to liability and thus disable it from considering demand.

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87 473 A.2d 805, 811 (Del. 1984).

88 634 A.2d at 934.

89 *Wenske*, 2018 WL 3337531, at *18.

1. The General Partner faces a substantial likelihood of liability for breach of contract as alleged in Count I

Count I of the Amended Complaint alleges the General Partner breached its contractual duties by failing to appropriately monitor the integrity of Plains' oil pipelines, which led to damages stemming from the Oil Spill.[90] Plaintiff asserts that the General Partner "acted in bad faith when [it] utterly failed to ensure that a reasonable information and reporting system existed with respect to a compliance issue intrinsically critical to Plains' business operations."[91]

Plaintiff's claim resembles oversight liability claims litigated in the corporate context under the framework in *In re Caremark International Derivative Litigation*.[92] While this case concerns a master limited partnership, the parties applied *Caremark* in briefing and oral argument.[93] This opinion does not rule that a general partner's contractual requirement to act in "the best interests of the [p]artnership" imposes duties identical to those identified in *Caremark*.[94]

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90 Am. Compl. ¶¶ 276-77.

91 Pl.'s Answering Br. 19.

92 698 A.2d 959 (Del. Ch. 1996).

93 Defs.' Opening Br. 27; Pl.'s Answering Br. 26. Defendants questioned the use of *Caremark*'s framework for the first time at oral argument, but they also stated that they were "happy to embrace the *Caremark* framework" for the purposes of resolving this Motion. Oral Arg. Tr. 11:20-12:2; 12:3-4.

94 LPA § 7.10(d).

Nonetheless, this opinion does as the parties have and analyzes these contract-based oversight liability claims using *Caremark*'s established framework.

"A *Caremark* claim is a difficult one to prove."[95] As often noted, oversight liability "is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[96] In order to succeed under *Caremark*, Plaintiff must show that either "(a) the [general partner] utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling [itself] from being informed of risks or problems requiring [its] attention."[97] Either of *Caremark*'s two prongs, if proven, support a finding of bad faith by revealing an "unconsidered failure of the [general partner] to act in circumstances in which due attention would, arguably, have prevented the loss."[98]

Plaintiff primarily alleges the General Partner's inaction falls within the first *Caremark* prong because it did not create any "board-level system of monitoring and reporting . . . to detect, report, and respond to [pipeline corrosion]."[99] To support its

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95 *Guttman v. Huang*, 823 A.2d 492, 505-06 (Del. Ch. 2003).

96 *Stone v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (quoting *Caremark*, 698 A.2d at 968).

97 *Id.* at 370 (citing *Caremark*, 698 A.2d 959).

98 *Caremark*, 698 A.2d at 967.

99 Pl.'s Answering Br. 28.

claims under the difficult oversight liability theory, Plaintiff draws parallels between this case and the Supreme Court's recent decision in *Marchand v. Barnhill*,[100] which stands out as a recent rare example of a *Caremark* claim surviving a motion to dismiss.

In *Marchand*, the Supreme Court considered derivative claims against Blue Bell Creameries following a listeria outbreak.[101] The plaintiff claimed that Blue Bell failed to implement any reporting system for food safety compliance and, therefore, breached its duty of loyalty under *Caremark*.[102] The Supreme Court reversed the dismissal of plaintiff's derivative suit under Rule 23.1, holding that "[w]hen a plaintiff can plead an inference that a board has undertaken no efforts to make sure it is informed of a compliance issue intrinsically critical to the company's business operation, then that supports an inference that the board has not made the good faith effort that [the first prong of] *Caremark* requires."[103]

The Supreme Court highlighted plaintiff's allegations that Blue Bell's board conducted no "regular discussion of food safety issues;" there was "no regular process or protocols that required management to keep the board apprised of food

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100 212 A.3d 805 (Del. 2019).

101 *Id.* at 807.

102 *Id.*

103 *Id.* at 816, 822.

safety compliance practices;" the board received and apparently ignored "reports that contained what could be considered red, or at least yellow, flags;" the board was given only "certain favorable information about food safety;" and "no board committee that addressed food safety existed."[104]

Based on the allegations, the Supreme Court concluded the plaintiff adequately pled that "no reasonable compliance system and protocols were established as to the obviously most central consumer safety and legal compliance issue facing the company [and] that the board's lack of efforts resulted in it not receiving official notices of food safety deficiencies for several years."[105] Thus, the plaintiff's claims survived the motion to dismiss stage.

Plaintiff here argues that the General Partner's failure is analogous to that of the board in *Marchand*. As "one of North America's largest energy pipeline operators," Plains acknowledges that its "'primary operational emphasis' [is] on pipeline integrity and maintenance."[106] Plaintiff alleges that despite this fact, the General Partner, like Blue Bell's board of directors in *Marchand*, ignored the

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104 *Id.*

105 *Id.* at 824.

106 Am. Compl. ¶¶ 11, 31, 56-62.

Company's most "intrinsically critical" business operation and made no good faith effort to implement a board-level pipeline integrity reporting system.[107]

While Plaintiff did not undertake a Section 220 investigation in this case, the Amended Complaint benefited from the fully-developed record in the recently concluded California Action, a state criminal case based on the same Oil Spill at issue in this litigation.[108] Drawing from the California Action, Plaintiff relies heavily on the trial testimony of Defendant Gregory Armstrong, Plains' CEO and the chairman of the Board. Armstrong testified extensively about executive-level and board-level pipeline integrity review.[109] Thus, this case presents the unusual scenario where Plaintiff, at the motion to dismiss stage, has access to extensive testimony from the company's CEO and Board chairman about the contested issue.

First, Armstrong maintained that Plains used an executive committee to ensure the Company was "in compliance with all the rules and regulations," but he stated that decisions regarding pipeline integrity were made "at lower levels of the company."[110]

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107 Pl.'s Opening Br. 34.

108 Am. Compl. ¶¶ 1-4.

109 Pl.'s Reply Supp. Mot. Requesting Judicial Notice of Criminal Conviction Ex. C.

110 *Id.* at 14:21-15:3.

Next, Armstrong testified about the Board's role in monitoring and establishing policies for integrity pipeline management:

> Q. Okay. What about the Plains -- the actual board of directors, those meetings themselves then? Do you discuss integrity management process?
> A. No, not the process.
> Q. What about the policy or needs that might need to be addressed relating to integrity management program?
> A. That's not discussed at the board level.
> Q. Those -- those would be covered at the monitoring activities to see that they're on track level?
> A. I'm not sure I understand your question.
> Q. So what if something is going on with the -- you said the executive VP of operations looks to monitor the activities from the beginning of the year to see if they're on track. At what point does that discussion get to the board of directors about whether or not those activities are indeed on track or not?
> A. So we have quarterly board meetings. They're regularly scheduled board meetings. As part of the package of information that's provided to the board in advance of each meeting, they get a version -- in some cases, it may be the same report just the most current one, included in their director package that would show, again, the projected activity level at the beginning of the year and then in each update, how we're doing relative to that activity level.[111]

Further, Armstrong testified that there was no "subcommittee of the board of directors that [met] to discuss the integrity management process"[112] and that

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111 *Id.* at 17:7-18:4.

112 *Id.* at 18:21-24.

decisions to conduct detailed reviews of problematic pipelines were "made probably three or four, maybe five or six levels down" the Company hierarchy.[113] Finally, Armstrong stated that he never attended an integrity management meeting and was not even "aware that that there were integrity management meetings to be held."[114]

Plaintiff argues that, as Armstrong testified, the Board never discussed pipeline integrity policies or management and, therefore, wholly failed to "establish a board-level system of monitoring and reporting."[115] Plaintiff further asserts that the Board failed to "receive much less review reports concerning pipeline integrity,"[116] that it "repeatedly ignored crucial safety issues over a period of years,"[117] that no "subcommittee of the board of directors" discussed integrity management,[118] and that Plains' audit committee was a sham.[119] Finally, Plaintiff

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113 *Id.* at 63:12-22.

114 *Id.* at 16:27-17:6.

115 Pl.'s Answering Br. 26.

116 Am. Compl. ¶ 221.

117 Pl.'s Answering Br. 25.

118 Pl.'s Reply Supp. Mot. Requesting Judicial Notice of Criminal Conviction Ex. C, at 18:21-24.

119 Pl.'s Answering Br. 33.

alleges that "Plains and its limited partners suffered damages because of Defendants' sustained and systematic failure to exercise pipeline integrity oversight."[120]

Defendants respond that Armstrong's testimony and the facts in the Amended Complaint conclusively show that "the General Partner established an extensive system of oversight for maintaining Plains' pipelines."[121] To that end, Defendants argue that demand is not futile for two reasons: first, the Board established an audit committee to oversee compliance and update the Board on regulatory issues; and second, the Board reviewed reports showing activity levels of company sectors and containing explanations when sectors did not meet their target activity levels.

a. The audit committee

Defendants assert that, unlike the board of directors in *Marchand*, the Board here created an audit committee to monitor all "legal and regulatory requirements," including pipeline maintenance.[122] Plains' audit committee, comprised of three Director Defendants, was required by its charter to meet "on at least a quarterly basis" and to "(i) obtain reports from management, the vice president of internal audit, and the independent auditor . . . [;] (ii) review reports, disclosure, and affiliated

120 *Id.* at 3.

121 Defs.' Opening Br. 29.

122 Am. Compl. ¶ 231.

party transactions; and (iii) advise the Board with respect to policies and procedures regarding compliance by the Company with applicable laws and regulations."[123]

Defendants argue that the Board's creation of the audit committee demonstrates that the General Partner "took steps to monitor pipeline activity."[124] Previously, this Court has found that "the existence of an audit committee . . . is some evidence that a monitoring system was in place . . . ."[125] And, as Defendants highlight, "[i]n decisions dismissing *Caremark* claims, the plaintiffs usually lose because they must concede the existence of board-level systems of monitoring and oversight such as a relevant committee . . . ."[126] Thus, Defendants argue that the audit committee's existence negates Plaintiff's claim that "oversight measures were not in place."[127]

Plaintiff responds that the audit committee was not a good faith oversight measure because it never actually performed any oversight. Contrary to the audit committee's duty under its charter to "advise the Board with respect to policies and procedures," Plaintiff points to Armstrong's testimony that the Board never

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123 *Id.* ¶¶ 231, 232.

124 Defs.' Reply Br. 16.

125 *Ash v. McCall*, 2000 WL 1370341, at *15 n.57 (Del. Ch. Sept. 15, 2000).

126 *Marchand*, 212 A.3d at 823.

127 Defs.' Reply Br. 16.

"discuss[ed] [the] integrity management process"[128] nor the "policy or needs that might need to be addressed relating to the integrity management program."[129] Plaintiff interprets Armstrong's testimony to mean that the audit committee did not perform the functions described in its charter and that it abdicated its duties regarding board-level review of pipeline integrity.[130] Based on the record before me, Plaintiff's interpretation is reasonable.

While the audit committee's charter dictates what the audit committee was supposed to do, it says nothing about what it actually did. Defendants can point to nothing in the Amended Complaint, any document incorporated by reference, or anything else properly before me showing that the audit committee actually conducted pipeline integrity review.[131] To the contrary, Armstrong's testimony that the Board never discussed pipeline integrity supports the inference made by Plaintiff that the audit committee failed to perform its duties. Direct testimony from the Board chairman that the audit committee never performed its duties under the charter

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128 Pl.'s Reply Supp. Mot. Requesting Judicial Notice of Criminal Conviction Ex. C, at 17:7-10.

129 *Id.* at 17:11-13.

130 Pl.'s Answering Br. 33-34.

131 Notably, though Armstrong was questioned at length in the California Action about pipeline integrity, oversight, and regulatory maintenance, he never once mentioned the activities, or even the existence of, the Board's audit committee. Pl.'s Reply Supp. Mot. Requesting Judicial Notice of Criminal Conviction Ex. C.

supports Plaintiff's interpretation that, like in *Marchand*, "no system of board-level compliance monitoring and reporting existed" for pipeline integrity despite the existence of the audit committee.[132]

The Amended Complaint's references to Armstrong's testimony and to the audit committee's existence present "factual allegations from which inferences reasonably could be drawn in favor of either the plaintiffs or the defendants."[133] I do not know what the audit committee actually did or did not do; I hold only that Plaintiff reasonably infers from Armstrong's testimony that the Board's audit committee never assumed its reporting role with respect to pipeline integrity. "At this stage of the case, I must credit this inference, even if I believe it more likely that the directors acted in good faith."[134]

b. Activity level reports

Relying on Armstrong's testimony, Defendants argue that while the "Board delegated the 'field [observational work]' for . . . pipeline integrity management to 'multiple levels' down Plains' corporate structure," the Board itself "received materials that would compare 'projected activity level[s]' for pipeline integrity

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132 *Marchand*, 212 A.3d at 822.

133 *La. Mun. Police Empls.' Ret. Sys. v. Pyott*, 46 A.3d 313, 317 (Del. Ch. 2012) *rev'd on other grounds*, 74 A.3d 612 (Del. 2013).

134 *Id.* at 356.

management to actual activity levels."[135] Further, the activity-level reports included "[a]n explanation if there [was] a material variance" in sector activity levels.[136]

Defendants infer from the testimony that the activity-level reports and material variance explanations in those reports would include "materials specifically regarding pipeline integrity."[137] Thus, Defendants argue the Board's review of activity-level reports "establishes that Plains' Board received reports specifically about the very risk that Plaintiff asserts went unmonitored."[138]

However, Plaintiff also relies on Armstrong's testimony and contends that the activity-level reports were devoid of any substantive information concerning pipeline integrity.[139] Armstrong provided little detail about the board-level reports in his testimony, but he did describe them as "graphs that show what [Plains'] projected activity level was and how [the company sector was] doing against that."[140] The description of activity-level graphs does not contradict Plaintiff's assertion that

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135 Defs.' Opening Br. 29.

136 Defs.' Reply Br. 15-16.

137 *Id.* at 18.

138 *Id.* at 15.

139 Pl.'s Answering Br. 34.

140 Pl.'s Reply Supp. Mot. Requesting Judicial Notice of Criminal Conviction Ex. C., at 16:7-16, 23:7-21.

the reports were devoid of substance, and Armstrong's testimony that the Board never reviewed pipeline integrity policy and procedure supports that inference.[141] Further, nowhere in Armstrong's testimony concerning the "material variance" explanations in the reports did he state the Board ever considered pipeline integrity variances or that the explanations contained more substantive information than the general activity-level reports.[142]

Thus, because Armstrong clearly stated that pipeline integrity was "not discussed at the board level," Plaintiff reasonably infers that that the board-level reports did not actually address pipeline integrity. [143] As Plaintiff is entitled to have all reasonable inferences taken in its favor, I am bound at this stage to accept Plaintiff's well-pled allegation that the Board did not "receive [or] review reports concerning pipeline integrity."[144]

2. Plaintiff successfully pleads demand futility as to the General Partner

Defendants submit reasonable interpretations of the facts in the Amended Complaint, perhaps even the most reasonable interpretations. But they are not the

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141 Pl.'s Answering Br. 33-34.

142 *Id.* at 16:7-16, 23:7-21.

143 Pl.'s Reply Supp. Mot. Requesting Judicial Notice of Criminal Conviction Ex. C., at 17:11-14.

144 Pl.'s Answering Br. 34 (citing Am. Compl. ¶ 221).

only reasonable interpretations. Rule 23.1 requires plaintiffs to plead specific facts supporting their claims, but "once a plaintiff pleads particularized allegations, then the plaintiff is entitled to all 'reasonable inferences [that] logically flow from [those] particularized facts . . . .'"[145] Because "[t]he requirement of factual particularity does not entitle a court to discredit or weigh the persuasiveness of well-pled allegations," I credit all of Plaintiff's well-pled allegations as true and grant all reasonable inferences, even unlikely inferences, in its favor.[146]

Thus, the Amended Complaint alleges particularized facts that the General Partner, acting through the Board, violated its contractual duty to Plains by consciously failing to oversee its mission-critical objective of maintaining pipeline integrity.[147] As the Supreme Court stated in *Marchand*, "[a]lthough *Caremark* may not require as much as some commentators wish, it does require that a board make a good faith effort to put in place a reasonable system of monitoring and reporting

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145 *Pyott*, 46 A.3d at 351.

146 *Id.* at 351, 358 ("It may be that the directors in fact acted in good faith . . . but at the pleadings stage I do not believe that I can adopt a defendant-friendly interpretation of the plaintiffs' allegations.").

147 Notably, the requirement that plaintiffs demonstrate a "substantial likelihood of liability" to survive under Rule 23.1 does not mean that they have to demonstrate a reasonable probability of success on the claim." *Pyott*, 46 A.3d at 351 (citing *Rales*, 634 A.2d at 935). Instead, "[p]laintiffs need only 'make a threshold showing, through the allegation of particularized facts, that their claims have some merit.'" *Id*. (citing *Rales*, 634 A.2d at 934).

about the corporation's central compliance risks."[148] As the Amended Complaint establishes that the General Partner faces a substantial likelihood of liability for breaching its contactual duty in the LP Agreement, Defendants' Motion to Dismiss Count I under Rule 23.1 must be denied.[149]

3. Plaintiff's failure to pursue a Section 220 investigation does not invalidate its well-pled allegations

Defendants also argue their Motion should be granted because Plaintiff did not seek books and records under Section 220 of the Delaware General Corporation Law before filing this derivative action.[150] Defendants assert that Plaintiff's heavy reliance on Armstrong's testimony is due to the fact that Plaintiff never sought board-level materials through Section 220 and, therefore, "Plaintiff has not used the tools available to determine what steps were taken by the board."[151]

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148 *Marchand*, 212 A.3d at 824.

149 Demand is excused under Rule 23.1 because the General Partner faces a substantial likelihood of liability for breach of contract; *a fortiori*, the breach of contract claim also survives Defendants' Motion under Rule 12(b)(6). Since "the standard under Rule 12(b)(6) is less stringent than the standard under Rule 23.1, a complaint that survives a Rule 23.1 motion to dismiss generally will also survive a Rule 12(b)(6) motion to dismiss, assuming that it otherwise contains sufficient facts to state a cognizable claim." *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 285 (Del. 2003); *see also McPhadden v. Sidhu*, 964 A.2d 1262, 1270 (Del. Ch. 2008) ("[A] complaint that survives a motion to dismiss pursuant to Rule 23.1 will also survive a 12(b)(6) motion to dismiss[.]").

150 Defs.' Opening Br. 9-10.

151 Defs.' Reply Br. 18 n.9.

"Delaware courts have strongly encouraged stockholder-plaintiffs to utilize Section 220 before filing a derivative action, in order to satisfy the heightened demand futility pleading requirements of Court of Chancery Rule 23.1."[152] While Plaintiff here did not pursue a Section 220 investigation before filing its Amended Complaint, it did have access to a fully developed criminal trial record involving the same Oil Spill at issue in this derivative litigation. That record, as utilized by the Plaintiff, contained sufficient evidence to survive this Motion to Dismiss.

III. CONCLUSION

Based on the foregoing, Defendants' Motion to Dismiss is DENIED as to Count I against PAA GP LLC, the General Partner, and GRANTED as to all other claims and Defendants.

IT IS SO ORDERED.

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152 *King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1145 (Del. 2011).