EFiled: Mar 15 2018 02:23PM EDT
Filing ID 61800798
Case Number 534,2017 D

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 REPLY BRIEF

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March 15, 2018

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INTRODUCTION

Plaintiff's Opening Brief ("OB") demonstrated that the Court of Chancery's dismissal of the complaint (the "Complaint") rested on three fundamental errors.[1] First, the Court of Chancery erred by holding that a Section 14.3(b) vote to approve a merger could, *sub silientio*, also constitute a vote of the unaffiliated unitholders to approve a conflict of interest pursuant to the safe harbor provision, Section 7.9(a)(ii).[2] Second, the Court of Chancery erred by finding that the standard for pleading a breach of the implied covenant with respect to Section 7.9(a)(ii) required Plaintiff to allege "fraud or conduct resembling fraud."[3] Third, the Court of Chancery erred by finding that Plaintiff failed to allege that the Proxy contained material misstatements.[4]

Defendants' Answering Brief ("AB") fails to rebut Plaintiff's arguments. First, Defendants assert that Section 7.9(a)(ii) can be satisfied whenever a vote of all common unitholders, for any reason, happens to garner a majority of the unaffiliated unitholders.[5] This argument is contrary to the plain language of the LPA, which mandates that for the General Partner to obtain a safe harbor for a conflict of interest,

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[1] Capitalized terms not defined herein have the same meaning as in the Opening Brief.
[2] OB 17-24.
[3] *Id.* at 25-26.
[4] *Id.* at 27-31.
[5] AB 16-19.

the General Partner's "resolution or course of action in respect of such conflict of interest" be "approved by the vote of a majority of the [unaffiliated units]."[6] The announced purpose of the vote must be whether the unaffiliated unitholders wish to approve of the General Partner's resolution of the conflict, thereby giving the General Partner a safe harbor.

Further, if the plain language does not require that the unaffiliated unitholders be told that they are being asked to provide a safe harbor, the implied covenant surely must. It would undermine the public unitholders' reasonable expectations to suggest that investors could be deemed to have taken important actions like giving the General Partner immunity on a conflicted transaction without being told that, in fact, that is what they are doing. This is especially so in the present case where unaffiliated unitholders were specifically told that the Merger was not conditioned on their approval.

Second, the Court of Chancery applied the incorrect standard to determine whether the proxy was misleading and so violated the implied covenant.[7] The court below described the standard as barring "fraud and conduct resembling fraud."[8] In

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[6] A123.
[7] AB 23-24.
[8] *Id.* at 23 (citing Order at ¶ 5(d)).

fact, this Court's decision in *Dieckman v. Regency GP LP* does not refer to "fraud" at all.[9]

Third, Defendants failed to rebut Plaintiff's allegations that the Proxy Statement was, in fact, misleading.[10] It is not enough for Defendants to say that unaffiliated unitholders should have to search through years of prior SEC filings to determine when the Committee members were appointed to the Board and when they served on prior Committees. Nor can Defendants avoid providing a meaningful description of the claims by asserting that they need not disclose Plaintiff's theories and damages allegations. Here, Defendants provided almost no information concerning the factual basis of the claims, disclosing merely that the Derivative Litigations alleged that the Partnership paid excessive consideration in certain prior conflicted transactions.

Fourth, Plaintiff's Opening Brief demonstrated that the Complaint pleads adequately that the General Partner failed to secure "Special Approval" of the Merger in good faith as required by the LPA.[11] As the court wrote in *Massey*, in the corporate context:

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[9] 155 A.3d 358 (Del. 2017).
[10] OB 25-31.
[11] OB 32-38.

> Any board negotiating the sale of a corporation should attempt to value and get full consideration of all the corporation's material assets.[12]

Here, Defendants orchestrated a Special Approval process by which they knew the Committee would not value the Derivative Litigations, and the Committee acceded to KMI's wishes by approving the Merger without attempting to get consideration for Derivative Litigations worth hundreds of millions of dollars.

Defendants Answering Brief does little more than offer conclusory assertions that the conflicted members of the Committee believed their own statements as to the merits of the Derivative Litigations, assertions specifically contradicted by the allegations in the Complaint.[13] Further, Defendants cited authority does not support the proposition that the General Partner may appoint a Committee that is directly interested in the transaction at issue and will receive benefits in the transaction, such as the elimination of claims against them, not shared by the unaffiliated unitholders.

Fifth, the Opening Brief demonstrated that the Derivative Litigations were material as compared with the Merger consideration.[14] Defendants argue in response that a "risk adjusted calculation" made "as of" the Merger's Special Approval date would demonstrate that the Derivative Litigations were not material But, Defendants ignore the fact that they all knew, in August 2014, of the facts

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[12] *In re Massey Energy Co. Deriv. & Class Action Litig.*, 2011 Del. Ch. LEXIS 83, at *8 (May 31, 2011).
[13] ¶¶ 33, 40 (A23-24, A26).
[14] OB 39-42.

demonstrating the value of the Derivative Litigations that were subsequently proved at trial on the Fall Dropdown. Further, having prepared no risk adjusted analysis as part of their Merger approval process, the Court should not provide Defendants with the benefit of that analysis now.

Finally, because the Complaint states a reasonably conceivable claim for an underlying breach of LPA and the implied covenant, plaintiff's secondary liability claims also should not have been dismissed.

ARGUMENT

I. THE MERGER VOTE DID NOT MEET SECTION 7.9(A)(ii)'S REQUIREMENT.

A. Section 7.9(a)(ii) Requires That The Unaffiliated Unitholders Vote To Approve The Safe Harbor.

Section 7.9(a)(ii) provides that to satisfy the Unaffiliated Unitholder Approval safe harbor, the General Partner's action must be "approved by the vote of a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates)."[15] The required vote, therefore, must address the safe harbor for which General Partner seeks approval. Section 7.9(a)(ii) does not refer to any other type of vote that may be held pursuant to the LPA. Nor does it provide that the Section 7.9(a)(ii) vote could occur, without notice to the unaffiliated unitholders, "as part of" or within another vote. The plain language of Section 7.9(a)(ii) requires that General Partner obtain approval by a vote of the unaffiliated unitholders, called for the purpose of approving the safe harbor for the conflict transaction.

Defendants' assertion that Section 7.9(a)(ii) does not require a "separate class vote of the unaffiliated unitholders called for the specific purpose of determining whether the Unitholder Approval Safe Harbor applies, as opposed to a single

[15] A123.

unitholder vote on the Merger," is incorrect.[16] Section 7.9(a)(ii) requires a "vote of" a majority of the unaffiliated unitholders voting to approve the safe harbor. The subject of the vote, therefore, must be whether to grant the safe harbor. On the other hand, Section 14.3(b) requires, for approval of the merger, "the affirmative vote or consent of the holders of a Unit Majority." The Section 14.3(b) vote does not ask the unaffiliated unitholders to approve a safe harbor, nor does it apply only to a related-party merger: it is to approve **any** merger. Nothing in Section 7.9(a)(ii) (or elsewhere in the LPA) provides that Unaffiliated Unitholder Approval could be satisfied through a unitholder vote brought for a different purpose under another LPA section.

Thus, Section 7.9(a) does "suggest[] that the safe harbor should apply only if the General Partner puts 'the issue of the conflict to the unaffiliated unitholders for a vote called for *that* purpose.'"[17] Indeed, Section 7.9(a)(ii) requires it. Defendants argue otherwise but cite no support other than their own *ipse dixit*.

Defendants' reference to LPA provisions that call for certain votes "as a class" is a red herring.[18] The LPA refers to voting "as a class" where more than one class of units are involved in voting on a single issue. If a majority is required of the

[16] AB 17.
[17] AB 18.
[18] AB 18-19.

combined units from two classes, the LPA specifies that the two classes vote "as a single class."[19] If the LPA requires a separate majority vote from each class, it specifies that each class votes "as a class." Thus, the "unit majority" that must be obtained to approve a merger during the Subordination Period required the majority approval of the unaffiliated unitholders, "voting as a class," and of the Outstanding Subordinated Units, "voting as a class."[20] After the Subordination Period, a merger requires "a majority of the Outstanding Common Units and Class B Units, if any, voting as a single class."[21] In the former scenario, the two classes vote separately, in the latter, the two classes vote as one.[22]

The Section 7.9(a)(ii) vote, however, does not involve more than one class. Approval of the conflict requires a majority vote of only the "Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates)." The issue of "voting as a class" is not implicated at all.

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[19] *E.g.*, Section 11.2 (Removal of the General Partner), A136; Section 12.3 (Liquidator), A139.

[20] Section 1.1, A72; Section 14.3(b), A150.

[21] Section 1.1, A72.

[22] *See also* Section 11.2 (Removal of the General Partner) (providing that the General Partner may be removed by a 66.66% vote of the "Outstanding Units (including Units held by the General Partner and its Affiliates) voting as a single class," and that such removal must also provide for election of a successor by majority votes of "the outstanding Common Units and Class B Units, if any, voting as a single class and a majority of the outstanding Subordinated Units . . . voting as a class."), A136.

Defendants' assertion that General Partner need not tell the unaffiliated unitholders that they are being asked to vote to approve a safe harbor for a conflict because the "Unitholder Approval Safe Harbor is self-effectuating and does not require the General Partner to take any action in advance" bears no relation to the LPA or common sense.[23] The concept of a "self-effectuating" vote is meaningless. The LPA provides procedures to be followed to hold a unitholder vote; unitholder votes do not appear out of nowhere.[24] Defendants' assertion that Special Approval requires "affirmative steps in advance" but Unaffiliated Unitholder Approval does not is also incomprehensible. Section 7.9(a)(i) provides that one safe harbor requires "Special Approval;" Section 7.9(a)(ii) provides that the second requires approval by a majority vote of the unaffiliated unitholders. The first requires the General Partner to appoint a Committee; the second requires the General Partner to hold a vote to approve the safe harbor. Therefore, both require affirmative, advance steps.

B. The Implied Covenant Obligates The General Partner To Tell Investors That They Are Being Asked To Approve A Conflict Pursuant To Section 7.9(a)(ii)

Finally, if the Court finds that the plain language Section 7.9(a)(ii) does not require a vote of the unaffiliated unitholders called for specifically to approve the safe harbor, such a vote is clearly required by the implied covenant. It should go

[23] AB 19.

[24] *See, e.g.*, Section 7.9(a), A123; Section 14.3, A150; Section 7.3, A117; Section 11.1, A134-35.

without saying that the unaffiliated unitholders must be told that a vote in favor of the Merger would also be considered a vote to grant a safe harbor to the General Partner's conflict.[25] Certainly, nothing in the LPA provides that the Section 7.9(a)(ii) vote may be an undisclosed component of a unitholder vote on another matter. Therefore, there is a "gap," and the implied covenant requires the Court to consider an investor's reasonable expectations.[26]

A limited partner has a reasonable expectation that they would be told if they were being asked to vote on whether to provide the General Partner with a safe harbor for a conflict transaction. Indeed, it strains credulity to suggest that an investor could be asked to make a decision as important as immunizing the General Partner's conflict without being told that he or she was voting to do so.

Requiring the General Partner to provide notice that it was asking the unaffiliated unitholders to provide a safe harbor would not require the Court to rewrite the LPA – a boilerplate objection to implied covenant claims.[27] At most, the LPA is silent on how the Section 7.9(a)(ii) should be implemented. By requiring basic notice to the limited partners, the Court would merely be implying reasonable terms – that the vote be fully informed and not misleading. In *Dieckman*, for

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[25] Under the current circumstances, the unaffiliated unitholders would also have to be told of the Committee's conflict with respect to the Derivative Litigations.
[26] *See, e.g.*, *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017).
[27] AB 20.

example, the LPA did provide requirements for a merger vote, yet the Court held that the implied covenant required additional disclosures.[28] This did not amount to re-writing the agreement.

Here, Defendants compounded the breach by misleading the unaffiliated unitholders. The Proxy Statement stated that *that the General Partner proceeded by Special Approval to approve the transaction*, that the Merger was not conditioned on a vote of the minority units, and, therefore, that the unaffiliated unitholders' vote was relatively unimportant.[29] Defendants did not tell the investors that if, by chance, a majority of the unaffiliated unitholders voted in favor of the Merger, the Merger could not be challenged because of the 7.9(a)(ii) safe harbor.[30] That is the exact opposite of what Section 7.9(a)(ii) requires: a vote of the unaffiliated unitholders to approve of a conflicted transaction.

Finally, Defendants assert that Plaintiff failed to raise this issue below.[31] Defendants' are wrong. *Compare* AB 20 (attacking Plaintiff's alleged failure to argue a duty "to inform the limited partners in advance of the vote that it might rely on the unitholder Safe Harbor") *with* A504-05 (Plaintiff's Court of Chancery Brief clearly arguing that "[t]he Merger Proxy never says that if a majority of the

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[28] *Dieckman*, 67 A.3d at 368.
[29] *E.g.*, A181, A184, A218, A224, A227-28.
[30] A233
[31] AB 20.

unaffiliated common unitholders vote in favor of the merger, KMI will consider the merger definitively approved.").[32]

C. Defendants Breached The Implied Covenant Because The Proxy Statement Was False And Misleading.

1. The Court Of Chancery Applied The Incorrect Standard.

This Court recently held that to allege that a proxy statement breached the implied covenant, a plaintiff must allege the proxy was misleading or deceptive.[33] The Court did not hold that a plaintiff was required to prove fraud.

The Court of Chancery erroneously found that Plaintiff was obligated to prove "fraud [or] conduct resembling fraud."[34] The court relied upon *pre-Dieckman* case law, which noted that "[p]roving fraud thus offers *one way* of establishing a breach

[32] A504-05. Plaintiffs further argued that the Proxy Statement was misleading when it said:

> [T]he vote of a majority of the outstanding EPB units, including those owned by KMI and its affiliates, is required to approve the EPB merger agreement, [and] no separate vote of a majority of the unaffiliated EPB unitholders is required under the terms of the EPB partnership agreement.

A505; *see also* A599, A601, A603 (arguing that the disclosure issues breached the implied covenant).

[33] *Dieckman*, 155 A.3d at 368.

[34] Order 4.

of the implied covenant."[35] It may be that fraud is *sufficient* to prove a breach of the implied covenant, but it is not *necessary*.

Further, the Court of Chancery misconstrued Plaintiff's argument as one seeking to impose "a generalized duty to disclose all material information reasonably available . . .."[36] As this Court held in *Dieckman*, once the General Partner chose to go beyond the bare requirements of Section 14.3(b), the General Partner was "obligat[ed] not to mislead unitholders."[37] Therefore, when it distributed the Proxy Statement, the General Partner obligated itself "not to mislead" investors.

Defendants offer nothing to suggest that the Court of Chancery applied the correct standard. Defendants merely assert wrongfully that *Dieckman* required the higher "fraud" standard.[38]

2. The Complaint Alleges That The Proxy Statement Was False And Misleading.

First, with respect to Section 7.9(a)(ii), the Proxy Statement failed to inform unaffiliated unitholders that they were being asked to provide the General Partner with a safe harbor for a conflict transaction. To the contrary, as noted above, the

[35] *Id.* at 5 (citing *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 443 (Del. Ch. 2012), *rev'd on other grounds*, 68 A.3d 665 (Del. 2013)) (emphasis added).
[36] Order 4.
[37] 67 A.3d at 368.
[38] AB 23.

General Partner told the unitholders that it proceeded by "Special Approval" and that the Merger would not be conditioned on a vote of the unaffiliated units. Thus, the General Partner did not "accurately describe[] the details of the vote" as Defendants now assert.[39]

Second, with respect to the Merger vote pursuant to Section 14.3(b), the Proxy contained numerous false and misleading statements:

The Proxy stated that the Committee determined that the value of the Derivative Litigation was "not sufficiently material such that they would merit adjustments to the KMP merger consideration . . .."[40] In fact, the Committee did not value the Derivative Litigations at all, whether themselves or by retaining an independent evaluation. Instead, the Committee pounced on the opportunity to extinguish the lawsuits against themselves and their colleagues for no consideration. Further, neither the Proxy Statement nor any of the Partnership's prior filings provided a meaningful summary of the allegations to permit the unaffiliated unitholders to evaluate whether the claims should be abandoned for nothing. The Proxy Statement disclosed no more than that the Derivative Litigations claimed the Partnership had overpaid for certain assets in prior dropdown transactions.[41] The

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[39] AB 24.
[40] A221.
[41] A221.

Partnership's previously filed Forms 10-Q offered little more.[42] Indeed, the Proxy Statement did not even disclose that one of the Derivative Litigations was heading for trial on claims asserting that the Committee members' bad faith had damaged the Partnership by at least $171 million – a fact that might have caused unaffiliated unitholders to investigate further. Instead, the Proxy Statement deliberately white-washed the facts of the Derivative Litigations to give the false impression that they were without value, despite the fact that Defendants were well-aware of the damning factual evidence soon to be disclosed at trial on the Fall Dropdown.

The Proxy Statement also failed to disclose the crucial fact that the Committee members were named defendants in the Derivative Litigations and were alleged to have acted in bad faith when they approved the prior transactions. To understand that even the Committee members reviewing the Merger were the same individuals that approved three prior dropdown transactions over the preceding five years, the unaffiliated unitholders would have to piece together snippets of information from filings going back years about transactions that were not identified in the Proxy Statement. Investors should not have to refer back to previously filed documents and piece together bits of information to learn the basic facts necessary to make an informed vote, especially given that the Proxy was deliberately crafted to give the false impression that the Derivative Litigations had no merit.

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[42] A454.

Defendants assert that the Proxy Statement need not have disclosed the damages sought by the Derivative Litigation or that the Committee were alleged to have acted in bad faith because these facts were merely "plaintiff's legal theories or his subjective valuation of his claims."[43] Plaintiff is not complaining that the Proxy Statement failed to describe the Derivative Litigations as he would have; the Proxy Statement, even by reference, failed to disclose material facts concerning the Derivative Litigations. These basic facts, especially in light of the Committee's deliberate failure to provide any valuation for the claims, are not mere theories or opinions but necessary information for the unaffiliated unitholders to evaluate the merits of the Derivative Litigations in light of the Merger price.

Further, Plaintiff did not argue that the Proxy Statement was obligated to disclose that the Committee members "were conflicted" because of their status as defendants. But the Proxy Statement did have to disclose that they were named as defendants in the underlying litigations and were alleged to have acted in bad faith. The disclosure of these facts do not require any characterization and do not amount to "self-flagellation."

Finally, the Proxy Statement failed to provide the most basic information concerning the total Merger consideration KMI would pay to acquire the

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[43] AB 25.

Partnership. Defendants do not dispute that the Proxy Statement failed to disclose this information.[44] Nor do Defendants dispute that the information concerning the per-unit merger price and the number of units outstanding were separated by more than 100 pages in the Proxy Statement.[45] This "hiding-the-ball" is compounded by the Proxy Statement's omission of any necessary facts by which the unaffiliated unitholders could evaluate the value of the Derivative Litigations.

None of the Defendants' authority supports their position that the Proxy could withhold material facts as to the value of the claims.[46] The decision in *Seibert v. Harpers Row Publishers, Inc.*,[47] says nothing about providing a value for a derivative litigation that investors are being asked to vote to extinguish. The plaintiff in *Seibert* argued that the company should have disclosed stockholder opposition to a stock buyback plan and that termination of a retirement plan served no proper purpose. The court disagreed, stating that the company need not include "opinions or possibilities."[48] Here, Defendants knew of the actual facts underlying the litigation

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[44] Defendants' assertion that no unitholder could reasonably believe that the Merger's value alone was $70 million (AB 25) is beside the point and still fails to demonstrate that the Proxy Statement disclosed the actual Merger consideration.
[45] Defendants have no response to Plaintiffs' authority holding that investors need not engage in [scavenger hunts] to locate material information. OB 28 (citing *Vento v. Currey*, 2017 Del. Ch. LEXIS 45 (Mar. 22, 2017), *vacated on other grounds*, 2017 Del. Ch. LEXIS 207).
[46] AB 25 n.89.
[47] 1984 Del. Ch. LEXIS 523 (Dec. 5, 1984).
[48] *Id.* at *16.

and a damages report, which could have been disclosed to the unitholders, even if Defendants asserted that they disagreed with the allegations.

In *Edelman v. Phillips Petroleum Co.*,[49] the court denied a motion to enjoin a vote for a recapitalization plan. Although the court held that management was not obligated to include opinions of the opposition's experts about the negative effects of the recapitalization plan that did not form part of the directors' judgment, the court did not hold that the company could withhold material facts necessary to allow the stockholders to make an informed vote.

Defendants also fail to provide authority for their argument that the Committee was not, itself, conflicted.[50] *Aronson v. Lewis*[51] and *Orman v. Cullman*,[52] on which Defendants rely,[53] interpreted special rules for "demand futility," or "business judgment," which are not applicable here. Further, *Orman* and *Krim v. ProNet, Inc.*,[54] say only that the offer of a seat on the board is not sufficient, without more, to demonstrate a conflict. Here, the offer of a seat compounded the Committee members' existing conflict.

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[49] 1985 Del. Ch. LEXIS 459 (Feb. 12, 1985).
[50] *See* OB nn.110 & 111.
[51] 473 A.2d 805, 815 (Del. 1984).
[52] 794 A.2d 5 (Del. Ch. 2002).
[53] AB 31-32.
[54] 744 A.2d 523, 528 n.16 (Del. Ch. 1999).

II. DEFENDANTS FAILED TO OBTAIN SPECIAL APPROVAL

A. The Committee Failed To Form A Subjective Belief That The Merger Was In The Best Interests Of The Partnership.

The Complaint alleges specific facts to raise an inference that the Committee did not form a subjective belief that the Merger was in the best interests of the Partnership.[55] The Committee deliberately turned a blind eye to the Derivative Litigations' merits and, therefore, knew that they had not fairly evaluated whether agreeing to the Merger price, which included no consideration for the Derivative Litigations, was in the best interests of the Partnership.

Nothing in the Answering Brief rebuts the allegations of bad faith, and the inference of bad faith raised by these allegations. The Complaint's allegations show more than poor negotiations by the Committee.[56] By Defendants' own admission, the Committee engaged in *no negotiations* concerning the Derivative Litigations and took no steps to obtain value for the unaffiliated unitholders. The Committee made a self-interested decision to abandon the claims for no consideration, despite the fact that one of the claims was advancing to trial.

Delaware's policy is to prevent "third-party acquirers [buying] into litigation morasses, the persistence of which they cannot control." *In El Paso Pipeline GP*

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[55] OB 34-37. Contrary to Defendants' assertion (AB 33), the Complaint alleges that the Committee "purported to grant Special Approval for the Merger in bad faith" (A0011).

[56] AB 36.

Co., L.L.C. v. Brinckerhoff, 152 A.3d 1248, 1251 (Del. 2016). But, here, the Merger was a related-party transaction. Delaware policy should further the goal of preventing controllers from acting in bad faith, overcharging a controlled public entity, and then arranging a related-party merger that would extinguish the controller's and its affiliates liability for no consideration.

Defendants' suggestion that the "litigation facts known at the time hardly support Plaintiff's warped view as to the value of the Derivative Litigations" is specious. The "litigation facts" known to the Committee in August 2014 are the same facts put forth at the trial in November that supported the Court of Chancery's extensively detailed findings of the Committee's bad faith. If Defendants contend that the Committee members truly believed in August 2014 that they had behaved properly, this could only be explained by the fact that the members' own status as defendants in the litigation "warped" their view of the facts.

B. Defendants Breached The Implied Covenant By Appointing A Conflicted Committee.

Defendants' assertion that the implied covenant is inapplicable because the LPA addresses the requirements for service on the Committee is, in light of this Court's decision in *Dieckman*, specious. It further well illustrates Defendants' view of their obligations to the public that invested their money in the Partnership.

The limited partners would reasonably expect that the Committee members would not be asked to evaluate and approve transactions in which they themselves

were conflicted. The Complaint alleges that Defendants breached the implied covenant by appointing conflicted individuals to the Committee and not ensuring that the committee obtained independent advisors to value and negotiate with respect to the Derivative Litigations.[57] As such, Defendants orchestrated the Special Approval process to ensure that a by-product of the Merger would be to extinguish the Derivative Litigations without having to provide any additional consideration to the unaffiliated unitholders.

Defendants' attempt to rebut the inference of bad faith falls far short. Defendants cannot seriously argue that KMI's offer of lucrative board positions to the Committee members is irrelevant because the LPA "only precludes *current* KMI directors from serving on the Committee . . .."[58] This Court's decision in *Dieckman* effectively put an end to such gamesmanship.[59] Indeed, Defendants effectively concede that the offer of a Board position amounted to a bad faith attempt to influence the Committee members – early in their brief they boast that none of the committee members "is alleged . . . to have held any position with KMI or its

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[57] ¶¶ 31, 33, 34, 66 (A23-24, A35).
[58] AB 30.
[59] Whether the Defendants' bad faith rises to the level of the bad faith in *Dieckman* is not the question. AB 30. The Court did not suggest that the facts of *Dieckman* established a "floor" for a finding of bad faith or breach of the implied covenant.

affiliates *before the Merger*."[60] Only later do Defendants acknowledge that such positions were promised, *before the Merger*.[61]

Defendants' contention that the Committee did not realistically face personal liability in the Derivative Litigations is irrelevant. The members faced claims that they had acted in bad faith to the detriment of the public unitholders. When proven, such claims would at least materially damage their reputations. In *Massey*, the court noted that a director would be interested in a Merger where the Merger "could be perceived as lessening the chances for prosecution of [derivative claims] . . .."[62] Further, this is not a situation where Plaintiff alleges "merely" that the Committee members faced exposure due to their vote on the Merger.

Moreover, a limited partner would have a reasonable expectation that a Committee would, when deciding whether to abandon a Partnership asset for no money, obtain a valuation of the asset.[63] A limited partner would reasonably expect that a Committee would not hire conflicted legal and financial advisors, and would not themselves decide to abandon claims alleged to be valued at as much as $700

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[60] AB 6 (emphasis added).

[61] Defendants cite authority holding that continued membership on the board post-merger does not "alone" establish a conflict. AB 31. Here, Plaintiff has alleged significant additional facts which, together, demonstrate the conflict and Defendants' bad faith.

[62] *Massey*, 2011 Del. Ch. LEXIS 83, at *64-65.

[63] *See, e.g., Gerber v. Enter. Prods. Holdings, LLC,* 67 A.3d 400, 422 (Del. 2013) (implied covenant obligated financial advisor to value each component of transaction).

million without making any effort to negotiate for a higher merger price. The Committee's failure to seek any valuation of the Derivative Actions is a further breach of the implied covenant.

The Special Approval mechanism is meant to ensure that independent individuals step in to address certain matters because the unaffiliated unitholders should not have to "trust" conflicted Board members to do the right thing – especially in light of the many protections the LPA offers to the General Partners and its Board. That protection is lost when the Committee is itself conflicted. No reasonable investor would expect that the protections offered by the Special Approval process could be circumvented by appointed committee members who have a personal interest in a matter approved.

III. THE DERIVATIVE LITIGATIONS WERE MATERIAL.

Plaintiff's Opening Brief demonstrated that the Complaint adequately alleges that the amounts alleged in the Derivative Litigations were material. Plaintiff alleged, and ultimately proved, that the Fall Dropdown claim was worth $171 million to the Partnership. Plaintiff alleged that the Spring Dropdown claim was worth $141 million.[64] Finally, Plaintiff alleged that the 2012 Merger was worth $400 million. Although Defendants dispute these valuations, that merely creates issues of fact for trial.

Defendants contend that at the time of the Merger, one of the Derivative Litigations had been dismissed, another was in its infancy, and the Fall Dropdown claim had yet to be tried.[65] However, the Court of Chancery's decision in *Primedia* reasoned that, for purposes of a merger challenge involving failure to adequately

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[64] Notably, in *Primedia*, the Court of Chancery found that derivative claims were material despite the fact that they had been dismissed. *In re Primedia Inc.*, 67 A.3d 455 (Del. Ch. 2013). Further, although the Spring Dropdown claim had been dismissed, that dismissal likely would have been reversed on appeal. Here, the Court of Chancery concluded that the General Partner had no obligation to disclose all material facts to the committee during the Special Approval process. In *Dieckman*, the Court held that even where the LPA specified the information to be provided in connection with a merger, once the company chose to provide additional information, it was obligated to not to mislead investors. In the Special Approval process, a reasonable investor would assume that when the General Partner provides information to the Committee, the General Partner would not omit necessary information.

[65] AB 40-41.

value derivative claims, the value of the claims is determined at the time of the challenge. The Court of Chancery took into consideration the fact that, after the Primedia merger, this Court revitalized the *Brophy* doctrine to increase the damages in such cases.[66]

Defendants' reliance on *Massey* is misplaced. In *Massey*, the proxy statement disclosed that the Massey directors did not consider the value of the claims in evaluating the Massey merger agreement, because the directors there assumed that the derivative claims would survive the merger. The Massey proxy statement represented the value of those derivative claims was "uncertain,"[67] not that the claims were, as the Proxy Statement represented here, "immaterial." Further, the court, in *Massey*, noted that the Company had little interest in proving that its own directors had engaged in pervasive violations of the law, which could expose the company to substantial liability for securities fraud.[68] Here, the Partnership would not suffer any adverse effects by proving that its General Partner's Board acted in bad faith. And here, General Partner and its Parent had the means to satisfy any judgments in favor of the Partnership.

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[66] *Primedia*, 67 A.3d at 482.
[67] AR3.
[68] *Massey*, 2011 Del. Ch. LEXIS 83, at *87.

CONCLUSION

For all of the foregoing reasons and those set forth in Appellant's Opening Brief, the Order dismissing the Complaint should be reversed and the matter remanded for further proceedings.

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March 15, 2018