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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM ALLEN, Plaintiff Below-Appellant, v. EL PASO PIPELINE GP COMPANY, L.L.C., RONALD L. KUEHN, JR., JAMES C. YARDLEY, JOHN R. SULT, DOUGLAS L. FOSHEE, D. MARK LELAND, ARTHUR C. REICHSTETTER, WILLIAM A. SMITH, and EL PASO PIPELINE PARTNERS, L.P., Defendants Below-Appellees, and EL PASO PIPELINE PARTNERS, L.P., Nominal Defendant Below-Appellee.	)	No. 399, 2014 COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 7520-VCL

APPELLEES' ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

Plaintiff below-appellant William Allen ("Plaintiff") initiated this action in the Court of Chancery alleging that defendants below-appellees breached express and implied duties under the El Paso Pipeline Partners, L.P. ("EPB" or the "Partnership") limited partnership agreement ("LPA") in approving a "drop-down" asset purchase ("Drop-Down" or "Transaction"). In that purchase, EPB acquired a 25% interest in Southern Natural Gas Co. ("SNG") from El Paso Corporation ("El Paso"), the indirect parent company of EPB's general partner, El Paso Pipeline GP Company, L.L.C. ("General Partner" or "EPB GP"). Plaintiff concedes that EPB paid a fair price for the Transaction. Plaintiff also concedes that distributions received by common unitholders increased as a result of the Transaction, and that the Transaction conferred a benefit on the common unitholders. Indeed, Plaintiff himself purchased additional common units in EPB following the SNG purchase, choosing to double his investment in EPB. Nevertheless, Plaintiff argues that defendants acted in bad faith because, he contends, the benefit conferred upon the common unitholders was not sufficiently accretive.

Plaintiff's argument is directed at a common feature in master limited partnership agreements: incentive distribution rights ("IDRs"). The purpose of IDRs is to incentivize the general partner to grow distributions for the benefit of all partners. Although Plaintiff concedes a fair price was paid, he argues that the

independent Conflicts Committee of EPB formed to evaluate and approve the Drop-Down acted in bad faith by failing to employ his expert's novel, litigation-driven valuation of the impact of the IDRs. In other words, he claims that the Transaction did not meet an objective standard of fairness to the limited partners.

Plaintiff seeks to impose a standard of conduct on the Conflicts Committee that is not supported by the express language of the LPA. The contractual standard is "good faith," which is expressly defined in the LPA as a subjective belief that the transaction "is in the best interests of the Partnership." There is no separate duty for the Conflicts Committee to determine that the price paid is fair to the common unitholders (even though they did make such a determination). And there is certainly no requirement that the Committee perform a novel valuation exercise posited by Plaintiff. Rather, the Committee is charged with evaluating whether the Transaction is, in their subjective good faith belief, in the best interest of the Partnership. As the Court of Chancery observed, Plaintiff failed to raise a genuine issue of material fact as to the Conflicts Committee's compliance with the standard of conduct established by the LPA.

For the reasons set forth herein and in the Court of Chancery's Opinion, Plaintiff's attempt to re-write the LPA through this action should be rejected.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not err in holding that, under the governing standard for "Special Approval" set forth in the LPA, the Conflicts Committee was not obligated to determine that the Drop-Down was in the best interests of the limited partners as a class. As the court held, the LPA establishes a subjective good faith standard requiring the Committee to determine that the Drop-Down was in the "best interests of the Partnership." No genuine issue of material fact exists to question the Committee's good faith compliance with this contractual standard. *See* Point I, *infra*.

2. Denied. As the Court of Chancery held, Plaintiff offered no genuine issue of material fact as to whether the Committee provided Special Approval in good faith. Under the LPA, the Committee is presumed to have acted in good faith, and it is Plaintiff's burden to rebut that presumption. As the court below determined and the record reflects, Plaintiff failed to identify any evidence from which a fact-finder could reasonably conclude that the Committee did not believe the Drop-Down was in the best interests of the Partnership. *See* Point II.

3. Denied. The Court of Chancery properly held that any purported deficiencies in Tudor's fairness opinion would fail to support a claim for breach of the implied covenant of good faith and fair dealing in connection with Section 7.9(a) of the LPA governing Special Approval. As the court explained, Section

7.9(a) does not require reliance on a fairness opinion to support Special Approval. Rather, the LPA requires only that the Committee subjectively believe that the relevant transaction is in the best interests of the Partnership. *See* Point III.

4. Denied. The Court of Chancery correctly held that, because the LPA completely eliminates all fiduciary duties and supplants those with a contractually defined standard of good faith, Plaintiff's aiding and abetting claims are not viable. The LPA establishes a purely contractual relationship among the Partnership, General Partner, and limited partners. As the court below explained, under well-established Delaware law, there are no legally cognizable aiding and abetting claims for breach of a purely contractual relationship. *See* Point IV.

5. Denied. The Court of Chancery did not "resolv[e] conflicts, weigh[] evidence, decid[e] upon competing inferences and mak[e] factual findings in favor of Defendants" in granting defendants' motion for summary judgment. Rather, adhering to the applicable standard of review on summary judgment, the court below made inferences in Plaintiff's favor and viewed the evidence "in the light most favorable" to Plaintiff. Notwithstanding this plaintiff-friendly standard, Plaintiff failed to adduce any evidence of a triable issue of fact. Defendants are entitled to summary judgment as a matter of law. *See* Point II, *infra*.

STATEMENT OF FACTS

A. The Parties

Plaintiff is the purported owner of 200 EPB limited partnership units. A1372 at ¶ 10; B235 (Allen 20:6-8).

Class and nominal defendant EPB is a publicly-traded master limited partnership, or MLP, which owns and operates natural gas transportation and storage assets throughout the United States. A1375 ¶ 25. Defendant EPB GP is EPB's general partner. A1372 ¶ 12. At the time of the Transaction, EPB GP was a wholly-owned indirect subsidiary of non-party El Paso. Through EPB GP and its affiliates, El Paso owned (i) a 2% general partner interest in EPB, (ii) all of the incentive distribution rights, or IDRs, issued by EPB, and (iii) approximately 88,400,059, or 48.9%, of EPB's limited partnership units. B54. At all relevant times, EPB GP's board of directors (the "EPB Board") was comprised of defendants Douglas L. Foshee, D. Mark Leland, James C. Yardley, John R. Sult, Arther C. Reichstetter, Ronald L. Kuehn, and William A. Smith. Op. at 7.

B. The Role Of IDRs In Achieving A Primary Purpose Of An MLP

As is common in many MLP operating agreements, the LPA provides EPB GP with IDRs, designed to incentivize EPB GP to grow distributions. IDRs are a contractual right entitling EPB GP to an increasing percentage of the cash distributed by the Partnership if the cash flow distributed to the limited partners increases in excess of specific target distribution amounts. A984-1011, A1048-50

(LPA §§ 1.1, 6.4).[1] For example, if the distributions exceed the 50% target amount, EPB GP receives 50% of the amount of the distribution that exceeds that target (not, to be clear, 50% of the entire distribution). IDRs thereby align the general partner's and limited partners' interests, creating a "win-win situation" that incentivizes the general partner to manage the MLP to maximize cash flow for the limited partners.[2] As an EPB limited partner, Plaintiff accepted the terms and conditions of the LPA, including those setting forth the terms of the IDRs. *See* A1071 (§ 10.4(a)).

C. The LPA Eliminates Fiduciary Duties And Establishes A Purely Contractual Standard Of Conduct

As authorized by 6 *Del. C.* § 17-1101(d), the LPA eliminates all common law duties that EPB GP and its board might otherwise owe to EPB or its limited partners. Section 7.9(e) of the LPA provides:

> Except as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner or Assignee and the provisions of this Agreement, to the extent that they restrict, eliminate or otherwise modify the duties and liabilities, including fiduciary duties, of the General Partner or any other Indemnitee otherwise existing at law or in equity, are agreed by the Partners to replace such other duties and liabilities of the General Partner or such other Indemnitee.

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[1] John Goodgame, *Master Limited P'ship Governance*, 60 Bus. Law. 471, 476-79 (2005); B168 (Sult 36:22-24).

[2] *Lonergan v. EPE Hldgs., LLC*, 5 A.3d 1008, 1012 (Del. Ch. 2010). IDRs are a "form of pay for performance, with performance measured in distributable cash" to the limited partners.

A1063. In place of common law duties, Section 7.9(b) of the LPA imposes a contractual good faith standard for any actions taken by the General Partner or its board and expressly disclaims "any other or different standards (including fiduciary standards) imposed by [the LPA], any Group Member Agreement, any other agreement contemplated [by the LPA] or under the Delaware Act or any other law, rule or regulation or at equity." A1061-62.

Section 7.9(a) of the LPA governs the resolution of all potential conflicts of interest between El Paso or the General Partner, on the one hand, and EPB or its limited partners, on the other. Approval of any potential conflict transaction "*shall not* constitute a breach" of the LPA or of any stated or implied duties on the part of the General Partner or its board, if one of four stated conditions is met. *Id.* (emphasis added). "Special Approval," the first condition (and the one at issue here), is defined as "approval by a majority of the members of the Conflicts Committee acting in *good faith*." A1008. Section 7.9(b), in turn, provides that, "[i]n order for a determination or other action to be in 'good faith' for purposes of this Agreement, the Person or Persons making such determination . . . must believe that the determination or other action is in the best interests of the Partnership." A1062. As this Court held in *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. 2013), Section 7.9(b) thus establishes a *subjective* good faith standard.

Section 7.9(a) further provides that, if Special Approval is sought with respect to a transaction, then "it shall be presumed that, in making its decision, the Conflicts Committee acted in good faith." A1061-62. Accordingly, any person seeking to challenge Special Approval must overcome a rebuttable presumption that the Committee acted in subjective good faith.

D. The Conflicts Committee Evaluates The Challenged Transaction

On February 8, 2011, El Paso proposed to drop down to EPB a 22% general partner interest in SNG for a purchase price of $587 million, excluding debt, with an option to purchase an additional 3% interest in SNG (for a total 25% interest). A1101. In response to the proposal, the EPB Board resolved to form a Conflicts Committee, comprised of Reichstetter, Smith, and Kuehn. The Committee was charged and empowered "to evaluate and assess whether the Transaction is fair and reasonable to the Partnership and, if the Conflicts Committee so determines, (a) to approve the Transaction as provided by Section 7.9(a) of the Limited Partnership Agreement and (b) to make a recommendation to the Board whether or not to approve such terms and conditions of the Transaction." A1098.

Plaintiff does not challenge the independence or experience of the members of the Conflicts Committee. It is undisputed that each of the Committee members brought a wealth of experience to the EPB Board. Also, at the time of the Transaction, Reichstetter owned 110,692 EPB limited partner units, 100,000 of

which he purchased in connection with EPB's 2007 IPO because of his belief that "independent directors in particular ought to have … some 'skin in the game,'" thereby aligning their interests with the public unitholders. A263-64 at 41:22-42:5-9, 49:19-42:1. Kuehn owned 70,692 limited partnership units. A518. The Committee retained Akin Gump Strauss Hauer & Feld LLP and Tudor, Pickering, Holt & Co. ("Tudor") as its independent legal and financial advisors. Op. at 7; A267-68. Each of the firms advised the Committee in prior drop-downs of SNG interests and were familiar with both the asset and its market. Op. at 21. Plaintiff has not challenged the independence or qualifications of the Committee's advisors.

As the record demonstrates beyond dispute, the Committee undertook a diligent and well-informed process. *Id.* at 8-10, 20-21. It met formally six times, relied on and probed Tudor for multiple analyses and research, and considered all material aspects of the Transaction, including the IDRs. *See generally* A1121-54 (Committee meeting minutes). Indeed, aware that EPB had just crossed over into the "high splits"—MLP parlance for the 50% incremental distribution level—the Committee requested analysis from Tudor specifically relating to IDRs, including analysis of precedent MLP drop-down transactions and the multiples paid by MLPs to their corporate sponsor as the general partner moved into progressively higher splits under the IDRs. A1155. The Committee also asked Tudor to research which sponsors of the fifteen largest MLPs had voluntarily given up their

rights in precedent transactions to take the full percentages to which they were entitled under their IDRs. A1156. In response, Tudor analyzed and provided information regarding, among other things, publicly disclosed transactions involving adjustments to a general partner's IDRs in relation to the accretion of distributable cash flow resulting from those transactions. A1155-56. The Committee's probing of analysis and information relating to the impact of the IDRs is reflected in multiple contemporaneous emails (*e.g.*, A1155, A1156) and throughout Committee meeting minutes (*e.g.*, A1132, A1142). Moreover, Tudor's presentations to the Committee specifically included analysis of the accretion of distributable cash flows to the limited partners and the General Partner, respectively, as a result of the Transaction. A1162; A1184; B33.[3]

Aware that "cash distributions are for the most part what drives value in the world of MLPs," the Committee relied primarily on Tudor's discounted cash flow analyses. A260 (Reichstetter 27:18-28:24). However, the Committee members also were advised and understood that such analysis calculates free cash flows available to an entity or asset over a number of years, discounting back to the present. *See* A178, A187, A190 (Simmons 91:9-92:22, 127:5-7, 140:13-17). It calculates the value of an entire business (or the equity portion of that business), not the value attributable to a particular *class* of stakeholders. A268-69

[3] A176 (Simmons 83:1-4) (Tudor's pro forma analysis "look[ed] at the levels of accretion to the distributable cash flow available to the LP unitholders after giving consideration to the IDRs").

(Reichstetter 61:22-62:16, 64:9-23). As Reichstetter explained, the cash flows ultimately attributable to either the general partner's IDRs or the limited partners comes *out of* the entity's available cash flows. Any analysis attempting to measure the portion of cash flows to which any particular group of stakeholders will be entitled is necessarily subsequent to the discounted cash flow valuation. *Id.* This is exactly how Tudor analyzed the Transaction—measuring first the value of the asset (*with a discounted cash flow* valuation, among other analyses) and, second, the levels of distributable cash flows attributable to the limited partners and the General Partner, respectively, as a result of the Transaction, taking into account the IDRs (*with a distributable cash flow accretion analysis*). A186 at 122:6-8; A191 at 143:9-145:16; B1-B26, B33.

Contrary to Plaintiff's unfounded characterizations, none of the Committee members testified or suggested they "knowingly" relied on "flawed" analysis from Tudor because it failed to account for IDRs in its discounted cash flow model. OB at 12-14, 26-28. The Committee testified uniformly that the impact on cash flows attributable to the IDRs, and therefore its effect on the value of the Transaction for the limited partners, is properly valued with a distributable cash flow accretion analysis, exactly as Tudor did. A37-38 at 70:21-71:6; A103-04 at 88:18-90:2; A268-69 at 61:22-62:16, 64:9-23. Indeed, as Plaintiff's expert acknowledged,

"valuing" IDRs in a discounted cash flow model (as Plaintiff advocates) would have been highly unusual and non-industry standard. *Infra* at 24 (or 25).

Based upon its independent review, including Tudor's discounted cash flow and distributable cash flow accretion analyses, the Committee determined that the Transaction would be accretive to the unaffiliated unitholders and in the best interests of the Partnership.[4] Accordingly, the Committee approved the Transaction on March 3, 2011. A1146-54. Following the Transaction, distributions to EPB's unitholders increased with each quarterly distribution.[5]

Plaintiff has conceded that EPB paid a fair price to acquire a 25% interest in SNG. Moreover, Plaintiff concedes that the Transaction benefitted the unaffiliated unitholders, as distributions received by the holders of common units increased. Plaintiff nevertheless contends that, when taking the IDRs into account, the benefit received was not substantial enough. As the Court of Chancery correctly held, and as discussed below, Plaintiff's argument finds no support under the express terms of the LPA and he cannot circumvent those terms by relying on the implied covenant of good faith and fair dealing.

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[4] *See* A261 at 31:12-16 (concluding Transaction would give EPB "more asset value and inherent value" and "would give the MLP an increased stability to increase . . . distributions"); A32 at 51:16-25 (concluding Transaction fair because of "accretion, the quality of the asset, [SNG's] future prospects, the expansions on the books, and a knowledge of [SNG's] market"); A108 at 106:8-25 (Committee's determination based on "work that Tudor Pickering had done, both in terms of the valuation as well as the accretion analysis," and "belief that [SNG] is . . . a first-class interstate pipeline asset with a terrific market").

[5] *See* B241 (Allen 43:16-24); A287 (Reichstetter 135:4-7).

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY HELD THAT THE LPA ESTABLISHES A SUBJECTIVE GOOD FAITH STANDARD REQUIRING THE COMMITTEE TO DETERMINE WHETHER A CONFLICT TRANSACTION IS "IN THE BEST INTERESTS OF THE PARTNERSHIP."

A. Question Presented

Did the Court of Chancery correctly conclude that the governing standard for Special Approval under the LPA was the Committee members' subjective good faith belief that the Drop-Down was "in the best interests of the Partnership"?[6]

B. Scope of Review

The Court of Chancery's holding is reviewed by this Court *de novo*. *Dabaldo v. URS Energy & Constr.*, 85 A.3d 73, 77 (Del. 2014).

C. Merits of Argument

Plaintiff contends that the Court of Chancery erred in applying the "good faith" standard governing Special Approval of conflict transactions, but the court's decision adheres to the plain language of the LPA, in accordance with bedrock principles of Delaware contract law and the holdings of this Court.

1. The Court of Chancery Properly Interpreted the LPA's Express Contractual Standard for Special Approval

As permitted under Delaware law, the LPA eliminates all common law duties and establishes instead a purely contractual standard to govern all actions,

[6] Plaintiff does not appeal or otherwise challenge the Court of Chancery's holding that the good faith standard under the LPA is a *subjective* good faith standard. *Encore Energy*, 72 A.3d at 107.

including the Special Approval of conflict transactions. "Special Approval" is defined as the "approval by a majority of the members of the Conflicts Committee *acting in good faith*." Op. at 13 (quoting (LPA § 1.1) (emphasis added). To constitute "good faith," "the Person or Persons making such determination or taking such other action must believe that the determination or other action *is in the best interests of the Partnership*." *Id.* at 13-14 (quoting LPA § 7.9(b)) (emphasis added). Thus, to have properly conferred Special Approval here—*i.e.*, in "good faith" as defined in the LPA—the Committee must have subjectively believed that the Drop-Down was "in the best interests of the [P]artnership." *See Encore Energy*, 72 A.3d at 107.

Section 7.9(a) does not require the Committee to employ a particular process to avail itself of the rebuttable presumption of good faith. Rather, in requiring the Committee to determine in its subjective belief whether a transaction is "in the best interests of the Partnership," the LPA affords the Committee broad discretion. *See In re K-Sea Transp. Ptnrs. L.P. Unitholders Litig.*, 2012 WL 1142351, at *6 (Del. Ch.) (holding that general partner was under no requirement to ensure that merger agreement was fair and reasonable to any particular partner or class of partners where partnership agreement granted the general partner discretion to consider the various interests); *Gelfman v. Weeden Invs., L.P.*, 792 A.2d 977, 987 (Del. Ch.

2001) (holding traditional fiduciary duties inapplicable where contract gives general partner wide discretion under contractually-defined liability standard).

The interpretation Plaintiff advocates would have this Court conclude that the "best interest of Partnership" standard differs depending on the nature of the potential conflict at issue. As Plaintiff notes, however, "Section 7.9(a) of the LPA expressly contemplates that it will apply 'whenever a potential conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership, any Group Member, any Partner or any Assignee, on the other.'" OB at 19-20 (quoting LPA § 7.9(a)). Section 7.9(a) of the LPA covers all potential conflicts arising between the General Partner or its affiliates and the limited partners, and not just "between the General Partner or its affiliates and the Partnership as a whole," and it subjects them to the same single standard. OB at 20.

Plaintiff's reliance on *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400 (Del. 2013), is unavailing. *Gerber* addressed the applicability of the implied covenant of good faith and fair dealing under a provision that granted the general partner a conclusive presumption of good faith when relying on an expert opinion. The expert opinion at issue was, on its face, fundamentally flawed as, among other things, it specifically disclaimed any opinion as to the financial fairness of the consideration received in the specific transaction at issue. *Gerber*,

67 A.3d at 421. As the Court of Chancery recognized and this Court affirmed, the limited partners in *Gerber* could hardly have anticipated that the general partner would invoke the conclusive presumption provision to shield itself from liability by relying on an opinion that expressly disclaimed any opinion as to the fairness of the transaction at issue. For that reason, this Court held that the plaintiff had sufficiently alleged a possible breach of the implied covenant as it related to the terms of the conclusive presumption provision. *Id.*

This case does not present the unusual fact pattern alleged in *Gerber*. It also does not implicate the conclusive presumption provision of Section 7.10(b). The provision at issue, Section 7.9(a), defers to the Committee's discretion in forming a subjective belief that the transaction is in EPB's best interests requiring no specific approach, expert opinion, or other objective measures. *Gerber* did not purport to re-write this contractual good faith standard, as Plaintiff asks the Court to do here.

Plaintiff's reliance on court decisions interpreting the phrase "best interests of the *corporation*" is also misplaced. OB at 20 (emphasis added). The Vice Chancellor properly rejected this approach, noting that, in the corporate context, the "stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end" and, thus, a corporate board's fiduciary duties always require "directors to prefer the interests of the common stock." Op. at 16-18 (citations omitted); *see also Encore*

Energy, 72 A.3d at 106 (refusing to "import standards of conduct from corporate or tort law to govern the Conflicts Committee's negotiation process" where partnership agreement expressly eliminated fiduciary duties in favor of a contractual standard); *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 321 n.2 (Del. Ch. 1998) (same).[7]

2. Contrary To Plaintiff's Characterizations, Neither The Committee Members' Testimony Nor EPB's Public Statements Alter The Contractual Good Faith Standard

The Committee members' understanding of their obligations in connection with the Special Approval process was consistent with the LPA's good faith standard and the broad discretion afforded the Committee in evaluating "the best interests of the Partnership." Although Plaintiff relies on selected deposition testimony to suggest otherwise, the very testimony he relies on reflects that the Committee considered the fairness of the Transaction taking into account *all*

[7] Plaintiff wrongly asserts that "the Court of Chancery offered no reason to construe the same phrase ['best interests of the Partnership'] as entitling the Committee to disregard the interests of the limited partners as a class." OB at 20. Plaintiff's assertion is flatly contradicted by the court's Opinion, which devotes four pages to explaining why the corporate standard does not apply in this strictly contractual context. Op. at 16-19. Plaintiff is also wrong to state that the court held the Committee could "disregard the interests of the limited partners as a class." The court held that, consistent with the LPA's terms, the Committee could "consider the full range of entity constituencies" and "balance the competing interests of the Partnership's various entity constituencies [including those of the limited partners] when determining whether a conflict-of-interest transaction is in the best interests of the Partnership." *Id*. at 19. Such a standard makes sense in the limited partner context.

relevant factors, including the interests of the unaffiliated unitholders and the IDRs. A268 (Reichstetter 59:19-60:13); A36-37 (Kuehn 69:21-70).[8]

Similarly flawed is Plaintiff's argument that, through statements in EPB's public filings, defendants "voluntarily assumed" a duty to evaluate conflict transactions from the standpoint of the limited partners' best interests. OB at 22. First, Plaintiff's argument should be rejected because it was raised for the first time on appeal. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review ...."); *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 902-03 (Del. 1994).

Second, the public statements Plaintiff relies on—two Form 10-K's and the disclosure following completion of the Transaction—merely described the process that the Committee undertook, including (but not limited to) its consideration of the Drop-Down from the limited partners' perspective. Each of the 10-Ks, for instance, indicate simply that the Committee based its decision regarding the Transaction "in part" on an opinion that it was fair to the unaffiliated limited partners, while also describing the benefits to the Partnership. A772, A993. None

[8] *See also* A1142 (Mar. 2, 2011 meeting minutes reflecting lengthy discussion among Committee and advisors regarding impact of Transaction on future growth and level of accretion); A1132 (Feb. 24, 2011 meeting minutes noting that the Committee probed Tudor's views regarding EPB's growth rates, assumptions underlying its financial modeling, and its views regarding the accretion of distributable cash per LP unit attributable to the proposed Transaction); B1-B42; A1157-65; A1166-85 (Feb. 24, Mar. 2, and Mar. 3, 2011 Tudor presentations including analysis of EPB's equity/debt ratio, its cost of capital, its total enterprise value, and its distributions, including to the limited partners, as affected by the proposed Transaction).

of the statements reflect an intention to assume duties not expressly set forth in the LPA.

Plaintiff's reliance on *In re Cencom Cable Income Partners, L.P. Litigation*, 1997 WL 666970 (Del. Ch.), is unavailing. In *Cencom*, the general partner sought and obtained limited partner approval of a self-interested transaction based on a Disclosure Statement that stated it would retain independent counsel for the limited partners "to assure that … *the Sale Transaction would be fair* to the Limited Partners and to protect the rights of the Limited Partners in connection therewith." *Id.* at *5. Largely on the basis of this statement, the Court of Chancery held that plaintiffs had stated a claim that the general partner "voluntarily assumed a duty to ensure that [independent counsel] would fulfill these obligations and that the Limited Partners could rely on the General Partner's representations" because the general partner made the statements "in order to induce their approval." *Id.*

The disclosures Plaintiff points to here are entirely different. Unlike in *Cencom*, the Transaction did not require the approval of the limited partners. *See Sonet*, 722 A.2d at 327 (refusing to apply *Cencom* where defendants had not sought unitholder action and "there [was] no element of reliance on misleading voluntary disclosure intended to induce the unitholders' acquiescence to the proposed [transaction]"). Moreover, EPB's limited partners have notice of, and are bound by, the terms of the General Partner's IDRs, as well as the terms of the LPA

governing approval of conflict transactions. Plaintiff cannot now claim some different understanding. *Gotham Ptnrs., L.P., v. Hallwood Realty Ptnrs., L.P.*, 2000 WL 1476663, at *22 (Del. Ch.). As noted, the disclosures Plaintiff points to merely described the Committee's process and conclusions; they did not purport to establish any standard other than the standard set forth in the LPA.

Finally, Plaintiff's reliance on comments from the trial court's motion to dismiss hearing questioning whether the Committee could properly "disregard" the limited partners' interests is both misleading and unavailing. OB at 21-22. First, the Committee did not disregard the limited partners' interests but rather properly considered them in its discretion. Second, the line of questions Plaintiff points to is neither law nor a holding of the court but *a line of questions* during colloquy at a pleadings-stage hearing. The standard that applies is set forth in the LPA, not in the transcript of a motion to dismiss hearing.

II. THE COURT OF CHANCERY PROPERLY HELD THAT PLAINTIFF FAILED TO PRESENT ANY GENUINE ISSUE OF MATERIAL FACT THAT THE COMMITTEE PROVIDED SPECIAL APPROVAL IN GOOD FAITH

A. Question Presented

Did the Court of Chancery err in holding that Plaintiff failed to identify any genuine issue of material fact as to whether the Committee provided Special Approval in good faith?

B. Standard and Scope of Review

The Court of Chancery's holding on summary judgment is reviewed *de novo*. *See* Point I.B. above.

C. Merits of the Argument

As the Court of Chancery noted, it is Plaintiff's burden under the LPA to rebut the presumption that, in providing Special Approval, the Committee acted in good faith. Op. at 20 (citing LPA § 7.9(a)). Accordingly, it is Plaintiff's task to "identify some evidence from which a fact-finder could conclude that the Conflicts Committee did not believe that the Drop-Down was in the best interests of El Paso MLP." *Id.* This contractual standard of subjective good faith is dispositive, and Plaintiff failed to provide any evidence to rebut it. *Id.*

Plaintiff argues that the court "erred in holding that the LP unitholders benefitted from the Drop Down" and, purportedly on this basis, that the Committee acted in good faith. Plaintiff mischaracterizes the court's holding. The court held:

> The actions of the Conflicts Committee were consistent with individuals proceeding in subjective good faith. The Conflicts Committee retained and consulted with financial and legal advisors who were experienced in working with midstream MLPs and had specific familiarity with El Paso MLP and [SNG]. The Conflicts Committee met formally six times. Tudor attended each of the meetings and provided three presentations. The members of the Conflicts Committee asked questions about the IDRs and transactions involving MLPs in this high splits, and Tudor investigated the issues raised by the Conflicts Committee and provided answers.

Id. at 20-21. Plaintiff failed to present *any* evidence from which a fact-finder could conclude that the Committee did not believe that the Drop-Down was in EPB's best interests. *Id.*

Indeed, Plaintiff conceded below—in briefing, at argument, and through his expert report—that EPB did not overpay for the SNG interest and that the Drop-Down did not otherwise harm EPB. *Id*. at 19-20; *see* B285 (Morris 108:14-109:3) (conceding Tudor performed a reasonable estimation of fair value); B335 ("Plaintiff has *not* alleged that EPB paid above fair market value for the interest acquired in the March 2011 Drop Down."); *id.* (acknowledging "absence of harm to EPB"). Plaintiff also conceded—perhaps because it is an irrefutable fact—that distributions to limited partners increased as a result of the Drop-Down. *See, e.g.*, A1342 (Pls. Answ. Br. in Opp. to Defs. Mot. for Summ. J.) (acknowledging "modest cash flow accretion to EPB's LP units"); A1207-08 (Morris Rep. ¶¶ 54-57). These concessions, and the objective facts, preclude a finding that the Committee members believed they were acting against EPB's best interests.

Indeed, Plaintiff was unable to present anything remotely resembling the "extreme set of facts" necessary to find that the Committee consciously disregarded its duty to form a subjective belief that the Transaction was in EPB's best interests. *Encore Energy*, 72 A.3d at 106.

Plaintiff argues that these concessions are irrelevant and that the court's reliance on them ignore his contention that the Drop-Down was "value destructive." As a preliminary matter, there is no genuine dispute that the Committee considered the impact of the IDRs and that, notwithstanding such impact, that the Drop-Down was accretive to the public unitholders. *See supra* at 12. Plaintiff's argument boils down to a contention that the Committee's advisor (Tudor) should have employed a novel valuation analysis that he contends shows the Drop-Down was unfair to the public unitholders.

First, Plaintiff's assertion is nothing more than a challenge to the methodology chosen by Tudor to analyze the Transaction. Even if valid (which it is not), such a challenge is insufficient to overcome the Committee's compliance with their contractual duty of subjective good faith. *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2011 WL 4599654, at *10 (Del. Ch.) (rejecting attempt to challenge Committee's good faith reliance on banker's opinion by disputing banker's methodologies, stating that "[t]he valuation methodology … an

investment banker undertakes … [is] properly within the discretion of the investment banker").

Second, Plaintiff's attack on Tudor's analysis creates no genuine dispute of material fact. Plaintiff conceded below that Tudor evaluated the impact of the IDRs (a fact indisputably evident from the minutes of Committee meetings and Tudor's presentations). A1132; A1142; A1162; A1184; B33; B290 (Morris 128:20-129:3). Plaintiff only takes issue with the fact that Tudor did not specifically adjust its discounted cash flow analysis in a manner that supposedly would reflect the IDR impact on cash flows going to the unaffiliated unitholders. But, as Plaintiff's expert, Matthew Morris, conceded, *no one* to his knowledge has ever done the type of analysis Plaintiff advocates to value the IDR impact on the limited partners; Mr. Morris stated that *he has never seen* an IDR valuation analysis conducted in the manner he and Plaintiff used and admits it is not an industry-standard practice for valuing IDR interests. A1200 (Morris Rep. ¶ 31) ("I have not identified an industry-standard practice for valuing IDR interests."); B286 (Morris 110:15-20) ("Q. Can you point me to any industry examples where valuing the cash flows attributed to the IDRs is done in connection with discounted cash flow analysis? A. I'm not sure that I can.").[9] Even assuming Plaintiff's valuation

[9] *See also* B291 (Morris 130:18-131:3) ("Q. And you concede that there is no industry standard for valuing IDR interest correct? A. Like I have said in my report, I have not seen an industry standard for that ….").

method had merit, Tudor's failure to employ a non-industry standard analysis cannot give rise to a reasonable inference of subjective bad faith on the part of the Committee members. *Encore Energy*, 72 A.3d at 106-07; *see also Cencom*, 1997 WL 666970, at *7 ("The Partnership Agreement does not require [a particular method of valuation]; therefore, the Limited Partners cannot be said to have agreed, that one specific method of valuation would be appropriate.").

The record demonstrates beyond dispute that the Committee considered the impact of the IDRs. As Plaintiff's own expert acknowledged, Tudor's analysis specifically accounted for the impact of the IDRs in determining whether the Transaction would be accretive on a distributable cash flow basis to the limited partners. B290 (Morris 128:20-129:24); A185 (Simmons 119:16-120:1). Nor was the Committee's consideration of the IDRs an empty analysis. The Committee members testified that if the IDRs had been projected to make the Transaction non-accretive or otherwise harmful to the limited partners, the Transaction would not have been approved. A283-84 (Reichstetter 121:13-122:2); A102 (Smith 84:6-85:25); A30 (Kuehn 45:15-18). This issue was also explored by the Vice Chancellor at the summary judgment hearing. B359-61; B383-87 (Summ. J. Hr'g., Tr. at 14-16, 38-42).

Contrary to Plaintiff's contention (OB 12, 26-27), the Committee never conceded that it knowingly relied on a flawed valuation analysis. The Committee

members testified uniformly that they believed Tudor's analysis properly reflected the economics of the Transaction from both the Partnership's and the unaffiliated unitholders' perspective, including the method Tudor chose to evaluate the impact of the IDRs. *See, inter alia*, A261 (Reichstetter 31:2-16); A32 (Kuehn 50:15-18); A104, A108, A120 (Smith 90:4-14, 106:8-25, 155:12-14).

The very testimony Plaintiff selectively quotes to assert that the Committee "knew" the valuation they relied on was "flawed" disproves Plaintiff's misleading statements. For example, Reichstetter, never testified, as Plaintiff asserts, that Tudor's valuation analyses, and more specifically the discounted cash flow analysis, should have been adjusted to separately account for the IDRs. *See* OB at 13. He testified it was his understanding that IDRs affect an MLP's cost of equity—*i.e.*, the cost associated with financing a transaction through the issuance of new units—thereby affecting the cost of capital, which is an input considered in a discounted cash flow analysis when valuing an MLP. A276 (Reichstetter 91:3-91:25). In that respect, the IDR "impact" on a discounted cash flow analysis is baked into the model. *Id.* Reichstetter did not testify or suggest in any way that, in his view, Tudor should have adjusted its valuation analysis in some manner. Simmons, Tudor's representative, testified to the same, stating: "The overall cost of equity of [an MLP] also takes into account the cash flows to the IDRs," which is "a function of where you are in the splits." A182, A189 (106:4-5, 106:18-19,

172:13-16).[10] Smith's testimony is the same. Smith made abundantly clear that he understood the direct effect of the IDRs on the limited partners to be best addressed in the distributable cash flow/accretion analysis, and not the discounted cash flow valuation. A111-12 (119:22-121:24, 123:5-124:3). None of the Committee members or Tudor conceded that Tudor's discounted cash flow analysis was flawed. Plaintiff's assertion otherwise is baseless.

Nothing in the record supports an inference that the Committee knowingly relied upon a flawed financial analysis or otherwise failed to form a subjective belief that the Drop-Down was in the Partnership's (and its unaffiliated unitholders') best interests. Each member of the Committee testified unequivocally that he believed the Transaction was in the best interests of both EPB and its unaffiliated unitholders. *See, e.g.*, A32 (Kuehn 51:13-15); A104 (Smith 90:4-20); A268 (Reichstetter 140:23-141:1). Based on the analysis of its advisors, as well as each of its members' experience and judgment, the Committee concluded that SNG was a highly desirable asset and that the Transaction would enhance the value of the Partnership and its limited partnership units. *See* A32-33 (Kuehn 63:23-54:1); A102 (Smith 82:6-8); A261 (Reichstetter 31:12-16).

[10] *See also* A171 (63:1-8) (explaining that IDR burdens for peer MLPs chosen for Tudor's comparable analyses would be implicitly reflected in their costs of capital).

III. THE COURT OF CHANCERY CORRECTLY HELD THAT THE IMPLIED COVENANT DID NOT IMPOSE ADDITIONAL REQUIREMENTS ON THE SPECIAL APPROVAL PROCESS

A. Question Presented

Did the Court of Chancery correctly hold that Plaintiff's reliance on the Tudor Fairness Opinion failed to support a claim for breach of the implied covenant of good faith and fair dealing with respect to the Committee's Special Approval under Section 7.9(a) of the LPA?

B. Scope and Standard of Review

The ruling below is reviewed *de novo*. *See* Point I.B. above.

C. Merits of Argument

1. The LPA Expressly Establishes The Standard Of Conduct Applicable To Resolve Conflicts Between The General Partner And Limited Partners And, Thus, There Are No Gaps To Be Filled In The LPA

The implied covenant of good faith and fair dealing is a cautiously applied doctrine of Delaware law whereby implied terms are used to fill gaps in express provisions of the parties' contract. The implied covenant applies only where it is clear from the express terms of a contract that the parties who negotiated the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith. *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012). The implied covenant does not establish a free-floating requirement that a party act in

good faith, but rather requires a focus "*on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally*." *Gerber*, 67 A.3d at 419. The doctrine requires a court to first determine whether there is a gap that needs to be filled because the implied covenant does not permit a court to infer language that contradicts the clear exercise of an express contractual right. *Nemec v. Shrader*, 991 A.2d 1120, 1127 (Del. 2010).

Here, as discussed above, the Special Approval process set forth in the LPA expressly establishes the duties and obligations of the Conflicts Committee in connection with transactions that create a conflict of interest between the General Partner and the limited partners. The Vice Chancellor correctly held that imposing a requirement upon the Special Approval process that the Committee obtain a fairness opinion that expressly considers the consideration flowing to the unaffiliated holders would alter the agreement, rather than fill a gap, and would upset the parties' contractual expectations. Op. at 38-40.

Because the standard of conduct that must be met in approving transactions involving conflicts between the General Partner and limited partners is expressly defined in the LPA, no gaps in the agreement need to be filled. To impose a different standard as argued by Plaintiff, would be to re-write the standard of

conduct applicable to conflicts between the General Partner and the limited partners, not merely fill a gap in the agreement.

Moreover, the implied covenant "only applies to developments that could not be anticipated" and thus cannot be applied to require the Committee's use of a judicially proscribed fairness opinion in connection with the Special Approval process. *Nemec*, 991 A.2d at 1126 (the implied covenant "only applies to developments that could not be anticipated"). As demonstrated by the requirement for the opinion of an expert for the conclusive presumption to apply, the drafters knew how to require a fairness opinion when they so intended. *Mickman v. Am. Int'l Processing, L.L.C.*, 2009 WL 2244608, at *2 (Del. Ch.) (refusing to imply terms into an LLC agreement where "[t]he parties to the LLC agreements undoubtedly knew how to use [the relevant] language, but did not"). The contractual agreement setting forth the manner in which to resolve conflicts between the General Partner and the unaffiliated unitholders should not be disturbed under the guise of the implied covenant. *Cencom*, 1997 WL 666960, at *4 ("Plaintiffs have failed to show why the written terms of the sale process should be subject to some court-approved, after-the-fact, moralistic 'entirely fair' standard, when the parties defined the desired process in the Partnership Agreement and could have, but did not, require the General Partner to include the

specific provisions that Garber testified would be desirable in a purchase agreement negotiated at arms-length.").

2. The Court of Chancery's Holding Is Not In Conflict With *Gerber*

Plaintiff contends that the Court of Chancery's decision is in conflict with this Court's decision in *Gerber*. In essence, he argues that *Gerber* stands for the proposition that the implied covenant establishes a free-standing duty for the Conflicts Committee to obtain a particular type of fairness opinion from a financial advisor. *Gerber* cannot be read so broadly.

The question presented for the Court in *Gerber* was whether Section 7.10(b) of the relevant partnership agreement applied to provide a conclusive presumption that the general partner acted in good faith. For the conclusive presumption to apply, the general partner must have relied on an opinion from an expert. On a deferential motion to dismiss standard, the Court found that the general partner may have acted arbitrarily by relying on a fairness opinion that "did *not* address whether holders of [the partnership's common units] received fair consideration." 67 A.3d at 421.

The situation here is inapposite. The Court's ruling in *Gerber* was based upon the fact that the conclusive presumption provision did not establish any parameters for the expert's opinion and, thus, this Court held that a gap existed for the implied covenant to fill. Here, defendants rely on the Special Approval

provision in the LPA. There is no requirement under the Special Approval process to obtain a fairness opinion or even retain a financial advisor. Special Approval also does not require that the Committee reach a separate determination about the fairness of the transaction to the limited partners – even though, as discussed above, the Conflicts Committee did here. As the Court of Chancery held, *Gerber's* provisional application of the implied covenant has no application here. Op. at 38.

Plaintiff incorrectly attempts to extend the holding of *Gerber* to apply to Section 7.9(a). OB at 31-32. The Court did not rule that the implied covenant mandated a particular form of fairness opinion in *Gerber*. Rather, the Court ruled that the implied covenant prevented the general partner from relying on the Special Approval process because it had structured a merger the purpose of which was to eliminate pending claims and exclude their value from the merger consideration. *Gerber*, 67 A.3d at 424-25. Thus, the underlying facts of *Gerber* are highly distinguishable, and that ruling did not impose a judicially mandated form of fairness opinion in order to comply with Special Approval.

Moreover, Plaintiff's policy argument that affirming the ruling would lead to nonsensical results is built on a faulty premise. The court below did not exclude the implied covenant *ab initio*. Rather, the court below followed established precedent to find that the implied covenant inapplicable because the LPA's Special Approval provision left no gaps for the implied covenant to fill and that, even

assuming the implied covenant would apply, Plaintiff's position would work to alter Section 7.9(a) rather than fill in any gaps. *See, e.g.*, *Nemec*, 991 A.2d at 1126.

The Vice Chancellor properly concluded that requiring that the Committee obtain a judicially prescribed fairness opinion prior to granting Special Approval would conflict with the plain language and structure of Section 7.9(a). Op. at 38-40. Indeed, if Plaintiff's argument were accepted, future plaintiffs could impose countless "requirements" on committees of this sort under the guise of needing to fill the gaps. This Court has previously admonished against such a proposed application of the implied covenant. *Nemec*, 991 A.2d at 1125-26, 128 (holding application of the implied covenant is a "cautious enterprise," not be used to imply terms to "rebalanc[e] economic interests after events that could have been anticipated, but were not, that later adversely affected one party to the contract").

Accordingly, for the foregoing reasons, the dismissal of Plaintiff's implied covenant claims should be affirmed.

IV. THE COURT OF CHANCERY PROPERLY DISMISSED PLAINTIFF'S CLAIMS FOR AIDING AND ABETTING

A. Question Presented

Did the Court of Chancery err in dismissing Plaintiff's aiding and abetting claims?

B. Scope and Standard of Review

The ruling below is reviewed *de novo*. *See* Point I.B. above.

C. Merits of Argument

Delaware law generally does not recognize a claim for aiding and abetting a breach of contract. *Gerber v. EPE Holdings, LLC*, 2013 WL 209658, at *11 (Del. Ch.) ("Delaware law does not recognize a claim for aiding and abetting a breach of contract."); *Zimmerman v, Crothall*, 2012 WL 707238, at *19 & n.104 (Del. Ch.) (citing *Gotham Ptnrs., L.P. v. Hallwood Realty Ptnrs.*, 817 A.2d 160, 172 (Del. 2002) (same)). Plaintiff's reliance on *Gotham Partners* to the contrary is unavailing. *See* OB at 35. The operative agreement in *Gotham* modified traditional fiduciary duties to leave in place a contractually established "fiduciary duty" of entire fairness. 817 A.2d at 172-73. By contrast, here, the LPA fully eliminates common law fiduciary duties in favor of a purely contractual standard. Accordingly, the Court of Chancery's dismissal of the aiding and abetting claim should be affirmed.

CONCLUSION

For the reasons set forth herein, the Court of Chancery's June 20, 2014 Memorandum Opinion and Order dismissing Plaintiff's claims for breach of express and implied duties under the LPA should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2014, a copy of the foregoing was served electronically via *File & ServeXpress* on the following counsel of record:

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