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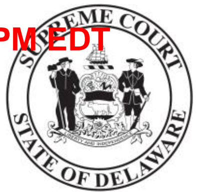

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| PETER BRINCKERHOFF, INDIVIDUALLY AND AS TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR U A DTD 10/17/97, and on behalf of all others similarly situated, | ) |
| Plaintiff-Below Appellant, | ) |
| v. | ) No. 273, 2016 |
| ENBRIDGE ENERGY COMPANY, INC., ET AL., | ) Court Below: Court of Chancery of the State of Delaware C.A. No. 11314-VCS |
| Defendants-Below Appellees, | ) |
| and | ) |
| ENBRIDGE ENERGY PARTNERS, L.P., | ) |
| Nominal Defendant–Below Appellee. | ) |

**DEFENDANTS-BELOW, APPELLEES' ANSWERING BRIEF**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ........ v

NATURE OF THE PROCEEDINGS ........ 1

SUMMARY OF ARGUMENT ........ 5

STATEMENT OF FACTS ........ 8

A. The 2009 Transaction. ........ 8

B. The 2015 Transaction. ........ 9

ARGUMENT ........ 12

I. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIMS FOR BREACH OF EXPRESS AND IMPLIED DUTIES. ........ 12

A. Question Presented. ........ 12

B. Standard and Scope of Review ........ 12

C. Merits of the Argument. ........ 12

II. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIMS FOR RESCISSION OR REFORMATION. ........ 27

A. Question Presented. ........ 27

B. Standard and Scope of Review ........ 27

C. Merits of the Argument. ........ 28

III. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIMS FOR AIDING AND ABETTING, TORTIOUS INTERFERENCE AND BREACH OF RESIDUAL FIDUCIARY DUTIES. ........ 34

A. Question Presented. ....................................................................34

B. Standard and Scope of Review...........................................................34

C. Merits of the Argument. ...................................................................34

CONCLUSION ...........................................................................................35

## TABLE OF AUTHORITIES

Page

**Cases**

*Account v. Hilton Hotels Corp.*,
780 A.2d 245 (Del. 2001) ....................................................................4

*Allen v. El Paso Pipeline GP Co., LLC*,
2014 WL 2819005 (Del. Ch. June 20, 2014)........................................35

*Allen v. El Paso Pipeline GP Co., LLC*,
90 A.3d 1097 (Del. Ch. 2014) ...............................................................33

*Ashley v. Kronfeld*,
1997 WL 398927 (Del. 1997).................................................................25

*In re Atlas Energy Res., LLC*,
2010 WL 4273122 (Del. Ch. Oct. 28, 2010) ..........................................20

*Brinckerhoff v. Enbridge Energy Co.*,
2011 WL 4599654 (Del. Ch. Sept. 30, 2011).................................*passim*

*Brinckerhoff v. Enbridge Energy Co.*,
2012 WL 1931242 (Del. Ch. May 25, 2012)..................................*passim*

*Brinckerhoff v. Enbridge Energy Co.*,
67 A.3d 369 (Del. 2013) ..................................................................*passim*

*Carey v. Brittingham*,
1992 WL 71509 (Del. Ch. Apr. 6, 1992)........................................... 31-32

*Cerberus Intern., Ltd. v. Apollo Mgmt., L.P.*,
794 A.2d 1141 (Del. 2002) .....................................................................30

*Cisneros v. Alpine Ridge Grp.*,
508 U.S. 10 (1993)...................................................................................23

*DV Realty Advs. LLC v. Policemen's Annuity and Ben. Fund of Chicago*,
75 A.3d 101 (Del. 2013) ............................................................................2

*In re El Paso Pipeline Partners, L.P. Deriv. Litig.*,
2014 WL 2768782 (Del. Ch. June 12, 2014)....................................................21

*In re Encore Energy Partners LP Unitholder Litigation*,
2012 WL 3792997 (Del. Ch. Aug. 31, 2012)....................................................20

*Eni Holdings, LLC v. KBR Grp. Holdings, LLC*,
2013 WL 6186326 (Del. Ch. Nov. 27, 2013)....................................................28

*In re Estate of Justison*,
2005 WL 217035 (Del. Ch. Jan. 21, 2005)........................................................30

*Gerber v. Enter. Prods. Holdings, LLC*,
67 A.3d 400 (Del. 2013)....................................................................................18

*Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*,
817 A.2d 160 (Del. 2002)................................................................ 27, 30, 32-33

*Haynes Family Trust v. Kinder Morgan G.P., Inc.*,
2016 WL 912184 (Del. Mar. 10, 2016)...............................................................19

*Int'l Telecharge, Inc.* v. *Bomarko, Inc.*,
766 A.2d 437 (Del. 2000)......................................................................... 27-28

*James River–Pennington Inc. v. CRSS Capital, Inc.*,
1995 WL 106554 (Del. Ch. Mar. 6, 1995)........................................................30

*In re Kinder Morgan, Inc. Corp. Reorg. Litig.*,
2015 WL 4975270 (Del. Ch. Aug. 20, 2015)........................................12, 15, 35

*Kostyszyn v. Martuscelli*,
2014 WL 3510676 (Del. Ch. July 14, 2014)......................................................33

*Kuroda v. SPJS Holdings, L.L.C.*,
971 A.2d 872 (Del. Ch. 2009)....................................................................20, 33

*In re Loral Space & Commc'ns Inc. Consol. Litig.*,
2008 WL 4293781 (Del. Ch. Sept. 19, 2008)....................................................32

*Malpiede v. Townson*,
780 A.2d 1075 (Del. 2001)...............................................................................28

*Medicis Pharm. Corp. v. Anacor Pharm., Inc.*,
2013 WL 4509652 (Del. Ch. 2013) ........................................................................23

*Messick v. Star Enter.*,
655 A.2d 1209 (Del. 1995) ......................................................................................2

*In re Molycorp, Inc. S'holder Deriv. Litig.*,
2015 WL 3454925 (Del. Ch. May 27, 2015).........................................................11

*Nemec v. Shrader*,
991 A.2d 1120 (Del. 2010) ..........................................................................12, 27, 34

*Norton v. K-Sea Transp. Partners, L.P.*,
67 A.3d 354 (Del. 2013) ..................................................................... 14-15, 19, 35

*Penn Mut. Life Ins., Co. v. Oglesby*,
695 A.2d 1146 (Del. 1997), *aff'd*, 127 F.3d 1096 (3d Cir. 1997) ......................25

*Stewart v. BF Bolthouse Holdco, LLC*,
2013 WL 5210220 (Del. Ch. Aug. 30, 2013) .......................................................21

*Supermex Trading Co. v. Strategic Solutions Grp., Inc.*,
1998 WL 229530 (Del. Ch. May 1, 1998)............................................................25

*United Rentals, Inc. v. RAM Holdings, Inc.*,
937 A.2d 810 (Del. Ch. 2007) ...............................................................................25

*Weinberger* v. *UOP, Inc.*,
457 A.2d 701 (Del. 1983) ......................................................................................27

*Winshall v. Viacom Int'l, Inc.*,
76 A.3d 808 (Del. 2013) ........................................................................................28

**Rules and Statutes**

Delaware Revised Uniform Limited Partnership Act § 17-1101(d)........1, 12, 32, 35

## NATURE OF THE PROCEEDINGS

Through this appeal, Plaintiff Peter Brinckerhoff implicitly asks this Court to reverse nearly all of its *en banc* rulings in *Brinckerhoff v. Enbridge Energy Co.*, 67 A.3d 369 (Del. 2013) ("*Brinckerhoff III*").[1] In *Brinckerhoff III*, this Court rejected Plaintiff's assertions that a 2009 related party transaction through which Enbridge Energy Partners, L.P. ("EEP" or the "Partnership") sold an interest in the unfinished Alberta Clipper pipeline to Enbridge, Inc. ("Enbridge") was undertaken in bad faith and to the detriment of EEP's Unitholders. In affirming the Court of Chancery's dismissal of Brinckerhoff's first Complaint, this Court ruled that the transaction was undertaken in accordance with the Sixth Amended and Restated Agreement of Limited Partnership of EEP ("LPA") that created a specific "safe harbor" for these transactions.[2] In *Brinckerhoff III*, this Court, like the Court of Chancery below, also confirmed that the LPA effectively disclaimed fiduciary duties, as authorized by Section 17-1101(d) of the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), a point surprisingly challenged by Brinckerhoff again here.[3]

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[1] Plaintiff's challenges to the 2009 Alberta Clipper transaction were rejected in three separate decisions: *Brinckerhoff v. Enbridge Energy Co.*, 2011 WL 4599654 (Del. Ch. Sept. 30, 2011) ("*Brinckerhoff I*"), *Brinckerhoff v. Enbridge Energy Co.*, 2012 WL 1931242 (Del. Ch. May 25, 2012) ("*Brinckerhoff II*") and *Brinckerhoff III*.

[2] *Brinckerhoff III*, 67 A.3d at 372.

[3] *Compare* Plaintiff's Opening Brief ("Pl. Op. Br.") at 32 *with Brinckerhoff III*, 67 A.3d at 373.

Further, this Court ruled that EEP's general partner, Enbridge Energy Company, Inc. ("General Partner" or "EEP GP"), was entitled to the LPA's conclusive presumption of good faith and, even if it were not, that Brinckerhoff had not pled facts establishing bad faith.[4]

Finally, in *Brinckerhoff III*, this Court also confirmed for Plaintiff the high standard he must meet[5] to defeat a motion to dismiss:

> Brinckerhoff is left with the difficult task of pleading facts that allow an inference that Defendants acted in bad faith when they approved or caused EEP to approve the Transaction. That is, he must plead facts that allow an inference that the decision to enter into the Transaction, under the circumstances, was *so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith*.[6]

Brinckerhoff's newest Complaint falls far short of this standard. Brinckerhoff objects to a transaction (the "Transaction") between the *same* parties, involving an interest in the *same* Alberta Clipper pipeline, authorized by the *same* LPA provisions, and approved by two of the *same* members of a three-person Special Committee reviewing the Transaction. As in *Brinckerhoff I-III*, Brinckerhoff's allegations here do not come close to meeting this Court's standard.

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4 *Brinckerhoff III*, 67 A.3d at 372.

5 Brinckerhoff personally cannot challenge issues previously litigated and lost: "Under the doctrine of collateral estoppel, if a court has decided an issue of fact necessary to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Messick v. Star Enter.*, 655 A.2d 1209, 1211 (Del. 1995).

6 Apr. 29, 2016 Memorandum Opinion ("Op.") at 36 (citing *Brinckerhoff I*) (citations and alterations omitted) (emphasis added). This Court reaffirmed the bad faith standard in *DV Realty Advs. LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101, 110 (Del. 2013).

EEP, in fact, further enhanced its process in connection with the proposed 2015 repurchase. The Special Committee of independent directors appointed to negotiate the Transaction was permitted to *reject* the transaction outright if it believed that was warranted, a power that the special committee did not possess in the original 2009 sale.[7] Just as in 2009, the Special Committee at issue here retained and met regularly with legal and financial advisors, negotiated to EEP's advantage certain terms, and received the required opinion from its financial advisor under the LPA—in this case, an opinion that the terms of the Transaction were fair to the Partners and to the holders of Partners' common units from a financial point of view (the "Fairness Opinion").[8] Following this extensive process, the Special Committee recommended the proposed transaction to the EEP GP Board for approval as fair and reasonable to the Partnership and in the best interests of the Partnership and its Unitholders. In fact, the Unitholders responded positively to the Transaction with its enhanced distributions, with the Unit price jumping over 6% on the announcement.

Brinckerhoff ignores the fact that he cannot plead a breach of the LPA, and invents a supposed "conflict" between two different opinions from the Court of Chancery in 2012 and 2016.[9] Brinckerhoff claims there is a "conflict" as

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[7] *Compare Brinckerhoff I*, 2011 WL 4599654 at *2 *with* Op. at 12.

[8] Fairness Opinion. (A306-07.)

[9] Pl. Op. Br. at 1.

to whether the Court of Chancery had the power to reform the LPA, despite the fact that there was no breach of the LPA and "no fraud, mutual mistake or unilateral mistake with knowing silence"[10] relating to the LPA's provisions, either then or now. Brinckerhoff disregards settled law and overlooks the fact that the Court of Chancery's musings on the potential for a remedy without a wrong in *Brinckerhoff II* was dicta. When faced with the *actual* question in 2015, the Court of Chancery rejected Brinckerhoff's challenge and followed settled law regarding the scope of the reformation remedy.

Plaintiff presents no good reason to overrule *Brinckerhoff III*,[11] nor does Plaintiff present a compelling reason to find that a court must reform an agreement where there is no breach, and where there are no relevant allegations of "fraud, mutual mistake or unilateral mistake with knowing silence." For the same reasons underlying *Brinckerhoff I* and *III*, the Court of Chancery's dismissal should be upheld in all respects.

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[10] Op. at 50 (citing *Universal Compression, Inc. v. Tidewater, Inc.*, 2000 WL 1597895, at *7 (Del. Ch. Oct. 19, 2000)).

[11] *See Account v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001) ("Once a point of law has been settled by decision of this Court, it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside and it should be followed except for urgent reasons and upon clear manifestation of error.") (citation and alterations omitted).

## SUMMARY OF ARGUMENT

1. *Denied.* The Court of Chancery properly dismissed Plaintiff's claims to reform or rescind the Transaction agreements to eliminate the tax allocation (the "Special Tax Allocation") because there was no breach and the allocation was in accordance with the LPA. The Court of Chancery alternatively held that, even if there were a breach, Plaintiff did not plead that the LPA was a product of "fraud, mutual mistake or unilateral mistake with knowing silence."[12] Nor could Plaintiff state a claim for reformation or rescission because he could not explain how to return the parties (including non-party Unitholders) to their pre-transaction positions, why monetary damages would be inadequate or why he delayed in bringing his claims.

2. *Denied.* The Court of Chancery correctly determined that Plaintiff "failed to plead facts that allow a reasonably conceivable inference that the Transaction violated Section 6.6(e), much less an inference that the Defendants acted in bad faith."[13] Section 6.6(e) permits related party transactions that are fair and reasonable. Section 6.9(a) provides that any course of action involving a conflict of interest shall be deemed approved by all Partners and not constitute a breach of the LPA absent bad faith by EEP GP; both provisions also provide that, in any event, there is no breach if the course of action is, or is deemed to be, fair

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12 Op. at 49 (quoting *Brinckerhoff II*, 2012 WL 1931242 at *3).

13 Op. at 36.

and reasonable to the Partnership. Moreover, Section 6.10(b)—a key safe harbor—provides that acts by EEP GP in reliance upon opinions of professionals as to matters reasonably believed to be within the professional's competence "shall be conclusively presumed to have been done or omitted in good faith and in accordance with such opinion."[14] By obtaining the Fairness Opinion from its financial advisor, Simmons & Company International ("Simmons"), EEP GP is *conclusively* presumed to have acted in good faith.

3. *Denied.* The Court of Chancery correctly dismissed Plaintiff's claims for monetary damages. Section 6.8(a) of the LPA states that the Defendants may not be held liable for monetary damages if they acted in good faith. This Court construed this specific provision in *Brinckerhoff III*.[15] The Court of Chancery properly held that Brinckerhoff did not plead a claim of bad faith.[16]

4. *Denied.* The Court of Chancery did not err in dismissing claims against Enbridge (EEP GP's parent) and the remaining defendants.[17] Because the LPA expressly permits EEP GP to take certain actions, "the board of

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14 LPA § 6.10(b). (A280.)

15 *Brinckerhoff III*, 67 A.3d at 372.

16 Op. at 37-38.

17 Op. at 39, 48, 51; *see also* Complaint ("Compl.") ¶¶ 119, 131. (A59, A62.) The remaining defendants are certain directors of EEP GP and Enbridge: J. Richard Bird, J. Herbert England, C. Gregory Harper, D. Guy Jarvis, Mark A. Maki, John K. Whelen, Jeffrey A. Connelly, Rebecca B. Roberts and Dan A. Westbrook. Plaintiff also brought its claims against parties to certain agreements it seeks to reform, Enbridge Pipelines (Alberta Clipper) L.L.C. and Enbridge Energy, Limited Partnership. The Court of Chancery dismissed Plaintiff's claims as to all defendants.

that general partner cannot be found to have acted in bad faith for causing the general partner to take the expressly permitted action."[18] This holding, too, was upheld over Plaintiff's objection in *Brinckerhoff III*.[19]

5. *Denied*. The Court of Chancery correctly ruled that Delaware does not allow a claim for aiding and abetting a breach of contract, that any claim for aiding and abetting or tortious interference cannot stand where there is no underlying breach of contract, and that Plaintiff did not sufficiently allege control liability.[20] The Court of Chancery also properly rejected Brinckerhoff's claim for breach of residual fiduciary duties.[21]

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[18] Op. at 39-40 (quoting *Brinckerhoff I*, 2011 WL 4599654 at *9).

[19] *Brinckerhoff III*, 67 A.3d at 373.

[20] Op. at 48.

[21] Op. at 48.

## STATEMENT OF FACTS

### A. The 2009 Transaction.

In 2009, EEP pursued the Alberta Clipper Project—a pipeline designed to meet the expected petroleum demands in the Midwestern United States at the implementation cost of $1.2 billion.[22] When financing became too difficult for EEP, Enbridge proposed a joint venture in which Enbridge and EEP would contribute a certain percentage of the pipeline's cost for the U.S. portion, and each entity would receive profits relative to their contributions.[23] EEP's Board formed a special committee to evaluate the proposed transaction and the special committee engaged a financial advisor to assess whether the proposed agreement was "representative of an arm's length transaction."[24] With an affirmative opinion from its advisor, the special committee determined that EEP's 33.3% interest would constitute an arm's length transaction, and EEP announced the agreement in July 2009.[25]

The Court of Chancery dismissed Plaintiff's claims regarding the 2009 transaction, finding that the LPA displaced fiduciary duties and Brinckerhoff failed to allege that the Defendants acted in bad faith.[26] This Court affirmed.[27]

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22 *Brinckerhoff I*, 2011 WL 4599654, at *2.
23 *Id.*
24 *Id.* at *3.
25 *Id.* at *3-4.
26 *Id.* at *8-9.
27 *Brinckerhoff III*, 67 A.3d at 373.

B. The 2015 Transaction.

Plaintiff now challenges EEP's repurchase of 66.7% of the Alberta Clipper Pipeline on January 2, 2015 for aggregate consideration of $1 billion, with that consideration comprising: (1) a new class of limited partnership interests of EEP, designated as Class E units, valued at $694 million, and (2) the repayment of an outstanding loan from EEP GP to EEP in the amount of $306 million.[28]

1. The Special Committee.

In 2014, EEP again formed a Special Committee of independent directors to evaluate the proposed Transaction.[29] EEP's Board empowered the Special Committee to determine whether the proposed Transaction was fair and to recommend whether to proceed with the proposed Transaction or to seek alternatives.[30] The Special Committee retained both Bracewell & Giuliani as legal advisor and Simmons, an investment bank with expertise in the energy industry and with no involvement in the 2009 transaction, as financial advisor.[31] From September to December 2014, the Special Committee met repeatedly with its advisors to analyze the proposed transaction.[32] These meetings included several presentations from Simmons regarding the financial structure of the Transaction,

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[28] Compl. ¶ 5. (A20-21.)

[29] The Special Committee consisted of independent directors Rebecca B. Roberts, Jeffrey A. Connelly and Dan A. Westbrook. Brinckerhoff named all three as defendants in this action.

[30] Compl. ¶ 53. (A38.)

[31] *Id*. at ¶¶ 52-54. (A38-39.)

[32] *Id*. at ¶¶ 52-59 (A38-41); Simmons Dec. 23, 2014 Presentation Prepared for the Special Committee (Dec. 23, 2014) ("Dec. 23, 2014 Presentation") at A84.

the issuance of Class E units, the allocation of additional taxable income to Class A, B and D Unitholders, and the increased distributions allowable through the Transaction.[33] Among other things, Simmons identified and analyzed over two dozen comparable transactions, analyzed alternative transaction structures, considered the Special Tax Allocation, and conducted "[m]ultiple due diligence calls with Enbridge management to discuss financial projections and Transaction tax treatment."[34] The Special Committee negotiated to EEP's advantage certain terms of the Transaction.[35]

2. The Fairness Opinion and Market Reaction.

On December 23, 2014, Simmons issued its Fairness Opinion, concluding that "the Transaction is fair to Partners and to the holders of Partners' common units (other than [EEP GP] and its affiliates) from a financial point of view."[36] As the Fairness Opinion reflects, Simmons evaluated the transaction documents, including "the terms of the Class E Units", the Contribution Agreement and the Seventh Amended and Restated Agreement of Limited Partnership that provided for the Special Tax Allocation.[37]

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33 *Id*. at ¶¶ 52-59, 68 (A38-41, A43-44.); Dec. 23, 2014 Presentation at A84, A109, A113.

34 Dec. 23, 2014 presentation at A84; Fairness Opinion (A306-07.)

35 (A174); (A584.)

36 Fairness Opinion (A306-07); Compl. ¶¶ 71-72 (A44-45.)

37 *Id.*

The Special Committee subsequently recommended the proposed Transaction to the EEP GP Board for approval. After the EEP GP Board approved, EEP issued a news release about the Transaction, including the new issuance of Class E Units.[38] The Unitholders' reaction was swift and favorable, with EEP's Class A Unit Prices increasing approximately 6.2% from December 23, 2014 to year-end.[39] During this period, Brinckerhoff never objected to the Transaction. The Seventh Amended and Restated Agreement of Limited Partnership was amended on January 2, 2015 to effectuate the Transaction and the issuance of Class E Units.

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[38] (A76-78) (the "Dec. 23, 2014 News Release").

[39] The Court may take judicial notice of stock prices. *See In re Molycorp, Inc. S'holder Deriv. Litig.*, 2015 WL 3454925, at *1 n.1 (Del. Ch. May 27, 2015).

## ARGUMENT

### I. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIMS FOR BREACH OF EXPRESS AND IMPLIED DUTIES.

#### A. Question Presented.

Whether the Court of Chancery correctly dismissed Plaintiff's claims for breach of express and implied duties (Counts I-IV of the Complaint)?

#### B. Standard and Scope of Review.

This Court evaluates this question *de novo*.[40]

#### C. Merits of the Argument.

##### 1. Plaintiff Must Plead that Defendants Acted in Bad Faith to State a Claim of Breach.

The LPA, as expressly authorized by DRULPA and as set forth in *Brinckerhoff I* and *III*, eliminates EEP GP's fiduciary duties and replaces them with "a contractual 'standard of care'."[41] Plaintiff has not adequately alleged that EEP GP breached the LPA's contractual standard.[42]

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[40] *See, e.g., Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).

[41] LPA § 6.10(d) (A280.); *see also Brinckerhoff I*, 2011 WL 4599654, at *8-9; *Brinckerhoff III*, 67 A.3d at 373.

[42] As the sole signatory to the LPA, EEP GP is the only Defendant that owes EEP's unitholders the contractual obligations Plaintiff alleges were breached. All contractual claims (Counts I-IV and VIII) against the remaining Defendants, which are not parties to the LPA, were properly dismissed because "only a party to a contract may be sued for breach of that contract." *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 WL 4975270, at *5 (Del. Ch. Aug. 20, 2015) ("*KMI*") (quoting *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002)). *See also Brinckerhoff I*, 2011 WL 4599654, at *11.

Sections 6.6(e) and 6.9(a) of the LPA provide that contracts with affiliates and other possible conflicts of interest "shall be permitted and deemed approved by all Partners and shall not constitute a breach of this Agreement"[43] if the proposed action is "fair and reasonable to the Partnership."[44] Sections 6.8(a) and 6.9(a) elaborate on this standard, providing that if the General Partner acted in good faith (or in the absence of bad faith), it cannot be held liable for either monetary damages (Section 6.8(a))[45] or a breach of the LPA or any other standard of care or duty (Section 6.9(a)). In particular, Section 6.9(a) specifically provides that "[i]n the absence of bad faith by the General Partner, the resolution, action or terms so made, taken or provided by the General Partner with respect to such matter shall not constitute a breach . . . ."[46] Plaintiff, therefore, "must 'plead facts suggesting that EEP GP's Board acted in bad faith' in its determination that the Transaction was 'fair and reasonable to the Partnership'."[47]

Here, because under Section 6.10(b) "EEP GP is conclusively presumed to have acted in good faith when it acts in reliance upon the opinion of

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43 LPA § 6.9(a) (emphasis added). (A279.)

44 LPA § 6.6(e). (A278.)

45 As the Court of Chancery explained in *Brinckerhoff I*, EEP GP would "only be liable . . . for monetary damages if [EEP GP] acted in bad faith." 2011 WL 4599654, at *10.

46 LPA § 6.9(a) (A279); Op. at 35 (holding that Defendants had not conceded inapplicability of Section 6.9(a) and observing "Defendants . . . have argued persuasively that Brinckerhoff's construction of Sections 6.6(e) and 6.9(a) is flawed.").

47 Op. at 34 (quoting *Brinckerhoff 1*, 2011 WL 4599654, at *9).

an investment banker,"[48] the Court of Chancery properly held that there can be no conceivable inference that EEP GP or the other Defendants acted in bad faith. And, even without the conclusive presumption of good faith, the Court of Chancery properly found that the process Defendants followed for the Transaction could not support an inference that the conduct alleged was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[49]

Plaintiff argues that *Norton v. K-Sea Transp. Partners. L.P.* suggests that his claims are now somehow exempt from the good faith standard set forth in the LPA's Section 6, but he is incorrect.[50] In *Norton*, this Court considered substantively identical good faith and contractual duty standards. In construing the limited partnership agreement's "overall scheme," this Court held:

> … an Indemnitee acts in good faith if the Indemnitee reasonably believes that its action is in the best interest of, or at least, not inconsistent with, the best interests of [the Partnership] … we must conclude that the parties' insertion of a free-standing, enigmatic standard of "good faith" is consistent with Section 7.10(d)'s conceptualization of a reasonable belief that the action taken is in, or not inconsistent with, the best interests of the Partnership.[51]

48 *Brinckerhoff I*, 2011 WL 4599654, at *9.
49 *Brinckerhoff III*, 67 A.3d at 373; Op. at 40.
50 Pl. Op. Br. at 26.
51 *Norton*, 67 A.3d at 362.

This Court concluded in *Norton*, as did the Court of Chancery below, that to survive a motion to dismiss Plaintiff had to plead that the General Partner did not act in good faith,[52] which Plaintiff failed to do here. Nor does Plaintiff's reliance on *In re Kinder Morgan, Inc. Corp. Reorg. Litig.* ("*KMI*") change the result.[53] As *KMI* states throughout, *Norton's* analysis of these substantively identical provisions is controlling, and Plaintiff is compelled to admit that this Court must overrule *Norton* too for his argument to be accepted.[54]

Finally, as the Court of Chancery recognized, the interrelated provisions of Sections 6.8(a), 6.9(a), and 6.10(b) & (d) "also cloak Enbridge and Enbridge Management as 'Affiliates' of EEP GP and the directors and officers of EEP GP as 'Indemnitees' with identical protections."[55] *First*, Section 6.8(a) expressly protects all "Affiliates" and "Indemnitees." *Second*, under Section 6.9(a), the Court of Chancery correctly applied this Court's precedent to conclude that Defendants other than EEP GP could not be held liable for "causing the general partner to take an action that did not breach the general partner's duties under the LPA."[56] *Third*, the Court of Chancery properly held Defendants cannot contractually be liable for causing EEP GP to rely on an opinion of its advisors

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[52] *Id.*

[53] *KMI*, 2015 WL 4975270 (Del. Ch. Aug. 20, 2015.

[54] *See* Pl. Op. Br. at 33, n.126 ("Plaintiff recognizes that his interpretation of 6.10(d) . . . could be viewed as inconsistent with this Court's holding in *Norton*.").

[55] Op. at 33.

[56] Op. at 39 (quoting *Brinckerhoff I*, 2011 WL 4599654, at *9).

where the "only reasonable construction of the LPA . . . suggests that Section 6.10(b)'s presumption of good faith radiates beyond EEP GP to the other Defendants as well."[57]

### 2. Plaintiff Failed to Plead Bad Faith on the Part of the Defendants.

Plaintiff's criticisms of the Special Committee process—critical to his allegations of bad faith—are baseless. *First*, the fact that Simmons' Fairness Opinion does not expressly mention the 2009 transaction is no basis for alleging a breach of Section 6.9(c)'s requirement that "the fair and reasonable nature of such transaction . . . shall be considered in the context of all similar or related transactions."[58] Simmons met this standard by conducting a "Comparable Transaction and MLP Trading Analysis" involving twenty-seven "comparable pipeline transactions" and seven "comparable MLP trading multiples."[59] From this analysis, Simmons concluded that the 10.7x EBITDA multiple for the Transaction was "within the range of comparable pipeline transaction multiples reviewed by Simmons" and "favorable when compared to EEP's long-term cost-of-capital."[60]

Nor does the alleged failure to mention the 2009 sale in minutes or transaction documents demonstrate bad faith. Two of the three Special Committee

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57 Op. at 39.

58 LPA § 6.9(c). (A280.)

59 Dec. 23, 2014 Presentation at A112, A116-A120.

60 Dec. 23, 2014 Presentation at A117.

members for this Transaction were on the Special Committee that considered the 2009 sale; it would be unreasonable to infer that these independent directors simply forgot about the 2009 transaction (or, for that matter, Brinckerhoff's lawsuit that followed it). Of course, the Alberta Clipper Project was at an entirely different stage of development in vastly different economic climates in 2009 and 2014, making it unsurprising that Simmons did not list it as comparable in its analysis. As this Court has previously held, allegations quibbling with the financial analysis an investment banker undertakes are insufficient to sustain a claim of bad faith.[61]

*Second*, Plaintiff's allegations that Simmons somehow failed to "value" the Special Tax Allocation are wrong. The Fairness Opinion addressed the "Transaction," defined to include all of its provisions, including the Special Tax Allocation. The Court of Chancery found that "Simmons le[ft] no doubt in its Fairness Opinion that it considered the Special Tax Allocation when reaching its conclusion that the Transaction as a whole was 'favorable' to EEP and the Public Unitholders."[62] For example, Simmons' valuation analysis included a review of "Per Unit Income Allocation Impact" to Unitholders, and analyzed "After-Tax Accretion" for Unitholders across various tax brackets.[63]

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61 *See Brinckerhoff III*, 67 A.3d at 373; *Brinckerhoff I*, 2011 WL 4599654, at *10.

62 Op. at 43.

63 Dec. 23, 2014 Presentation at A113, A114. Notably, Simmons concluded that the Transaction would be accretive regardless of individual tax bracket.

Plaintiff relies on *Gerber* to argue that Defendants are not entitled to the Section 6.10(b) good faith presumption, supposedly because the Fairness Opinion failed to "fulfill its basic function."[64] Plaintiff's reliance on *Gerber* must be rejected. *Gerber* addressed two financial advisor opinions.[65] The first opinion "did not value the consideration that the LP unitholders actually received,"[66] and the second opinion did not value the termination of derivative claims that were a "principal purpose" of the challenged transaction.[67] Here, Simmons valued the broadly-defined Transaction as a whole and expressly considered the Special Tax Allocation in reaching the Fairness Opinion.

*Third*, Simmons was not required to consider the Special Tax Allocation separately from the Transaction. The Court of Chancery correctly observed that "Brinckerhoff acknowledges that the Special Tax Allocation was adopted 'as part of the Transaction.'"[68] Further, considering the Special Tax Allocation separately from the Transaction would not make sense because EEP issued the Class E Units (with the Special Tax Allocation) as part of the consideration, and Simmons examined the effect on the Unitholders.

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64 *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 422 (Del. 2013); Pl. Op. Br. at 31.

65 *Gerber*, 67 A.3d at 406 (the "2009 opinion") and 407 (the "2010 opinion").

66 *Id*. at 422 (stating that the 2009 opinion opined on the fairness of the total consideration for two different transactions—the 2009 sale and the Teppco LP sale—rather than the fairness of the specific transaction at issue—the 2009 sale).

67 *Id*. at 422-23.

68 Op. at 43; Compl. ¶ 2 (A19.)

This Court in *Norton*[69] rejected a similar challenge to a financial advisor's analysis in the context of incentive distribution rights ("IDRs"):

> The LPA does not require K-Sea GP to evaluate the IDR Payment's reasonableness separately from the remaining consideration … K-Sea GP was not required to consider whether the IDR Payment was fair, but only whether the Merger as a whole was in the best interests of the Partnership … the LPA did not require K-SEA GP to consider separately the IDR's Payment's fairness, but granted K-Sea GP broad discretion to approve a merger, so long as it exercised that discretion in "good faith." Reliance on [the banker's opinion] satisfied this standard.[70]

Thus, the general partner "complied with its contractual duties in the approval process . . . and that compliance conclusively established the fairness of the transaction, precluding the judicial scrutiny that the unitholders now seek."[71]

Finally, the Court of Chancery correctly found that, under Section 6.10(b), EEP GP was not only entitled to a conclusive presumption that it acted in good faith, but also that it acted in accordance with Simmons' opinion that the Transaction was fair to the Partnership.[72]

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[69] *Norton v. K-Sea Transp. Partners, L.P.*, 67 A.3d 354 (Del. 2013).

[70] *Id.* at 367-68.

[71] *Haynes Family Trust v. Kinder Morgan G.P., Inc.*, 2016 WL 912184, at *1 (Del. Mar. 10, 2016).

[72] LPA § 6.10(b). (A280.)

### 3. The Complaint Failed to State a Claim of Breach of the Implied Covenant of Good Faith and Fair Dealing.

The Court of Chancery appropriately concluded that "where the LPA specifically addresses the challenged conduct and expressly eliminates fiduciary duties, the Court can discern no reasonable basis to allow the implied covenant claims to stand."[73] Additionally, "a plaintiff cannot 'plead that a defendant breached the implied covenant when the defendant is conclusively presumed by the terms of a contract to have acted in good faith.'"[74]

Plaintiff argues that EEP GP's reliance on the Fairness Opinion breached the covenant because (1) Plaintiff could not have expected EEP GP to rely on a Fairness Opinion that did not address whether the legal requirements for amending the LPA were met; and (2) the Fairness Opinion allegedly did not value the consideration paid in the Transaction.[75] Neither assertion is correct: the implied covenant "is a limited and extraordinary remedy" and "cannot be invoked to override the express terms of the contract."[76] Neither of Plaintiff's assertions can support a claim for breach of an *implied* covenant since they concern the

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[73] Op. at 47; *see also Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009); *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010); *Brinckerhoff I*, 2011 WL 4599654, at *11 ("The parties to the LPA thought about related party transactions and EEP GP's reliance upon investment banker opinions, and they explicitly addressed those issues. Therefore, Brinckerhoff cannot plead an implied covenant claim.").

[74] *See, e.g.*, *In re Encore Energy Partners LP Unitholder Litigation*, 2012 WL 3792997 at *14-15 (Del. Ch. Aug. 31, 2012) (citations omitted).

[75] Pl. Op. Br. at 32.

[76] *Kuroda*, 971 A.2d at 888.

reliance on a professional opinion that is permitted under (and thus squarely addressed in) the LPA.[77] Moreover, the Fairness Opinion did expressly consider and value the broadly-defined Transaction.[78]

#### 4. Plaintiff Failed to Allege that Issuance of New Units and the Special Tax Allocation Violated Express or Implied Duties.

The Court of Chancery correctly rejected Plaintiff's attempts to divorce the Special Tax Allocation from the rest of the Transaction.[79] The interrelated provisions in Section 6 set the bad faith standard and require the Plaintiff "to plead facts from which the Court may reasonably infer that EEP GP, in *bad faith*, created a 'material adverse effect on the Partners [or] the holders of any class or classes of Units,' or in *bad faith* 'enlarge[d] the obligations of any Limited Partner'."[80] Because EEP GP "relied on its Special Committee which studied the Transaction and properly considered Simmons' Fairness Opinion,"

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[77] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 WL 2768782, at *17 (Del. Ch. June 12, 2014) (implied covenant should "only be applied when the contract is truly silent with respect to the matter at hand") (citation omitted). The covenant is also superseded by the contractual good faith standard in the LPA. *See Stewart v. BF Bolthouse Holdco, LLC*, 2013 WL 5210220, at *17 (Del. Ch. Aug. 30, 2013) ("the parties' express agreement to evaluate Defendants' use of discretion under the standard of good faith supersedes the implied covenant").

[78] Fairness Opinion (A306-07); Dec. 23, 2014 Presentation at A114.

[79] Op at 44, n. 120 ("the Special Tax Allocation is a component of the properly authorized Transaction").

[80] Op. at 44 (emphasis in original). As noted previously, with the enhanced cash distributions to Unitholders, *see* Dec. 23, 2014 News Release (A76-78), Unitholders reacted favorably to the Transaction, with the price of EEP rising 6.2% in just over a week.

even if the adoption of the Special Tax Allocation was considered in isolation, Plaintiff has not pled a breach of the LPA.

Plaintiff's argument that EEP GP was not authorized to amend the LPA is baseless.[81] Section 4 of the LPA authorized EEP GP to issue additional units, including the Class E Units at issue here, "for any Partnership purpose . . . *in its sole discretion*, all without the approval of any Limited Partners."[82] The LPA authorizes and directs EEP GP "to take all actions that it deems necessary and appropriate . . . and to amend this Agreement in any manner that it deems necessary or appropriate to provide for each such issuance [of units]."[83] As for allocations of Partnership income, the LPA provides that "*[n]otwithstanding any provisions of this Agreement to the contrary*" additional Partnership Securities shall be issued and "fixed by the General Partner in the exercise of its sole and complete discretion, subject to Delaware law, including, without limitation, (i) the allocations of items of Partnership income, gain, loss, deduction and credit to each

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[81] Although the Court of Chancery did not expressly reach this issue, it did observe that if the Special Tax Allocation were to be considered separately, Sections 4, 5 and 15 of the LPA "suggest that EEP was authorized to implement the Special Tax Allocation." Op. at 44 n.120.

[82] LPA § 4.4(a), emphasis added. (A250.)

[83] LPA § 4.4(d). (A250.) This in effect grants EEP GP "sole discretion" when taking action based on Section 6.9(b). ("Whenever this Agreement … provides that the General Partner or any of its Affiliates is permitted or required to make a decision (i) in its 'sole discretion' or 'discretion' that it deems 'necessary or appropriate' or under a grant of similar authority or latitude, the General Partner or such Affiliate shall be entitled to consider only such interests and factors as it desires and shall have no duty or obligation to give any consideration to any interest of, or factors affecting, the Partnership, any Subsidiary, any Limited Partner or any Assignee.") (A279-80).

such class or series of Partnership Securities."[84] The phrase "notwithstanding any provisions of this Agreement to the contrary" confirms that Section 4.4(b) specifically overrides any other conflicting provision, including Section 15.3(b)'s "notwithstanding" clause that overrides only Sections 15.1 and 15.2.[85]

Brinckerhoff ignores Sections 15.1 and 4.4, focusing instead on Section 15.3(b), which prohibits amendments that "enlarge the obligations of any Limited Partner without such Limited Partner's consent."[86] Plaintiff's attempt to include the potential for generating taxable income within the scope of "enlarge the obligations" fails completely. The word "obligations" makes no sense in the context of taxation, and does not appear a single time in Article IX of the LPA, which addresses "Tax Matters," including the recognition of "income, gain, losses and deductions."[87] Instead, as used in the LPA, the term obligations primarily refers to contractual duties owed to its limited partners and is found in Article VII ("Rights and Obligations of Limited Partners") and Article XIV ("Dissolution and Liquidation").[88] The use of "obligations" does not carry over to the tax provisions.

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84 LPA § 4.4(b) (emphasis added). (A250.)

85 *See, e.g.*, *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("[T]he use of [a] 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."); *Medicis Pharm. Corp. v. Anacor Pharm., Inc.*, 2013 WL 4509652, at *8-9 (Del. Ch. 2013) (same).

86 LPA § 15.3(b). (A295.)

87 LPA § 9.1. (A284.)

88 Other provisions are in accord. *See, e.g.*, LPA §§ 5.11 (referring to "rights and obligations" of Holders of Series 1 Preferred Units) (A274); 5.12 (Holders of Class D Units) (A274); 5.13 (Holders of Incentive Distribution Units) (A274-75). The term obligations is also

Moreover, it is impossible, as a practical matter, to interpret "obligations" as Plaintiff construes the term. As Plaintiff concedes, every Unitholder's tax situation is different,[89] and there is no allegation that EEP or any other Defendant knew of, or sought to impact, any Unitholder's tax situation. If Brinckerhoff's reading were to be credited, individualized tax determinations would override the General Partner's express authority under Sections 4.4 and 15.1(f), among others.

Brinckerhoff's additional claim that Section 15.3(b) overrides Section 15.1 ignores the plain language of these provisions. Under Section 15.1, each Limited Partner agrees that the General Partner may amend the LPA with respect to certain categories without the approval of any Limited Partner.[90] One such category is Section 15.1(f), which provides that "*subject to the terms of Section 4.4*," the General Partner may effectuate "an amendment that the General Partner determines *in its sole discretion* to be necessary or appropriate in connection with the authorization for issuance of any class or series of Units pursuant to Section

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(. . . continued)
used for debts owed for loans or written instruments like securities, which is inapplicable here. *See, e.g.*, LPA §§ 4.4(a) ("unsecured or secured debt obligations" Partnership may issue) (A250.); 4.9 (referring to "debt obligation of the Partnership" with respect to loans from partners) (A253.)

[89] Pl. Op. Br. at 23; Pl. Ans. Br. to Defs. Mot. to Dismiss at 34. (A351.)

[90] LPA § 15.1. (A294-95.)

4.4."[91] When an amendment requires authorization under Section 15.1(f) for the issuance of Units under Section 4.4, the provisions of Section 4.4 control.[92]

Brinckerhoff's citation-free contention that "[i]f the drafters intended for Section 4.4 alone to allow EEP GP to amend the LPA, they would not have included Section 15.1(f)" is puzzling at best.[93] The language of Section 15.1(f) makes the parties' intent crystal clear that the issuance of additional Partnership Units, and the allocation of additional income with respect to those Units, resides in the sole discretion of EEP GP under its pre-existing authority.

Finally, this Court need not spend much effort evaluating Plaintiff's meritless and previously waived argument that the Special Tax Allocation breached Section 5.2(c). The Complaint does not allege such a breach and, worse, Brinckerhoff unequivocally disavowed it at argument.[94] The Section 5.2(c) argument should thus not be considered.[95] Even if properly before this Court, the allegation is without basis because Section 5.2(c) permits the General Partner to act

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[91] LPA § 15.1(f) (emphasis added). (A295.)

[92] *See, e.g.*, *Penn Mut. Life Ins., Co. v. Oglesby*, 695 A.2d 1146, 1147 (Del. 1997) (where provision was made "subject to" others, "it is the latter provisions that control"), *aff'd*, 127 F.3d 1096 (3d Cir. 1997); *Supermex Trading Co. v. Strategic Solutions Grp., Inc.*, 1998 WL 229530, at *6 (Del. Ch. May 1, 1998) (holding that where a first provision is "subject to" a second provision, second provision controls); *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 833 (Del. Ch. 2007) (indicating phrases such as "subject to . . . impose a hierarchy among provisions.").

[93] Pl. Op. Br. at 25.

[94] *See* Oral Arg. Tr. at 66. ("I want to be clear that it's the plaintiff's position that Section 5.2(c) is not applicable.").

[95] *Ashley v. Kronfeld*, 1997 WL 398927, at *1 (Del. 1997) ("Absent plain error, this Court will not consider issues raised for the first time on appeal.").

in its sole discretion.[96] This includes any determination as to whether an allocation would have a material adverse effect[97] on any Unitholder "as provided in this Section 5.2(c)." Additionally, because EEP GP was exercising its rights under the LPA in enacting the Transaction, including the Special Tax Allocation, it was by definition "for the proper administration of the Partnership" as outlined in various provisions of the LPA, including Articles III and VI.

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[96] LPA § 5.2(c). (A270.)

[97] Rather than showing a material adverse effect, Simmons' analyses prepared for the Special Committee showed that the Transaction would be accretive at all tax rates. Dec. 23, 2014 Presentation at A114.

## II. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIMS FOR RESCISSION OR REFORMATION.

### A. Question Presented.

Whether the Court of Chancery correctly dismissed Plaintiff's claims for rescission or reformation (Count VIII of the Complaint)?

### B. Standard and Scope of Review.

Typically, this Court reviews a decision on a motion to dismiss *de novo*.[98] But that does not mean, in a challenge to the Court of Chancery's denial of an equitable remedy, that the Vice Chancellor's rulings are due no deference. Plaintiff concedes that the Court of Chancery is "vested with *broad discretion* to fashion equitable relief."[99] Unlike the legal question whether the Complaint contains well-pleaded allegations sufficient to state a claim, whether (or how) to fashion a remedy—including the equitable remedies of reformation or rescission—is discretionary.[100] Because decisions on remedies require careful consideration of what "the facts of a particular case may dictate," this Court should review the Court of Chancery's declination to impose a remedy for abuse of discretion.[101]

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[98] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).

[99] Pl. Op. Br. at 19 (emphasis added).

[100] *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983) ("[T]he Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate.").

[101] *Gotham*, 817 A.2d at 177; *Int'l Telecharge, Inc.* v. *Bomarko, Inc.*, 766 A.2d 437, 440 (Del. 2000).

### C. Merits of the Argument.

#### 1. Under the LPA, Reformation and Rescission Are Barred Absent Bad Faith Because Without a Breach, There Is No Remedy.

Because of the weaknesses in his damages claims, Plaintiff focuses on the remedies of rescission and reformation. But those remedies cannot be imposed absent a breach of the LPA or the clear intent of the parties.[102] It is axiomatic that to pursue a claim for relief, a litigant must adequately plead his claim.[103] Brinckerhoff's Complaint fails this basic requirement.

#### 2. Even if the LPA Does Not Restrict These Remedies, Plaintiff Failed to Plead Facts Supporting Rescission or Reformation.

Even if Plaintiff could plead a breach, Plaintiff's equitable claims would still fail. The Court of Chancery correctly determined that Plaintiff was not "excuse[d] from supporting his claims for reformation or rescission with well-pled facts that meet the requisite elements of these remedies."[104]

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[102] *Id.*; *see also, e.g.*, *Eni Holdings, LLC v. KBR Grp. Holdings, LLC*, 2013 WL 6186326, at *24 (Del. Ch. Nov. 27, 2013) ("Rescission is not a cause of action but a remedy available only where facts indicate equity so requires.").

[103] *Malpiede v. Townson*, 780 A.2d 1075, 1094 (Del. 2001) ("A plaintiff must allege well-pleaded facts stating a claim on which relief may be granted."); *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 (Del. 2013) (same).

[104] Op. at 49.

a. Plaintiff Failed to Plead Rescission.

Concerning rescission, the Complaint only states in general that "[i]n the alternative, the Transaction can be unwound."[105] But Plaintiff has the burden to explain "how the Court could restore the parties to the positions they were in before they entered into [the Transaction]."[106] Plaintiff alleged nothing of the sort in the Complaint and offers no credible explanation for how rescission of a transaction that closed twenty months ago remains possible. Brinckerhoff asserts on appeal that "[t]he Court of Chancery could simply order that EEP return [the partnership] units to EEP GP, cancel the Class E Units, and reinstate the prior $306 million in debt,"[107] but this does not take into account multiple intervening events including changes in the valuation of the Units, increased distributions to Unitholders, sales by Limited Partners of their interests, any specialized individual tax planning based on the Transaction, or how one would "uncancel" debt and restore the parties to the *status quo ante*.[108]

Nor does Brinckerhoff allege, as he must, how money damages would be "inadequate to do justice."[109] The Complaint alleges only that "damages *may* be insufficient to make EEP and the Public Unitholders whole," but Plaintiff offers

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105 Compl. ¶ 175. (A72.)

106 *Brinckerhoff II*, 2012 WL 1931242, at *4.

107 Pl. Op. Br. at 22.

108 *Id.*

109 Op. at 51 (citing *Russell v. Universal Homes, Inc.*, 1991 WL 94357, at *2 (Del. Ch. May 23, 1991)).

nothing to support this claim, and nowhere does he "contend … the alleged harm is difficult to quantify or to measure in dollars."[110] But Brinckerhoff does not pause long before fixing the damages from the Special Tax Allocation at "more than" $100 million, conceding that monetary relief *is* possible.[111]

Finally, Brinckerhoff's rescission claim fails because he did not act promptly.[112] The Transaction closed on January 2, 2015, but Plaintiff waited a month before even making a books and record demand, and then waited another six months to file his claim, all after enjoying an increased cash distribution.[113]

b. <u>Plaintiff Failed to Plead Reformation.</u>

Brinckerhoff's reformation remedy suffers from even more infirmities. Reformation is to be used "in order to express the 'real agreement' of the parties involved."[114] In *dicta*, the Court of Chancery in *Brinckerhoff II* incorrectly expanded the scope of a claim for reformation by adding the word "Generally" to the following quote from *James River–Pennington Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *7 (Del. Ch. Mar. 6, 1995):

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[110] Compl. ¶ 173 (emphasis added) (A72.); *Brinckerhoff II*, 2012 WL 1931242, at *3 n.28 (observing Plaintiff's prior reformation was "at best, one step removed from money damages.").

[111] Compl. ¶¶ 2, 121, 132. (A19, A60, A62.)

[112] *Gotham*, 817 A.2d at 174 (quoting *Gaffin v. Teledyn, Inc.*, 1990 WL 195914, at *18 (Del. Ch. Dec. 4, 1990)).

[113] Dec. 23, 2014 News Release. (A76-78.)

[114] *Cerberus Intern., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002); *see also In re Estate of Justison*, 2005 WL 217035, at *10 (Del. Ch. Jan. 21, 2005) ("The purpose of reformation is to make an erroneous instrument express correctly the intent of, or the real agreement between, the parties.").

> *Generally*, "[r]eformation is appropriate *only* when the contract does not represent the parties' intent because of fraud, mutual mistake, or, in exceptional cases, a unilateral mistake coupled with the other parties' knowing silence."[115]

"Generally" is not consistent with "only." Even while citing the standard incorrectly, the Court in *Brinckerhoff II* noted that "[i]f the governing agreement only provides for exculpation of money damages, *and a plaintiff adequately pleads entitlement to an equitable remedy*, the plaintiff states a claim that may survive a motion to dismiss."[116] The Court then mused that if Plaintiff had stated a claim, "it is at least conceivable that he might be entitled to some sort of [reformation] remedy."[117] That ruling says nothing about whether the reformation claim was adequately pled or was appropriate in *Brinckerhoff II* or here.

Brinckerhoff nowhere alleges that the Transaction does not reflect the intentions of the parties, and certainly does not claim to have shown "clear and convincing" evidence of that error.[118] The Court of Chancery below correctly cited to well-established authority for the proposition that "reformation is appropriate

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115 *Brinckerhoff II*, 2012 WL 1931242, at *3 (quoting *James River–Pennington Inc. v. CRSS Capital, Inc.*, 1995 WL 106554, at *7 (Del. Ch. Mar. 6, 1995)) (emphasis added).

116 *Id.*

117 *Id.*; *see also id.* at *4 ("If Brinckerhoff did not waive his request for reformation, he has stated a claim, found in Count I of the Complaint, under Article 6.6(e) of LPA that is *potentially* remediable through reformation") (emphasis added).

118 *See Carey v. Brittingham*, 1992 WL 71509, at *2 (Del. Ch. Apr. 6, 1992).

*only*" where the written document does not reflect the parties' actual intent, rejecting Plaintiff's claim.[119]

The other cases cited by Plaintiff do not help his claim. *In re Loral Space & Commc'ns Inc. Consol. Litig.*,[120] for example, concerned alleged breaches of fiduciary duties, not breach of contract:

> [T]his is not a contract case involving the reformation of a contract to effectuate the parties' intent; *it is a fiduciary duty case*, and this court has broad discretion to remedy breaches of fiduciary duty, including reformation when, as here, that is appropriate to remedy a fiduciary violation."[121]

Thus, the Court of Chancery rejected the "*Loral*" argument for the second time.[122]

Plaintiff's continued citation to *Gotham* before this Court fails again for the same reasons.[123] *First*, *Gotham* was decided before the 2004 amendments to the DRULPA which allowed for the complete elimination of fiduciary duties in favor of a contractual standard.[124] *Second*, plaintiffs in *Gotham* only sought

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[119] *See* Op. at 50 n.140 & n.142 (citing *Universal Compression, Inc.* v. *Tidewater, Inc.*, 2000 WL 1597895 at *7 ("[A] party must allege that the contract as written does not represent the parties' actual intent, because of either fraud, mutual mistake or a unilateral mistake coupled with the other party's knowing silence or concealment.")); *Carey*, 1992 WL 71509, at *2 ("Reformation is appropriate only where there is clear and convincing evidence that, because of a mutual mistake, a written instrument does not properly reflect the agreement of the parties.").

[120] 2008 WL 4293781 (Del. Ch. Sept. 19, 2008).

[121] *Id.* at *33, n.161 (emphasis added).

[122] *Brinckerhoff I*, 2011 WL 4599654, at *9; *accord* Op. at 49.

[123] 817 A.2d 160 (Del. 2002). Plaintiff raised *Gotham* in briefing for *Brinckerhoff I*. *See, e.g.*, Pl. Ans. Br. to Defs. Mot. to Dismiss. (A369.)

[124] 817 A.2d at 167, n.13 ("Although on its face Section 17–1101(d) permits the fiduciary duty of a general partner to be expanded or restricted without limit by the terms of a partnership

rescission, not reformation as Plaintiff suggests.[125] *Third*, the limited partnership agreement in *Gotham*, unlike the LPA, expressly included fiduciary duties.[126] Even less relevant is *Allen v. El Paso Pipeline GP Co., L.L.C.*,[127] where the Court considered a motion for class certification, and did not opine on whether any particular remedy was viable.[128] Other cases Plaintiff cites are similarly inapposite.[129]

Plaintiff also fails to plead how any reformation would be effectuated. Plaintiff's request to reform the Transaction to "reflect a fair price" is an impermissible attempt to repackage a claim for money damages—a claim that is barred under the LPA—into a claim for equitable relief.[130]

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(. . . continued)
agreement, it is not clear whether a restriction can be such as to totally eliminate all fiduciary duties. The issue of the extent to which a fiduciary duty may be restricted has not yet been resolved.").

[125] Pl. Op. Br. at 21-22.

[126] *Gotham*, 817 A.2d at 171.

[127] 90 A.3d 1097 (Del. Ch. 2014).

[128] *Id.* at 1111 (observing that it would be "premature" to rule out reformation and other potential remedies "under the guise of a motion for class certification.").

[129] Pl. Op. Br. at 21 n.83.

[130] *Kostyszyn v. Martuscelli*, 2014 WL 3510676, at *4 (Del. Ch. July 14, 2014) ("[T]he court must determine *whether the nature of both the wrong alleged and the relief sought supports a finding that only equity can provide a remedy.*") (emphasis added).

## III. THE COURT OF CHANCERY CORRECTLY DISMISSED PLAINTIFF'S CLAIMS FOR AIDING AND ABETTING, TORTIOUS INTERFERENCE AND BREACH OF RESIDUAL FIDUCIARY DUTIES.

### A. Question Presented.

Whether the Court of Chancery correctly dismissed Plaintiff's claims for aiding and abetting, tortious interference, and breach of residual fiduciary duties (Counts V, VI and VII of the Complaint)?

### B. Standard and Scope of Review.

This Court reviews this question *de novo*.[131]

### C. Merits of the Argument.

#### 1. The Complaint Failed to State a Claim For Aiding and Abetting, Tortious Interference or Breach of Residual Fiduciary Duties.

Plaintiff limits his claims of error related to tortious interference and aiding and abetting to a single sentence tacked to the end of his brief.[132] This is no great surprise: Plaintiff cannot assert claims for aiding and abetting or tortious interference with a contract when he "has failed to state a claim for an underlying breach of the LPA."[133] But even more fundamentally, Delaware does not recognize a claim for aiding and abetting a breach of contract.[134]

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[131] *See, e.g., Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).

[132] Pl. Op. Br. at 35.

[133] Op. at 48 (citing *Gerber v. Enter. Prods. Hldgs., LLC*, 2012 WL 34442, at *13 (Del. Ch. Jan. 6, 2012) ("A claim for tortious interference with a contract, as well as a claim for aiding and

Plaintiff's breach of residual fiduciary duties claim was properly dismissed because the LPA's contractual standard displaces all common law fiduciary duties.[135] Plaintiff's argument that Section 6.10(d) creates a condition precedent to the modification of fiduciary duties rather than a complete elimination of the duties is, again, contrary to *Norton*. In *Norton*, this Court held that a nearly identical provision to Section 6.10(d) fully eliminated any fiduciary duties the defendants may have had and replaced them with contractual duties set out in the LPA.[136] To argue that Section 6.10(d) establishes a condition precedent to the modification of fiduciary duties, Plaintiff instead relies on dicta from a footnote in *KMI*, which questions *Norton*, but recognizes that this Court's opinion was "controlling."[137] This Court should follow *Norton* in finding that Section 6.10(d) fully eliminated fiduciary duties as authorized by DRULPA.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court affirm the Court of Chancery's thoughtful decision in all respects.

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(. . . continued)
abetting a breach of duties, requires an underlying breach."), *aff'd in part, rev'd in part*, 67 A.3d 400 (Del. 2013)).

134 *Allen v. El Paso Pipeline GP Co.*, 2014 WL 2819005, at *20 (Del. Ch. June 20, 2014).

135 Op. at 48.

136 67 A.3d 354 (Del. 2013).

137 Plaintiff states, without explanation, that "*Norton* does not preclude plaintiff's interpretation under the specific EEP LPA." Pl. Op. Br. at 33 n.126. However, because the contractual provision at issue in *Norton* is essentially identical to Section 6.10(d), any distinction on the facts would create uncertainty in the law.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 30, 2016, he caused a copy of the foregoing document to be electronically served, via File & Serve*Xpress*, upon the following counsel of record:

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