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IN THE

Supreme Court of the State of Delaware

PETER R. BRINCKERHOFF, TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR. U/A DTD 10/17/97, on behalf of all others similarly situated, Plaintiff Below-Appellant, v. KINDER MORGAN, INC., KINDER MORGAN ENERGY PARTNERS, L.P., RICHARD KINDER, STEVEN J. KEAN, RONALD L. KUEHN, JR, ARTHUR C. REICHSTETTER, and WILLIAM A. SMITH, Defendants Below-Appellees.	No. 534,2017 COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 2017-0313-JTL

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

In 2012, appellant, plaintiff-below, Peter R. Brinckerhoff ("Plaintiff" or "Brinckerhoff"), commenced an action on behalf of El Paso Pipeline Partners, L.P. ("El Paso Partners" or the "Partnership") against the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. ("General Partner") and those that control it. That action (the "Fall Dropdown Claim") resulted in a post-trial liability award in favor of the Partnership in the amount of $171 million, plus interest. Subsequently, General Partner's controlling parent, defendant Kinder Morgan, Inc. ("KMI") acquired all of the outstanding Partnership common units, including those held by Plaintiff (the "Merger").

In a December 20, 2016 Opinion, this Court held that the Merger divested Plaintiff of standing to pursue the Fall Dropdown Claim and dismissed the case.[1] The Court stated that Plaintiff's "recourse was to challenge the fairness of the merger by alleging that the value of his claim was not reflected in the merger consideration."[2] The Court's decision effectively dismissed two other pending derivative actions pursued by Plaintiff's against General Partner and other defendants: the Spring Dropdown Claim and the 2012 Dropdown Claim (collectively with the Fall Dropdown Claim, the "Derivative Litigations").

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[1] *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016) ("Supreme Court Standing Opinion").
[2] *Id.* at 1250-51.

Plaintiff commenced this action to challenge the fairness of the Merger. Plaintiff alleged, *inter alia*, that: (1) the Merger was unfair because it gave no value at all for the Derivative Litigations and, as compared to the Merger consideration,[3] the value of the Derivative Litigations was material; (2) General Partner failed to meet the "Special Approval" safe harbor[4] because, *inter alia,* members of the General Partner's Conflicts Committee for the Merger (the "Conflicts Committee" or "Committee") were conflicted and failed to form a subjective belief that the Merger, without providing any value for the Derivative Litigations, was in the best interests of the Partnership; and (3) General Partner failed to meet the Unaffiliated Unitholder Approval safe harbor[5] because the single vote to approve the Merger, without any disclosure of the effect of the vote, was ineffective to satisfy the safe harbor and, in all events, the vote was based on a false and misleading proxy.[6]

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[3] The Merger consideration was approximately $9.2 billion. (A508).

[4] First Amended and Restated Agreement of Limited Partnership of El Paso Pipeline Partners, L.P. ("LPA") § 7.9(a)(i), which provides that the General Partner's resolution of a conflict shall be permitted if "approved by Special Approval." (A123).

[5] *See* LPA § 7.9(a)(ii), which provides that General Partner's resolution of a conflict of interest "shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement . . . , if the resolution or course of action in respect of such conflict of interest is . . . (ii) approved by the vote of a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates) . . . ." (A123).

[6] El Paso Pipeline Partners, L.P., Schedule 14A, October 22, 2014 ("Proxy Statement") (A168-437).

On November 14, 2017, the Court of Chancery dismissed Plaintiff's Complaint.[7] The Court of Chancery found, erroneously, that General Partner met the Unaffiliated Unitholder Approval safe harbor because, in the single vote of all common unitholders to approve the Merger,[8] including the 40.1% controlled by KMI, a majority of the unaffiliated unitholders voted for the Merger.[9] In so holding, the court found that the LPA did not require a separate vote of outstanding common units (excluding common units owned by the General Partner and its affiliates), nor did it require any advance notice that defendants would use the vote, pursuant to Section 7.9(a)(ii), to immunize their conflict.[10]

The Court of Chancery also erroneously rejected Plaintiff's argument that even if Section 7.9(a)(ii) could be applied retroactively, Defendants could not rely on the Unaffiliated Unitholder Approval safe harbor because Defendants obtained that vote by a deceptive Proxy Statement (the "Proxy Statement").[11] Plaintiff alleged myriad specific material misrepresentations and omissions in the proxy solicitation materials that showed them to be false and misleading.

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[7] *Brinckerhoff v. Kinder Morgan, Inc.* Del. Ch., C.A. No. 2017-0313-JTL, Order, Laster, V.C. (Nov. 14, 2017) ("Order"), attached hereto as Exhibit A. The Complaint is cited as "¶ __."
[8] LPA § 14.3(b). (A150).
[9] Order at 3-4.
[10] *Id.* at 3-4.
[11] *Id.* at 3-6.

The Court did not address Plaintiff's other allegations concerning the Conflicts Committee, nor did it address Plaintiff's allegations that the Special Approval safe harbor did not apply.[12] Had it done so, it would have found valid Special Approval lacking. Finally, the Court of Chancery dismissed the secondary liability claims, finding no allegation of underlying wrong.[13]

[12] *Id.* at 6.
[13] *Id.*

SUMMARY OF ARGUMENT

1. In dismissing the Complaint, the Court of Chancery erred. The plain language of Section 7.9(a)(ii) requires a "vote of the majority of the" unaffiliated units. Nothing suggests that this requirement can be satisfied if, within a vote of all common units, a majority of the unaffiliated unitholders happen to vote in favor of a merger. Section 7.9(a)(ii) requires a separate "vote." At the very least, Section 7.9(a)(ii) requires that the unaffiliated unitholders be informed that their vote could be used by General Partner to immunize its conflicts. Unaffiliated unitholders cannot "approve" something without knowing that they are being asked to do so. Instead of being informed of the purpose and possible effect of their vote with respect to the conflict resolution, unitholders were told that they were participating in a majority vote that was virtually meaningless because KMI already controlled approximately 40.1% of the common units.[14] The Proxy Statement informed unitholders, misleadingly, that no separate vote of unaffiliated unitholders was required or being sought.[15]

2. The Court of Chancery also erred by finding that General Partner did not breach the implied covenant by disseminating a deceptive Proxy Statement. First, the Court applied an incorrect "fraud" standard, a standard much higher than

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[14] (A229).
[15] (A297).

the standard of prohibiting acts that undermine the parties' reasonable expectations under the contract.[16] Second, the court erred when it held that Plaintiff had not alleged that the Committee members in fact failed to believe that the value of the Derivative Litigations was not material. To the contrary, the Complaint alleged that the Conflicts Committee's statement that the value of the Derivative Litigations was not sufficiently material to warrant a price increase was made in "bad faith."[17] Third, the court below erroneously held that the Proxy Statement need not disclose that the Conflicts Committee members were defendants in the Derivative Litigations because, although material, such disclosure would amount to "self-flagellation" not required by Delaware law.[18] The Conflicts Committee members' defendant status is an objective fact; it does not amount to any "self-flagellation." Fourth, the Court of Chancery erred when it held that Plaintiff failed to allege any specific misleading statements or omissions in the Proxy Statement.[19] Plaintiff alleged that: (i) the Proxy Statement provided no value for the Derivative Litigations (in fact, defendants never valued the Derivative Litigations); (ii) the Proxy Statement never provided any value for the Merger consideration; and (iii) defendants repeatedly said in the

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[16] *See Dieckman v. Regency GP LP*, 155 A.3d 358, 368 (Del. 2017) (implying the term "the General Partner will not mislead unitholders when seeking Unaffiliated Unitholder Approval").
[17] ¶ 40. (A026). *See also* ¶ 33. (A023) ("Conflicts Committee's 'finding' was in bad faith.").
[18] Order at 6.
[19] *Id.* at 5.

proxy solicitations materials filed with the SEC that the value of the KMI's mergers was $70 billion, or nine times the value of the Merger consideration. Finally, Plaintiff also pleaded that the Proxy Statement, even by incorporation, failed to disclose that the Derivative Litigations alleged that, when the Conflicts Committee approved the prior conflicted transactions, it did so in bad faith.

3. Although the Court of Chancery did not reach the question of whether Special Approval was obtained in bad faith or breached the implied covenant, the Complaint alleges more than sufficient facts to show that General Partner's decision and process to seek Special Approval was in bad faith and breached the LPA.[20] The implied covenant prohibits General Partner from subverting the Special Approval process. General Partner allowed the Derivative Litigations to be evaluated by conflicted Committee members who were defendants in those actions, who were told that the Merger would extinguish the Derivative Litigations, and who all were promised lucrative board positions at KMI if the Merger closed. The Conflicts Committee itself did not address the Derivative Litigations until the night before they recommended approval of the Merger, failed to obtain any independent valuation of the Derivative Litigations, and hired conflicted advisors.

4. The Complaint also alleges facts to show that the value of the Derivative Litigations was material as compared to the Merger consideration, and

[20] ¶¶ 5, 7, 28-34. (A9, 11, 22-24).

that the failure to obtain any value for the Derivative Litigations, in bad faith, was a breach of the LPA.

5. Finally, because the Complaint states a claim against the General Partner, the Court of Chancery erred by dismissing the secondary liability claims against the remaining Defendants.

STATEMENT OF FACTS

A. The Derivative Litigations

In 2010, El Paso Corporation ("Parent") completed two transactions (the "Spring Dropdown" and the "Fall Dropdown") in which it had General Partner sell a liquid natural gas terminal to the Partnership.[21] In 2011 and 2012, Plaintiff commenced two derivative litigations, the Spring Dropdown Claim and the Fall Dropdown Claim, respectively, on behalf of the Partnership alleging that the General Partner had arranged for the Partnership to pay grossly unfair prices for those assets, and that General Partner and its Conflicts Committee approved both the Spring Dropdown and Fall Dropdown in bad faith.

In 2013, Plaintiff commenced another derivative case on behalf of the Partnership with respect to a dropdown that occurred in May 2012 (the "2012 Dropdown"), just prior to KMI's purchase of Parent. In the 2012 Dropdown, General Partner sold to the Partnership a 100% interest Cheyenne Plains Investment Company ("Cheyenne") and the remaining 14% interest in Colorado Interstate Gas

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[21] The Supreme Court Standing Opinion and the Court of Chancery's two opinions in that action, *In re El Paso Pipeline Partners, L.P. Deriv. Litig.* 2015 Del. Ch. LEXIS 116, *5-44 (Apr. 20, 2015) (the "Liability Opinion") and *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 132 A.3d 67, 76-80 (Del. Ch. 2015) (the "Court of Chancery Standing Opinion"), *rev'd*, 152 A.3d 1248 (Del. 2016), set forth in detail the factual background of the Spring and Fall Dropdowns, the Merger, and the post-trial proceedings.

("CIG").[22] Upon the announcement of the 2012 Dropdown, trading in an efficient market, the value of the Partnership's equity dropped immediately by about $400 million.[23] Plaintiff alleged that for the 2012 Dropdown, General Partner had the Partnership pay a grossly excessive price for those assets and that General Partner had done so in bad faith.[24]

The Fall Dropdown Claim was tried in November 2014.[25] After trial, the Court of Chancery found that the Conflicts Committee had not formed a subjective belief that the Fall Dropdown was in the best interests of the Partnership, and that the transaction breached the LPA. The Court of Chancery made numerous, detailed and devastating factual findings identifying the Committee members' bad faith. The court further found that the Partnership overpaid for the assets by $171 million. For the Partnership's unaffiliated common units, that judgment (after pre-judgment

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[22] ¶ 23. (A18-19).
[23] ¶¶ 6, 24. (A9, 19).
[24] ¶ 24. (A19).
[25] The Court of Chancery dismissed the Spring Dropdown Claim on summary judgment, and the parties agreed to stay the 2012 Dropdown Claim. Plaintiff appealed the Spring Dropdown dismissal, but that appeal was also mooted by the Supreme Court Standing Opinion.

interest and before counsel fees), was about $1.00 per unit.[26] Tellingly, on appeal, Defendants did not challenge any of the court's factual findings.[27]

B. The Relevant LPA Provisions

At the time of the Merger, the Partnership was governed by the First Amended and Restated Agreement of Limited Partnership of El Paso Pipeline Partners, L.P. (the "LPA"). [28]

Section 7.9(a) provides, in relevant part:

> Unless otherwise expressly provided in this Agreement . . . , 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 . . . , on the other, any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement . . . , or of any duty stated or implied by law or equity, if the **resolution or course of action in respect of such conflict of interest is (i) approved by Special**

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[26] Appendix A to the Court of Chancery Standing Opinion stated that as of the time of the Merger, unaffiliated investors held 139,416,863 common units. Supreme Court Standing Opinion, 132 A.3d at 133.

[27] The evidence showed that the Fall Dropdown was not an isolated case. All of the El Paso dropdowns, including the Spring Dropdown and the 2012 Dropdown, had the same cast of characters and script. ¶ 25. (A19-21). All of the dropdowns were approved by the same individuals acting as the General Partner's Conflicts Committee – Kuehn, Reichstetter, and Smith. Liability Opinion, 2015 Del. Ch. LEXIS, at *11-12. The committee always was advised by the same financial advisor – Tudor, Pickering, Holt & Co. ("Tudor"). Tudor opined that each dropdown was fair, and collected its $500,000 fee. *Id.* For all the dropdowns, the same law firm advised the Conflicts Committee. *Id.* at *12. And, for each of three dropdowns, Parent sought to immunize the transaction by having the Partnership's General Partner obtain Special Approval from the same Conflicts Committee. *Id.* at *11.

[28] (A43-167).

> **Approval, (ii) approved by the vote of a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates)**. . . . The General Partner shall be authorized but not required in connection with its resolution of such conflict of interest to seek Special Approval of such resolution, and the General Partner may also adopt a resolution or course of action that has not received Special Approval. . . .[29]

Section 14.3(a) provides that if the General Partner approves a Merger Agreement, then the Merger Agreement and merger shall "be submitted to a vote of Limited Partners . . . ."[30] Section 14.3(b) provides that the Merger Agreement "shall be approved upon receiving the affirmative vote or consent of the holders of a Unit Majority."[31] "Unit Majority" means "at least a majority of the Outstanding Common Units and Class B Units, if any, voting as a single class."[32]

C. The Conflicts Committee Granted Special Approval for the Merger In Bad Faith and Without Obtaining Any Value for the Derivative Litigations

By August 2014, KMI had acquired Parent and, through Parent, controlled 100% of General Partner. KMI also controlled approximately 40.1% of the Partnership's common units.[33] General Partner's directors and executive officers controlled approximately 0.1% of the Partnership's common units.[34] In August 2014, KMI announced that it had proposed to acquire all of the outstanding

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[29] LPA § 7.9(a). (A123) (emphasis added).
[30] LPA § 14.3(a). (A150).
[31] LPA § 14.3(b). (A150).
[32] LPA §1.1. (A72).
[33] (A229).
[34] (A181).

Partnership common units it did not already own and merge the Partnership into a wholly owned subsidiary of KMI.

KMI appointed defendants Reichstetter, Kuehn, and Smith, to the General Partner Conflicts Committee to evaluate and decide whether to recommend the proposed merger. They were the same members of the Conflicts Committee who had given Special Approval for the dropdowns that were the subject of the Derivative Litigations. KMI knew that these individuals all were defendants in the Derivative Litigations and knew that these individuals had already gone on record as stating that the Derivative Litigations were without merit. KMI did not appoint a separate, truly independent committee to evaluate the Derivative Litigations.[35]

The Conflicts Committee retained the same financial advisor, Tudor, as it had in the prior dropdowns.[36] The Committee retained different legal counsel, but it chose attorneys that enjoyed a prior and current relationship with KMI and its affiliates.[37]

Although Tudor issued a fairness opinion for the Merger, the opinion expressly stated that Tudor did not value Derivative Litigations.[38] The Conflicts Committee did not seek any independent valuation of the claims. Indeed, the

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[35] ¶¶ 7, 28-34. (A11, A22-24).
[36] Court of Chancery Standing Opinion, 132 A.3d at 80 (emphasis added).
[37] ¶¶ 33-34. (A23-24).
[38] ¶ 46. (A29).

Conflicts Committee did not value the claims, other than to say they were without merit, *i.e.* valueless. Instead, the Conflicts Committee purported to determine, on its own, that the Derivative Litigations did not warrant any increase in the Merger price. Despite the facts that the Fall Dropdown Claim was soon to be tried and that the Committee members were well-aware of their own bad faith actions, they did not seek to obtain any value in return for KMI extinguishing the Derivative Litigations.

When the Conflicts Committee provided Special Approval, each member was acting to extinguish the material claims alleging that he had breached duties owed to the Partnership, put the controlling Parent's interests over the interests of the Partnership and had acted in bad faith. Each Committee member also knew, in advance, that by granting Special Approval, they could obtain a much more lucrative Board position with KMI.[39]

General Partner issued the Proxy Statement in October 2014. As found by the Court of Chancery:

> The Merger Committee did not seek value for the breach of contract claim at issue in [the Fall Dropdown] litigation, and the Proxy Statement made clear that the consideration provided in the Merger did not incorporate any value for the claim. The Merger Committee did not consider [the Fall Dropdown] lawsuit at all until the day before they voted to approve the Merger, after the consideration had been set. No third-party analysis or valuation of claims was undertaken. The Merger Committee assumed that the claims would be "extinguished as a result of the [Merger]" and regarded their value as "not sufficiently material"

[39] ¶¶ 57-58. (A33-34).

> as to "merit adjustments to the [El Paso MLP] merger consideration or otherwise affect the determinations made by the [Merger Committee] with respect to the [Merger]."[40]

The Proxy Statement also represented "no separate vote of a majority of the unaffiliated [Partnership] unitholders is required under the terms of the [LPA]. KMI is not willing to proceed with a transaction that included a 'majority of the unaffiliated votes cast' threshold . . . ."[41] The Proxy Statement said that approval of the Merger "requires the affirmative vote of a majority of the outstanding [Partnership] common units," and that KMI controlled approximately 40.1% of those units.[42]

The Proxy Statement did not tell the unaffiliated unitholders that KMI's position was that unitholders were voting to immunize, pursuant to Section 7.9(a)(ii), General Partner's attempt to extinguish the Derivative Litigations for no consideration. Indeed, at no time prior to their motion to dismiss this action did the Defendants ever assert that they were entitled to rely on the Unaffiliated Unitholder Approval safe harbor.

On November 20, 2014, the Partnership's common unitholders voted on the Merger.[43] Approximately 78% of the common units were voted in favor of the

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[40] Court of Chancery Standing Decision, 132 A.3d at 80 (quoting Proxy Statement at 45-46 (A221-22)).
[41] *Id.* at 57. (A233).
[42] (A229).
[43] (A457).

Merger, more than half of which were voted by KMI and its affiliates. Only about 66.6% of the unaffiliated units were voted in favor of the Merger. The Merger closed shortly thereafter.

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY FINDING THAT GENERAL PARTNER SATISFIED THE UNAFFILIATED UNITHOLDER APPROVAL SAFE HARBOR

A. Question Presented

Did the Court of Chancery err when it held that: (i) Section 7.9(a)(ii) could be satisfied if a Section 14.3(a) vote of all common unitholders garnered a majority approval of the unaffiliated unitholders, even though the unaffiliated unitholders were not told they were voting to immunize a conflict; and (ii) when it held that the misleading Proxy Statement did not breach the implied covenant? This issue was raised below at A504-09.

B. Standard and Scope of Review

The Court of Chancery's ruling on a motion to dismiss is subject to *de novo* review.[44] When considering a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6), the Court is required to "(1) accept all well pleaded factual allegations as true, (2) accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw all reasonable inferences in favor of the non-moving party, and (4) do not affirm a dismissal unless the plaintiff

[44] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011).

would not be entitled to recover under any reasonably conceivable set of circumstances."[45]

C. Merits of Argument

The rules for interpreting contracts are well-settled. Where the LPA is ambiguous, ambiguities should be resolved against the drafter.[46] Also, "ambiguities are resolved . . . to give effect to the reading that best fulfills the reasonable expectations an investor would have had from the face of the agreement."[47] Investors buy equity in reliance on "the text of the public documents and public disclosures about that entity. . . ."[48]

The implied covenant further protects investors by inferring contract terms "to handle developments or contractual gaps that the asserting party pleads neither party anticipated" or by precluding one party from acting arbitrarily or unreasonably "thereby frustrating the fruits of the bargain that the asserting party reasonably expected."[49] As relevant here, implied in the language of Section 7.9(a) is the

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[45] *Id.*

[46] *Dieckman,* 155 A.3d at 367 (citing *Stockman v. Heartland Industries Partners, LP*, 2009 Del. Ch. LEXIS 131 (July 14, 2006) ("ambiguities are construed against the drafter.")); *see also Estate of Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) (when a contract is ambiguous, "we will apply the doctrine of *contra proferentem* against the drafting party and interpret the contract in favor of the non-drafting party").

[47] *Dieckman*, 155 A.3d at 366.

[48] *Id.* at 367

[49] *Id.*

"requirement that the General Partner not act to undermine the protections afforded unitholders in the safe harbor process."[50] This requirement is breached when the General Partner seeks to rely on an unaffiliated unitholder vote that it induced through misleading statements.[51]

1. The Court of Chancery Misinterpreted the Plain Language of Section 7.9(a)(ii)

The Court of Chancery erred by interpreting Section 7.9(a)(ii) as only "requir[ing] that as part of the [Section 14.3(b)] vote, the merger must receive the votes of a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates."[52] That language – "as part of that vote" – does not appear in Section 7.9(a)(ii) and nothing in the provision suggests that the General Partner's conflict can be immunized by anything other than by putting the issue of the conflict to the unaffiliated unitholders for a vote *called for that purpose*. The Court of Chancery may not read into Section 7.9(a)(ii) language that does not exist.[53]

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[50] *Id.* at 368.

[51] *Id.* (the implied covenant requires that "the General Partner will not mislead unitholders when seeking Unaffiliated Unitholder Approval."). The Court in *Dieckman* did not discuss whether Section 7.9(a)(ii) required a separate vote or whether the unaffiliated unitholders had to be informed that they were being asked to provide Unaffiliated Unitholder Approval.

[52] Order 3-4.

[53] *See In re Explorer Pipeline Co.*, 781 A.2d 705, 723 (Del. Ch. 2001).

Section 7.9(a)(ii) provides that the General Partner's resolution of "in respect of such conflict of interest" is deemed approved if:

> approved by the vote of a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates).

The Court of Chancery's brief analysis focused on Section 14.3(b), noting that it "requires only a single vote of the unitholders to approve a merger."[54] The court below blended Section 7.9(a) into that provision, finding that it requires that "as part of [the Section 14.3(b)]" vote, the merger must receive the votes of a majority of the" unaffiliated units.[55] But Section 7.9(a)(ii) is not a subsection of Section 14.3(b). It is a separate stand-alone provision creating a mechanism for General Partner to obtain a safe harbor for a conflicted transaction.[56] Nothing in Section 7.9(a)(ii) provides that the Unaffiliated Unitholder Approval vote can be joined with a vote to approve a merger, especially when the General Partner fails to inform the unitholders that their vote is for Section 7.9(a)(ii) ratification.[57]

Unlike other LPA mechanisms for unitholder approval, Section 7.9(a)(ii) expressly conditions approval on the "vote of" the unaffiliated unitholders,

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[54] Order at 3.
[55] *Id.* at 3-4.
[56] *See Dieckman*, 155 A.3d at 367 (the Court of Chancery "erred by focusing too narrowly" on one provision, and "[i]nstead it should have focused on the language of the safe harbor approval process.").
[57] (A123).

specifically for the purpose of "approving" the General Partner's resolution of "such conflict." For example, Section 7.3 provides that General Partner may not sell all of the Partnership's assets "without the approval of holders of a Unit Majority."[58] Section 11.1 provides that General Partner may withdraw on certain conditions, provided that the withdrawal be "approved by Unitholders holding at least a majority of the Outstanding Common Units (excluding Common Units held by the General Partner and its Affiliates) . . . ."[59]

Further, Defendants breached the plain terms of Section 7.9(a)(ii) because the Merger vote was not in fact an "approval in respect to such conflict of interest." It is rudimentary that approval can only be secured if unitholders know what they are approving.[60] Here, General Partner never requested, sought or explained to the unaffiliated unitholders the effect of the conflict waiver it now claims to have received from them.

Indeed, the Proxy Statement states that KMI was seeking only a majority vote of all unitholders; not the majority of the unaffiliated unitholder vote required by

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[58] LPA § 7.3. (A117).
[59] LPA § 11.1 (A134-35); *see also* LPA § 12.3 (A139-40).
[60] *See, e.g., In re Investors Bancorp, Inc. S'holder Litig.*, 2017 Del. LEXIS 517, at *18 (Dec. 19, 2017) (explaining that the ratification only operates "when specific acts are presented to the stockholders for approval"); *In re Massey Energy Co. Deriv. & Class Litig.*, 160 A.3d 484, 507 (Del. Ch. 2017) (cleansing vote requires stockholders to be asked in "direct and straightforward way to approve" action being cleansed).

Section 7.9(a)(ii). It specifically recites that "no separate vote of a majority of the unaffiliated [Partnership] unitholders is required under the terms of the [LPA]" and KMI is "unwilling" to condition approval of the Merger on an Unaffiliated Unitholder Approval vote.[61]

Section 7.9(a)(ii) provides important protections to the unaffiliated unitholders in light of the fact that they have invested money in an entity that purported to "limit" fiduciary duties. The controller may obtain the rewards of a safe harbor only by seeking (and running the risk of losing) an Unaffiliated Unitholder Approval vote. General Partner is not permitted under the LPA, and should not be allowed by this Court, to achieve the benefits of the safe harbor by a stealth "vote" buried within another vote of all unitholders.

2. The Court of Chancery's Opinion Did Not Address Whether Defendants, by Failing to Hold a Separate Vote and Inform Unaffiliated Unitholders That They Were Voting to Immunize a Conflict, Violated the Implied Covenant

Even if the express terms of Section 7.9(a)(ii) did not obligate defendants to inform the unaffiliated unitholders that they were being asked to vote to approve a conflict resolution, the implied covenant requires such a separate vote and disclosure. No reasonable investor would think that a vote in a favor of a Merger

[61] (A233).

proposal would also be considered approval of a Conflicted Committee's and the General Partner's conflict.

A reasonable investor would expect that in order to obtain the safe harbor of Unaffiliated Unitholder Approval, the General Partner must, at the very least, inform the unaffiliated unitholders that they are being asked to "approve" General Partner's resolution of a conflict. Here, General Partner told the unaffiliated unitholders the exact opposite: the Proxy Statement represented that there would not be a vote of the unaffiliated unitholders.[62] In essence, General Partner represented that the unaffiliated unitholders' vote was of little significance.[63] The implied covenant prevents Defendants from then turning around and using that same vote to sanitize their conflicted transaction.

The Court of Chancery's interpretation of Section 7.9(a)(ii) undermines the purpose of that provision. By conditioning approval of a conflict transaction by the vote of the unaffiliated units, the drafters sought to encourage the General Partner to propose a fair transaction, and to have to the unaffiliated unitholders believe that their votes would matter.[64] However, the Court of Chancery, by writing that the

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[62] (A229).
[63] (A233).
[64] *See Dieckman*, 155 A.3d at 361 (Section 7.9 operates for unaffiliated unitholder's benefit); *see also In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 Del. Ch. LEXIS 174 (Oct. 2, 2009) (in the corporate context).

provision means the unaffiliated units votes can be counted as "part of the vote" (especially where, as here, the controller already held about forty percent of the vote), undermines the purpose of the safe harbor.[65]

In holding the Merger deprived Plaintiff of standing, this Court relied on corporate precedent in the context of this LPA.[66] Corporate law precedents evaluating the effect of a vote controlled by an interested stockholder, have found that burden shifting requires that the transaction be conditioned on an up-front on approval of the majority of the minority.[67] For the same reasons, the Merger vote cannot provide the basis for the Unaffiliated Unitholder Vote safe harbor absent advance notice that of the effect of the vote.

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[65] In fact, the Proxy Statement (A229) explained that the vote of the unaffiliated units would be relatively unimportant: "Because the EPB merger agreement can be approved by holders of a majority of the outstanding EPB common units, and KMI and its controlled affiliates already own approximately 40.4% of the outstanding EPB common units and has agreed to vote in favor of the EPB merger proposal, the affirmative vote of only 9.6% of the unaffiliated EPB unitholders is needed to approve the EPB merger proposal."

[66] *See* Supreme Court Standing Opinion, 152 A.3d at 1256 nn.20, 26; *id.* at 1261 n.60.

[67] *See In re Southern Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 793 (Del. Ch. 2011) (holding in the corporate context that "because the vote is controlled by an interested stockholder, any burden-shifting should not depend on the after-the-fact vote result but should instead require that the transaction has been conditioned up-front on the approval of a majority of the disinterested stockholders"), *aff'd sub nom, Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

3. The Court of Chancery Erred by Finding that the Misleading Proxy Statement Did Not Violate the Implied Covenant

In evaluating the Merger consideration, the unaffiliated unitholders had to take into account that, in the Merger, they would be relinquishing the value of the Derivative Litigations for nothing. However, the Proxy Statement was misleading and so rendered it impossible for investors to make an informed and intelligent decision. Defendants' Proxy Statement was deceptive and so violated the implied covenant of good faith and fair dealing.

a. The Court of Chancery Applied the Wrong Standard and Held that General Partner Had No Duty to Disclose All Material Facts

In *Dieckman*, this Court held that the implied covenant requires a court to determine whether the express terms of the LPA "can be reasonably be read to imply certain other conditions, or leave a gap, that would prescribe certain conduct, because it is necessary to vindicate the apparent intentions and reasonable expectations of the parties."[68] The Court evaluated a limited partnership agreement with a substantively identical Unaffiliated Unitholder Approval provision, and noted that the agreement "did not address one way or another, whether the General Partner could use false or misleading statements to enable it to reach the safe harbors."[69] It

[68] *Dieckman*, 155 A.3d at 367.
[69] *Id.* at 368.

held that an implied term of the agreement was that "the General Partner will not mislead unitholders when seeking Unaffiliated Unitholder Approval."[70] The Court held that such term was "too obvious to need expression" in the contract.[71]

The *Dieckman* Court further noted that "[u]nder the LP Agreement, the General Partner did not have the full range of disclosure obligations that a corporate fiduciary would have had."[72] However, once General Partner went beyond the agreement's minimal disclosure requirement and issued a proxy statement, General Partner was "obligat[ed] not to mislead unitholders."[73] Nowhere did this Court state that the standard was whether the proxy amounted to "fraud," as the court below required.[74] Instead, the standard for whether a proxy statement is misleading requires only that the General Partner 'not act to undermine the protections afforded unitholders in the safe harbor process."[75] Accordingly, the Court of Chancery erred when it required Plaintiff to plead fraud.[76]

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[70] *Id.* at 368.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Order at 4-5.
[75] *Dieckman*, 155 A.3d at 368.
[76] Fraud requires different pleading standards and requires proof of different elements than a claim that a fiduciary will not mislead investors when seeking their approval of a corporate transaction. *See, e.g.*, *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 141 (Del. 1997) (comparing pleading standards for fraud and a traditional-disclosure based breach of fiduciary duty claim); *Metro Comm'n Corp. BVI v. Advanced Mobilcom Tech. Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004) (noting

b. The Proxy Statement was Materially Misleading

Plaintiff alleged numerous facts to show that the Proxy Statement was misleading. First, the Proxy Statement said that the vote required was a majority of the common unitholders and that there would be no vote of a majority of the unaffiliated unitholders.[77] Moreover, the Proxy Statement indicated that the unaffiliated unitholders vote was mostly insignificant because of KMI's agreement to vote in favor of the Merger.[78] The Proxy Statement never described the effect of unaffiliated unitholder approval in the context of now claiming the protections of the Unaffiliated Unitholder Approval safe harbor. These disclosures alone were materially misleading and deceptive.

Second, the Proxy Statement did not provide any value for the Derivative Litigations. Although the Proxy Statement asserted that the Conflicts Committee purportedly determined that the Derivative Litigations' value "was not sufficiently material such that they would merit adjustments to the" Merger price, the Proxy

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more relaxed standards that govern fiduciary disclosure when a vote is required). *Dieckman* implied a term similar to the fiduciary duty disclosure requirement, which is logical given the context of unitholders being asked to make a ratifying vote, and did not mention any of the other attributes of fraud.

[77] (A233).

[78] (A297).

Statement never informed what that value was.[79] Indeed, Defendants' submissions make clear that the Conflicts Committee never valued the claims at all.[80]

The Proxy Statement did not disclose how much Plaintiff sought in the Derivative Litigations. Plaintiff alleged that the Spring Dropdown Claims was properly valued at $141 million.[81] Plaintiff alleged that the 2012 Dropdown Claim caused damages of $400 million.[82] For the Fall Dropdown, Plaintiff had provided defendants a damages estimate in that action (prior to the Proxy Statement) and ultimately demonstrated damages of $171 million (subsequent to the Proxy Statement). Defendants could have disclosed those values and said they disagreed with them. But they did not.

Third, the Proxy Statement failed to disclose the Merger consideration. The Proxy Statement separated the numbers (*i.e.*, the per unit value) and the number of shares investors would need to calculate the overall value by more than 100 pages.[83] Unitholders "should not have to go on a scavenger hunt" to find this information.[84] Then, Defendants said repeatedly that the Merger was part of an overall $70 billion

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[79] (A222).
[80] (A593).
[81] ¶ 18. (A15).
[82] ¶ 24. (A19).
[83] *See* Per unit value (A169-79) and shares outstanding (A296).
[84] *See Vento v Currey*, 2017 Del. Ch. LEXIS 45, at *10 (Mar. 22, 2017), *vacated on other grounds*, 2017 Del. Ch. LEXIS 207 (July 27, 2017).

corporate restructuring[85] – which is more than 11 times the actual Merger consideration of about $9.1 billion ($6 billion to the unaffiliated unitholders). Defendants did this because, compared to $70 billion, the Derivative Litigations would appear immaterial. But compared to the much lower $9.1 billion price paid for the Partnership, the Derivative Litigations' value would be, and was, material.

The facts alleged in the complaint, but which Defendants omitted from the Proxy Statement, reasonably lead to a pleading stage inference that Defendants believed that, as compared to the Merger consideration, the value of the Derivative Litigations was in fact, material. In its Order, the Court of Chancery does not mention any of the grounds described above.

The Court of Chancery incorrectly stated that the Proxy Statement "provided facts about the Derivative Litigations . . . ."[86] But, the Proxy Statement failed to describe accurately the Derivative Litigations. For example, the Proxy Statement failed to disclose that the Conflicts Committee members who granted Special Approval for the Merger were also defendants in the Derivative Litigations, and were alleged to have acted in bad faith when they provided Special Approval for the three prior conflicted transactions. Instead, the Proxy Statement, by incorporation of SEC Forms 10-K and 10-Q's, merely says that the Derivative Litigations alleged

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[85] ¶ 45. (A28).
[86] Order at 5.

payment of "excessive" consideration and "conflicts of interest" in prior transactions, meaningless information that offers a unitholder no ability to evaluate whether the claims had merit.[87]

The Court of Chancery's erroneous rejection of Plaintiff's allegations was error. For example, the Court of Chancery, rejected Plaintiff's allegation that the Proxy Statement "represented falsely that the Derivative Litigations were not material to the value of the overall transaction."[88] Instead, the court asserted that the Proxy Statement "does not contain an affirmative representation regarding the materiality of certain Derivative Litigations. It reports the belief of members of the Conflict Committee regarding the value of the Derivative Litigations in the context of the El Paso Merger."[89] This too was error. In fact, the Complaint alleges that the Committee's conclusion that the Derivative Claims value was not sufficiently material was a conclusion reached in bad faith.[90]

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[87] (A444, A449, A454).
[88] Order at 5.
[89] *Id.*
[90] *See* ¶ 40 (A26), where Plaintiff alleges, *inter alia*, "the Conflicts Committee knew that a fair valuation of the Derivative Litigations would require them to seek a greater price for the Merger. Instead, the Conflicts Committee purported to conclude, in **bad faith**, that the Derivative Litigations' value was 'not sufficiently material such that it would merit adjustment to the El Paso Partners merger consideration or otherwise affect the determinations made by the Conflicts Committee." (emphasis added). *See also* ¶ 33. (A23).

The Court of Chancery noted that the Proxy Statement failed to disclose that the Committee members were conflicted because they were defendants in the Derivative Litigations.[91] The Court did not deny that this information was material. However, the Court incorrectly held that such disclosure would amount to "self-flagellation" and was thus not required.[92] This is error. Acknowledging that one is a defendant in a claim is not "self-flagellation."

Recently, the Court of Chancery has written that for a defendant to rely on a stockholder vote to cleanse Derivative Litigations in a merger, the defendants must present the issue in a "straightforward way."[93] To the contrary, here: (1) KMI advised unitholders it would not condition approval of the Merger on a majority vote of the unaffiliated units and then, after the fact, took the position that KMI had secured a "safe harbor" based on the unaffiliated unitholders' vote; (2) represented there had been a "valuation" of the Derivative Litigations when there had been none; and (3) gave no value in the Proxy Statement for the overall Merger consideration, but instead, repeatedly, represented its MLP transaction as $70 billion. These misrepresentations violated the implied covenant and deny Defendants any reliance on the Unaffiliated Unitholder Approval safe harbor.

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[91] Order at 6.
[92] *Id.*
[93] *Massey,* 160 A.3d at 507.

II. DEFENDANTS CANNOT RELY UPON SPECIAL APPROVAL BECAUSE IT WAS GRANTED IN BAD FAITH AND IN BREACH OF THE LPA

A. Question Presented

May Defendants rely upon Special Approval where: (i) General Partner chose Special Approval in bad faith; (ii) General Partner appointed conflicted members to the Conflicts Committee; and (iii) the Conflicts Committee purported to grant Special Approval in bad faith, and in breach of the LPA. This issue was raised below at A496-503.

B. Standard and Scope of Review

See I.B.

C. Merits of Argument

The LPA provides that General Partner and its affiliates must take all actions and make all determinations "in good faith."[94] The LPA further provides that Special Approval means approval of a majority of the members of the Conflicts Committee "acting in good faith."[95] Good faith requires that the actor "believe that the determination or other action is in the best interests of the Partnership."[96] The

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[94] LPA § 7.9(b). (A124).

[95] *Id.*

[96] *Id.* Where, as here, "the LPA specifically provides a definition of 'good faith' the Court will construe that term consistently throughout the contract and need not look to 'extra-contractual notions of waste and heightened pleading burden to prove bad faith.'" *Morris v. Spectra Energy Partners (DE) GP, LP*, 2017 Del. Ch. LEXIS 114,

LPA also provides that General Partner and its Affiliates are exculpated for money damages unless they are found to have acted in "bad faith."[97]

Further, the implied covenant requires, generally, that the General Partner and Committee members may not act to subvert the Special Approval process.[98]

To plead bad faith, Plaintiff can allege:

> that the Conflicts Committee believed it was acting against [the Partnership's] best interests when approving the Merger. *He can also do that by showing that the Conflicts Committee consciously disregarded its duty to form a subjective belief that the Merger was in [the Partnership's] best interests.*[99]

Accordingly:

> It may also be reasonable to infer subjective bad faith in less egregious transactions when a plaintiff alleges objective facts indicating that a transaction was not in the best interests of the partnership and that the directors knew of those facts. Therefore, objective factors may inform an analysis of a defendant's subjective belief to the extent they bear on the defendant's credibility when asserting that belief.[100]

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at *33 (June 27, 2017) (quoting *Brinckerhoff v. Enbridge Energy Co., Inc.*, 159 A.3d 242, 259 (Del. 2017)).

[97] LPA § 7.8(a). (A122) (emphasis added).

[98] *Dieckman*, 155 A.3d at 368; *see also Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 423 (Del. 2013) ("The selection and carrying out of the Special Approval process must satisfy both the express overarching contractual duty in Section 7.9(b) to act in good faith and the duty under the implied covenant.").

[99] *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 106 (Del. 2013) (emphasis added).

[100] *Id.* at 107.

In the Liability Opinion, the Court of Chancery concluded that the Committee members' own trial testimony established that they did not "subjectively believe that approving the Fall Dropdown was in the best interests of the Partnership."[101] Rather,

> [The Committee members] viewed El Paso MLP as a controlled company that existed to benefit Parent by providing a tax-advantaged source of inexpensive capital. They knew that the Fall Dropdown was something Parent wanted, and they deemed it sufficient that the transaction was accretive for the holders of the common units.[102]

The court found that "[t]he Committee members failed to form a subjective believe that the Fall Dropdown was in the best interests of El Paso MLP," and therefore, the General Partner "breached the LP Agreement by causing El Paso MLP to engage in the Fall Dropdown."[103]

The Complaint alleges sufficient facts to infer that the Conflicts Committee did not grant Special Approval in good faith and never formed a subjective belief that the Merger, without providing any consideration for extinguishing the Derivative Litigations, was in the best interests of the Partnership.[104] Contrary to the Court of Chancery's finding below, the Complaint does allege that the Committee

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[101] Liability Opinion, 2015 Del. Ch. LEXIS 116, at *50.
[102] *Id.* at *77.
[103] *Id.* at *5.
[104] ¶¶ 22, 24, 26, 29, 31, 33, 34, 38-40, 43-45, 47 (A17-18, A21-29); *see also* Transcript of Hearing on Motion to Dismiss, October 17, 2017 (A584-89).

members did not, in fact, believe that the Derivative Litigations were not material in comparison to the Merger price.[105]

The Complaint alleges that, although KMI first proposed the Merger on July 15, 2014,[106] the Conflicts Committee did not even consider the Derivative Litigations until *the evening of* August 8, 2014, the night before the purported grant of Special Approval.[107] The Conflicts Committee did not obtain any independent counsel to evaluate the "merits" of the Derivative Litigations, instead they relied upon a report by counsel that had ties to KMI.[108] The Committee did not obtain any valuation of the Derivative Litigations, asserting that they did not want to incur the delay involved in doing so.[109] They offered no explanation for why the Committee did not seek an independent valuation of the claims promptly.[110]

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[105] ¶ 40. (A026). *Cf.* Order at 5 (asserting that the Complaint did not allege that "the Committee members did not actually hold the" reported belief "regarding the value of the Derivative Litigations).

[106] (A204).

[107] (A221-22).

[108] (A221). The Committee hired counsel who had "current and prior relationships [with] KMI and its affiliates . . .." ¶¶ 33-34. (A23-24).

[109] (A222).

[110] The Court's decision in *Kinder Morgan Inc. Corp. Reorganization Litig.*, 2015 Del. Ch. LEXIS 221 (Aug. 20, 2015), *aff'd sub nom., Haynes Family Trust v. Kinder Morgan G.P., Inc.,* 135 A.3d 76 (Del. 2016) (table), is not to the contrary. Rather, in that case, there was no claim that the Merger would eliminate valuable Derivative Litigation claims asserted against the Committee members, or that defendants had made an "end run" around the requirements for membership on the Conflicts Committee.

Each Committee member was a defendant in the Derivative Litigations and the Committee was told that the Merger would likely extinguish the claims alleged against each of them. For the Committee to have demanded that KMI pay for the Derivative Litigations, they would have had to argue to KMI that serious claims of bad faith leveled against them had merit – an event so unlikely as to be non-existent. The Conflicts Committee members, of course, were well-aware of the evidence of their bad faith which subsequently led to the Court of Chancery's Liability Opinion in the Fall Dropdown action. [111]

The Complaint also alleges facts to infer that the General Partner, controlled by KMI, did not select or carry out the Special Approval process in good faith. General Partner chose to proceed by Special Approval, using three Board members that were all defendants in the Derivative Litigations. General Partner was well aware of the evidence, subsequently presented in the Fall Dropdown Claims trial, that these individuals had, for all prior conflicted transactions subject to the

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[111] *See* Court of Chancery Standing Opinion, 132 A.3d at 113 (citing *Merrit v. Colonial Foods, Inc.*, 505 A.2d 757, 765 (Del. Ch. 1986) ("[T]he law, sensitive to the weakness of human nature and alert to the ever-present inclination to rationalize as right that which is merely beneficial, will accord scant weight to the subjective judgment of an interested director concerning the fairness of transactions that benefit [ ] him"); *Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660, 663 (Del. 1952) ("[T]he law . . . does not presume that directors will be competent judges of the fair treatment of their company where fairness must be at their own personal expense.")).

Derivative Litigations, favored the Parent's interests over the interests of the Partnership and unaffiliated unitholders.

The General Partner knew that the Committee members had previously represented in Forms 10-Q that the Derivative Litigations were without merit. General Partner could have, but did not, appoint new non-conflicted directors to value and negotiate the value of the Derivative Litigations. Finally, General Partner informed the Committee Member that, if the Merger closed, they would each be offered lucrative positions on the KMI Board.

These facts are sufficient to raise an inference that General Partner chose to seek Special Approval and appoint these Committee members to subvert the Special Approval process. The General Partner knew these individuals would never ascribe any value to the Derivative Litigation and would not insist, or even argue, that KMI pay anything for the value of the Derivative Litigations.

It does not matter that the Committee members satisfied the literal terms of the LPA's definition of "Conflicts Committee."[112] In *Dieckman*, this Court rejected the proposition that satisfying only the letter of the committee requirements was required. It held that the language defining "Conflicts Committee" "is reasonably read by unitholder to imply a condition that a Committee has been established whose members *genuinely qualified as unaffiliated with the General Partner and*

[112] LPA § 1.1. (A56).

independent at all relevant times."[113] "[D]eceptive conduct may not be used to create the false appearance of an unaffiliated, independent Special Committee."[114]

Because the Conflicts Committee did not act in good faith, General Partner did not obtain Special Approval as required by the LPA.[115] Further, General Partner, in bad faith, acted to subvert the Special Approval process. General Partner, therefore, is not entitled to a safe harbor pursuant to Section 7.9(a)(i). Likewise, because Defendants acted in bad faith, they are not entitled to exculpation.[116]

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[113] *Dieckman*, 155 A.3d at 369.
[114] *Id.*
[115] (A70).
[116] (A122).

III. THE DERIVATIVE LITIGATIONS WERE MATERIAL

A. Question Presented

Does the Complaint allege that the value of the Derivative Litigations was material in comparison to the Merger price? This issue was raised below at A487-95.

B. Standard and Scope of Review

See I.B.

C. Merits of Argument

The overall Merger consideration was approximately $9.1 billion. As set forth below, the Derivative Litigations, collectively, were worth as much as $700 million. That value is material to the Merger price and the unitholders should have received compensation for the claims.

Plaintiff alleged facts to show that, as compared to the Merger consideration, the value of the Derivative Litigations was material.[117] The damages claim for the Fall Dropdown alone, which Plaintiff tried and proved, was material. [118]As the Court of Chancery wrote:

> The General Partner already has suggested that the $171 million Liability Award was not material in the context of the $6 billion Merger. Brinckerhoff disagrees, but the General Partner's position on materiality is not a frivolous one. Personally, I believe Brinkerhoff has

[117] ¶¶ 27, 39. (A21-22, A25-26).
[118] ¶ 27. (A21-22).

> the stronger of the argument, because the pro rata value of the Liability Award, plus interest, approximates 2.8% of the value of the Merger consideration that the unaffiliated holders of common units received.[119]

The Complaint alleged facts to show that the claims for the Spring Dropdown and the 2012 Dropdown also had substantial merit and were material in comparison to the Merger price.[120] Indeed, the Court of Chancery's grant of summary judgment to defendants on the Spring Dropdown Claim rested on its holding that the General Partner in negotiating with the Conflicts Committee had no duty to disclose material facts.[121] That holding is contrary to this Court's reasoning in *Dieckman* – the implied covenant does not eliminate duties to disclose. Thus, it is likely that Plaintiff would have prevailed on appeal of the Spring Dropdown Claim and achieved the same result at trial as for the Fall Dropdown Claim. Further, each of those dropdowns followed the same script as in the Fall Dropdown, for which Plaintiff proved the General Partner, in bad faith, had the Partnership pay an excessive price for the assets dropped down.

Particularly, for the 2012 Dropdown Claim, defendants knew that the contracts for the pipeline assets the Partnership purchased, Cheyenne and CIG, were

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[119] Court of Chancery Standing Opinion, 132 A.3d at 117.
[120] ¶¶ 20, 23, 24. (A16-17, A18-19).
[121] *In re El Paso Pipeline Partners, L.P.*, 2014 Del. Ch. LEXIS 285, at *4-5 (June 12, 2014). When the court held that General Partner had no duty to disclose, it did not address the fact that the Partnership's prospectus represented that to investors that "[o]ur general partner is accountable to us and our unitholders as a fiduciary." (A528 n.273, *see also* A528-29 nn.273, 274 & 277).

soon to expire and, on renewal, would certainly suffer lower rates. As noted, in May 2012, defendants' calculation of cash flows for those assets rested in large part, or even entirely, on supposed Merger "synergies." Upon the announcement of the 2012 Dropdown, trading in an efficient market, the market realized the transaction was unfair and the value of EPB's equity dropped immediately by about $400 million.[122]

We recognize that, as the Court explained in *Massey*,[123] the valuation of pending Derivative Litigations involves many complex issues. Here, however, a fair reading of the facts alleged in the Complaint, the facts set forth in the Proxy Statement (which Defendants argued should be incorporated into the complaint), together with Defendants' briefs and arguments, show that Defendants failed entirely to value the Derivative Litigations. And, this was not a case where a third-party acquirer might pursue any of the claims alleged in the Derivative Litigations. The Merger was an attempt by KMI to ensure it would never pay anything for the claims of bad faith overcharges alleged in the Derivative Litigations.

Also, on the issue of materiality, it should be noted that given that the Conflicts Committees' two-and-a-half week effort to increase the Merger consideration achieved an increase of about 1% (.0114) of a share of KMI (0.9337 to 0.9451), or about 36 cents per Partnership unit. Juxtaposed against that 36 cent

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[122] ¶¶ 6, 23, 24. (A9, A18-19).
[123] 160 A.3d at 484

bargaining increase, the value for the claim for the Fall Dropdown alone – which with interest and without counsel fees, was about $1.00 per share – was material.

IV. THE SECONDARY LIABILITY CLAIMS SHOULD BE SUSTAINED

A. Question Presented

Did the Court of Chancery err by dismissing the secondary liability claims based solely on his erroneous conclusion that the Complaint failed to state a claim against the General Partner? Secondary liability was addressed below at A511-17.

B. Standard and Scope of Review

See I.B.

C. Merits of the Argument

The Court of Chancery dismissed the secondary liability claims based solely on its finding that "there is no underlying wrong . . . ."[124] As demonstrated above the dismissal of the claims against General Partners was in error. Therefore, the dismissal of the secondary liability claims was in error.

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[124] Order at 6.

CONCLUSION

For all of the foregoing reasons, the Order should be reversed and the matter remanded for further proceedings.

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