IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAUL MORRIS, on behalf of all similarly situated unitholders of SPECTRA ENERGY PARTNERS, L.P., Plaintiff-Below, Appellant, v. SPECTRA ENERGY PARTNERS (DE) GP, LP, Defendant-Below, Appellee.	No. 489,2019 Court Below: Court of Chancery of the State of Delaware C.A. No. 2019-0097-SG PUBLIC VERSION: FILED ON MARCH 4, 2020

APPELLANT'S REPLY BRIEF

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GLOSSARY[1]

Op.	Memorandum Opinion dated Sepember 30, 2019, attached as Exhibit A to Plaintiff's Opening Brief
Pl. Br.	Appellant's Opening Brief
Def. Br.	Appellee's Answering Brief On Appeal

[1] Terms used herein have the meanings as in Appellant's Opening Brief filed on January 7, 2020.

PRELIMINARY STATEMENT

Defendant's answering brief is an exercise in misdirection and evidences a fundamental misunderstanding of the applicable pleading standard on a motion to dismiss. The trial court's 75% discount for supposed "risk in the litigation" was untethered to any evidence and was improper at the pleading stage. On Defendant's Motion to Dismiss, the relevant question was *not* whether Plaintiff would have prevailed on the Derivative Claim at trial, but whether based on the allegations in the Complaint, it was reasonably conceivable that the Derivative Claim was material in the context of the Roll-Up. Delaware law does not permit the trial court to impose an arbitrary discount to the value of a derivative claim in assessing the claim's materiality, particularly without any analysis of the underlying evidence. Defendant's contention that Plaintiff argued for a litigation discount conflates the New Committee's responsibility in negotiating value for the Derivative Claim in the Roll-Up with the trial court's obligation in testing the adequacy of the pleadings. The simple fact, at the pleading stage, a derivative claim with a reasonably conceivable value of $112 million - approximately 3.4% of the merger consideration - is material under *Parnes*/*Primedia*.

Defendant's alternative arguments fare no better. The trial court properly did not credit Defendant's argument, renewed on appeal, that Plaintiff failed to adequately allege that the merger consideration was unfair. Plaintiff also properly alleged that the deficiencies in the New Committee's process here — particularly when juxtaposed against the contemporaneous and "most comparable" process at EEP—were reflective of the New Committee's bad faith. And finally, Plaintiff properly alleged a breach of the implied covenant of good faith and fair dealing as an alternative claim.

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF LACKED STANDING TO CHALLENGE THE FAIRNESS OF THE ROLL-UP

A. THE COURT DEFIED THE APPLICABLE 12(b)(6) STANDARD BY MAKING A FACT-INTENSIVE DETERMINATION ON A DEFICIENT EVIDENTIARY RECORD AT THE PLEADING STAGE

The trial court granted Defendant's Rule 12(b)(6) Motion upon finding that Plaintiff had not satisfied *Primedia*'s materiality factor. In granting the motion, the trial court erred by making fact-intensive Defendant-friendly determinations based on a limited, one-sided discovery record.

The trial court's observation that whether Reduced GP Cash Flow should have been included as consideration in the Reverse Dropdown was a "litigable question"[2] confirmed that Plaintiff had presented a "reasonably conceivable set of circumstances" under which its argument as to the illegitimacy of Reduced GP Cash Flow could prevail.[3] That should have been enough to satisfy the Rule 12(b)(6) pleading standard.

Turning the pleading standard on its head, however, the trial court found that this "litigable question" presented a "substantial roadblock" to Plaintiff recovering

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[2] Op. at 32.

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

the full value of the Derivative Claim.[4] This "roadblock" finding was untethered to any evidence. Without the half-billion-dollar-plus plug of "Reduced GP Cash Flow" there was no conceivable way that selling Assets indisputably worth $1.5 billion for consideration worth, at most, $946 million was in the "best interests of the Partnership." Defendant does not claim otherwise. It simply asserts on appeal—as it did before the trial court—that "Reduced GP Cash Flow" was a valid element of incremental consideration in the Reverse Dropdown, without providing a rational explanation for how projected per-unit distributions associated with the canceled LP units would be ***incremental*** to the market value of those same units. Notwithstanding the trial court's unsupported conclusion that whether Reduced GP Cash Flow represented consideration was a "litigable question,"[5] simple math demonstrates that the cancellation of LP units did not cause any reduction in distributions payable to SEP GP or anyone else.[6] Defendant ignores this point entirely. Defendant likewise ignores, and thus offers no response to, the myriad absurd implications arising from its false Reduced GP Cash Flow construct.[7]

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[4] Op. at 32-33.

[5] Op. at 32.

[6] *See* Pl. Br. at 14-15.

[7] *See* Pl. Br. at 17-18.

Defendant cites analyst reports,[8] its expert report,[9] and its summary judgment brief[10] in claiming Reduced GP Cash Flow is incremental consideration. But this is misdirection. The analyst reports do not compare the value of the consideration paid by SE Corp in the Reverse Dropdown against the $1.5 billion value of the Assets. Rather, they *ignore the market value of those units* and simply compare cash flows associated with the Assets against per share distributions from SEP's projections[11]—just as the Old Committee did in seeking to merely keep the Reverse Dropdown "net cash neutral."[12] Defendant's reliance on its own baseless and self-serving arguments in its summary judgment brief underscores the unfairness of allowing Defendant to manipulate the record with a limited 220 production, and highlights Defendant's disregard for the standard applicable to a motion to dismiss.

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[8] B402-B412; B414-420; B422-424.

[9] B50-140.

[10] B465-537.

[11] *See* B402 ("We view the Transaction as a modest negative for SEP. While lost cash flows from Sand Hills and Southern Hills is essentially offset by the retirement of SEP common units, reduction in IDR payments and a partial GP IDR subsidy (i.e. Transaction is DCF neutral), we estimate the partnership's leverage increases to 3.7x from 3.5x (pro forma debt/EBITDA for year end 2015)."); *see also* B415 (evaluating cash flows while ignoring market value of LP units); B422 (same).

[12] A0037-A0038 at ¶¶37-38 & n.10.

Nowhere in its appellate brief, does Defendant contest the mathematical reality that simply cancelling LP units *increases* per share distributions to all partnership units. Defendants' Reduced GP Cash Flow construct is nothing more than the delta in projected distributions from the Company's available cash had the Assets remained part of the Company's cash flows.[13] But the value of the anticipated per-unit distributions was baked into the market value of the LP units, which Defendants—and the market—valued at $41.95 as of October 6, 2015.[14] By counting the market value of those LP units as consideration,[15] Defendant has *already included* the value of the anticipated cash flows from the cancelled LP units. Thus, by counting "Reduced GP Cash Flow" as *incremental* to the market value of the cancelled units in the consideration paid in the Reverse Dropdown, Defendant is simply double counting.[16] Defendant's answering brief provides ***no*** rational explanation to the contrary, nor could it.

The trial court also identified "roadblocks" requiring Plaintiff to demonstrate (i) "that the work of the Defendant's advisor, Simmons, on the Reverse Dropdown

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[13] A0496 (comparing "GP DISTRIBUTIONS – STATUS QUO AND PRO FORMA")

[14] A0484.

[15] A0484 ("The market value of the proposed 21.56 million in redeemed units is approximately $904 million").

[16] *See* Pl. Br. 15-17.

did not fit in the parameters of Section 7.10(b) of the Second A&R LPA, or [ii] that SEP GP did not 'reasonably believe' that the valuation of the transaction was within Simmons' competence."[17] The court characterized this requirement as "remov[ing] the *conclusive presumption* of good faith."[18] Yet in its June 27, 2017 opinion in the Derivative Action, the trial court already recognized that there is no such "conclusive presumption" in Section 7.10(b), but merely a *rebuttable presumption* of good faith.[19] The trial court further held that Plaintiff met that standard in showing that the valuation gap "gives rise to a pleading stage inference of subjective bad faith."[20]

The "risk[s] of litigation" Plaintiff purportedly faced, therefore, were not "roadblocks" to Plaintiff's success on the pleadings. Rather, any such obstacles necessarily would arise from the presence or absence of certain evidence necessary to make out the *facts* of the claim. Yet Plaintiff has yet to receive discovery in this Action, and the only evidence available to Plaintiff for purposes of contesting Defendant's motion was a limited Section 220 production manipulated by

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[17] Op. at 33.

[18] *Id.*

[19] A0770.

[20] A0774.

Defendant. As this Court and the trial court have made clear, books-and-records productions fall far short of discovery provided by the Rules.[21]

Because the motion under consideration was a motion to dismiss, and because the trial court already determined that Plaintiff had alleged well-pled facts concerning his underlying Derivative Claim, Plaintiff was entitled to the reasonable inference that he could have proved out the elements of that claim at trial. Instead, the trial court erred by simply assuming, without even analyzing any underlying evidence, that Plaintiff would most likely fail to do so.[22]

B. DELAWARE LAW DID NOT REQUIRE THE COURT TO ASSESS A "LITIGATION RISK" DISCOUNT IN EVALUATING THE MATERIALITY OF THE DERIVATIVE CLAIM

Defendant wrongly argues that risk adjustment is required by Delaware precedent. *First*, no decision of this Court—including *Parnes*—required such adjustment. *Second*, even the Court of Chancery decisions cited by Defendant—which are not, of course, binding on this Court—require no such adjustment.

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[21] *See Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997) ("[Section 220 proceedings and Rule 34 discovery] are not the same and should not be confused. A Section 220 proceeding should result in an order circumscribed with rifled precision.").

[22] Indeed, Defendant does not even contest that the Rule 12(b)(6) pleading standard should have applied. Instead, in a tacit acknowledgment of Rule 12(b)(6)'s applicability, it merely quibbles with what ought to be considered a "reasonable inference" under the circumstances. Def. Br. 34 (suggesting that providing Plaintiff the inference of success would be not be "reasonable").

Defendant contends that *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011) "specifically contemplate[s] risk adjustment."[23] Yet Defendant fails to grapple with *Massey's* unique circumstances, which distinguish it from this Action. The *Massey* court ruled on a motion for preliminary injunction and was therefore ***required*** to determine, at a pre-discovery stage, the likelihood of the stockholder's success on the merits of the underlying claim.[24] Indeed, *Massey* ***never addressed*** the factors that should be considered by a court deciding whether to dismiss a *Primedia* claim under Rule 12(b)(6). Here, by contrast, the trial court ruled on a Rule 12(b)(6) challenge to the pleadings.

Moreover, as Plaintiff notes in his Opening Brief, the *Massey* court focused on factors not present here, such as the affirmative harm to the company that would result from the successful prosecution of the claims,[25] and which made "the notion that a third-party acquirer … would 'pay' for the[] claims [] dubious[.]"[26] The *Massey* court also focused on collectability and enforceability issues, which noted

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[23] Def. Br. 31.

[24] *Massey*, 2011 WL 2176479, at *17.

[25] Pl. Br. at 39; *see also Massey*, 2011 WL 2176479 at *26-27.

[26] *Massey*, 2011 WL 2176479, at *23.

would likely limit any recovery.[27] No such issues are present here, as Plaintiff's Derivative Claim was asserted against SEP GP, a well-resourced entity defendant.

Primedia also does not support Defendant's position. As Plaintiff demonstrated in his Opening Brief, nothing in *Primedia* states that risk adjustment is necessary.[28] Indeed, the *Primedia* court found that without discounting, the "recovery …. would be material in the context of the Merger."[29] The court then distinguished *Massey* and merely noted that "[t]he amounts *remain* material if discounted to reflect the minority stockholders' beneficial interest in the litigation recovery."[30]

Defendant's citation to *Onti, Inc. v. Integra Bank*,[31] is equally unavailing. *Onti* was a ***post-trial*** decision addressing whether the stockholders had established a fiduciary breach that exceeded the damages otherwise available under the appraisal framework.[32] In addition to its different procedural posture, *Onti* involved a suit

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[27] *Id.* at *26-28.

[28] Pl. Br. 40 n.62 (citing *In re Primedia*, *Inc. S'holders Litig*., 67 A.3d 455, 482 (Del. Ch. 2013))

[29] *Id.* at 482.

[30] *Id*. (emphasis added).

[31] 751 A.2d 904, 931 (Del. Ch. 1999).

[32] 751 A.2d at 929.

against the target company that would have offset any derivative recovery.[33] No such suit—or threat of one—is present here.

Defendant's other authority—*Bomarko, Inc. v. International Telecharge Inc.*[34]—also involved a ***post-trial*** decision rather than a pleading stage assessment of what the evidence might ultimately show.[35] The *Bomarko* court did not discount the claims based on the risk the plaintiff might not be able to adduce evidence for its claims like the trial court did here. Rather, the *Bomarko* court's adjustment was based on the "inevitable uncertainty of litigation" and the "chance that [a] forbearance agreement might be upheld."[36]

Determining the likelihood that a stockholder will ultimately prove bad faith requires consideration of the facts underlying the challenged decision. However, Plaintiff has not yet had the opportunity to obtain discovery to establish those facts. Nevertheless, without citing any such evidence in the record, the trial court predicted Plaintiff's chances of amassing that kind of evidence. That is clear error.[37]

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[33] *Id.* at 931.

[34] 794 A.2d 1161, 1189 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000)

[35] 794 A.2d at 1165.

[36] 794 A.2d at 1189.

[37] This error is evidenced by, among other things, the fact that the trial court determined a value for the Derivative Claim that did not reflect a position ***either*** party had taken in the proceedings below.

Even if the trial court *had* based its decision on the record before it, that decision would have also been improper. The "record" here consisted only of a limited set of documents from a 220 production curated by Defendant. Under such circumstances, it would be nearly impossible for *any* stockholder to conclusively prove bad faith.

C. DEFENDANT CONFLATES THE DUTIES OF DIRECTORS NEGOTIATING ON BEHALF OF STOCKHOLDERS WITH THE COURT'S THRESHOLD 12(B)(6) MATERIALITY INQUIRY

Defendant confuses the role of directors in determining the value of a derivative claim with the role of the court in deciding pleading-stage questions of materiality under a 12(b)(6) standard.[38] Defendant's argument—which asserts that Plaintiff endorsed the same discounting methodology adopted by the trial court—depends on this conflation.

Plaintiff properly argued below that it would have been appropriate for the New Committee to risk-adjust claims when considering the information before it in the context of an ongoing negotiation on behalf of stockholders to obtain value for the Derivative Claim.[39] Nothing about this position is inconsistent with Plaintiff's contention that it was improper for the trial court to make a risk-adjustment

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[38] Def. Br. 27-29.

[39] Pl. Br. at 25 (citing A0028-A0029 at ¶10, A0053-A0057 at ¶¶66-71).

determination when conducting a threshold standing inquiry under a Rule 12(b)(6) standard at the pleading stage based on an incomplete and manipulated evidentiary record.

Defendant's rebuttal to Plaintiff's waiver argument relies on Defendant's contention that it argued for risk-adjustment below. In fact, Defendant's discounting arguments below centered on whether the New Committee was acting in good faith or bad faith when it entirely failed to obtain any value for the claims, ***not*** what the Court should do when deciding a motion to dismiss based on a fiduciary breach.

To the extent the trial court briefly mentioned risk adjustment at the motion-to-dismiss hearing, it did so *sua sponte*,[40] in contravention of the parties' uncontested position as to the value of the claims for *Primedia* purposes, and it raised the issue without the benefit of the parties' research and briefing.

D. THE DERIVATIVE CLAIM WAS MATERIAL

A claim worth $112 million, representing 3.4% of the value of the Roll-Up, is material. As discussed in Plaintiff's Opening Brief, the materiality of a claim of that

[40] A0721.

size has been demonstrated in many corporate contexts, including other *Primedia* claims,[41] M&A termination fees,[42] and shareholder litigation recoveries.[43]

The $112 million figure calculated by the trial court properly included pre-judgment interest.[44] Defendant incorrectly cites *Primedia* as support for excluding pre-judgment interest.[45] *Primedia* merely reflected that even without interest, the value of the underlying claim was material.[46] Defendant ignores that elsewhere in the opinion, the court explicitly noted that "[i]nterest is typically awarded at the legal rate," that the amount "could be considerable," and that the profits and dividends

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[41] *See* Pl. Br. 32-33 (citing *In re Riverstone Nat'l S'holder Litig.*, 2016 WL 4045411, at *15 (Del. Ch. July 28, 2016) (claim at 5% is material) and *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 132 A.3d 67, 117 (Del. Ch. 2015) (position that 2.8% of value is material is the "stronger of the argument")).

[42] *See* Pl. Br. 32-33 (citing A0852 and *McMillan v. Intercargo Corp.*, 768 A.2d 492, 506 n.62 (Del. Ch. 2000)).

[43] *See* Pl. Br. 32-33 (citing A0889-A0890, A0892-A0893, A0900, A948, A949, A950 (settlement recovery in amount of 2.1% increase in merger consolidation an "excellent" result which it would be "unreasonable" to oppose).

[44] Defendant argues that the increasing pre-judgment interest on a derivative claim over time shows why it should be excluded for materiality purposes. Def. Br. 36 n.10. Nonsense. Including interest up to consummation of the challenged transaction that strips the plaintiff of derivative standing properly reflects the then-present value of the claim, allowing the court to better determine whether the failure to obtain full value for the claim gives rise to direct standing. Excluding interest arbitrarily eliminates part of the value of a claim that would otherwise properly belong to the entity.

[45] Def. Br. 35-36.

[46] Def. Br. 35.

received "(***plus interest***)" provided an upper bound for damages for the claim.[47] Indeed, Defendant fails to cite any authority suggesting that a court should exclude prejudgment interest when evaluating materiality—perhaps explaining why Defendant failed to argue below that prejudgment interest is inapplicable (thereby waiving the argument).

Defendant contends that Plaintiff's claim representing 3.4% of the value of the Roll-Up is not material because the SEC has "found matters that impact less than 5% of a company's assets or liabilities presumptively 'unlikely to be material.'"[48] That is not what the SEC has said. Rather, the Staff Accounting Bulletin cited by Defendant merely emphasizes that "exclusive reliance on [a 5%] percentage or numerical threshold [for the purposes of assessing materiality] has no basis in the accounting literature or the law."[49] Indeed, the SEC staff noted that "there are numerous circumstances in which misstatements below 5% could well be material."[50]

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[47] *Primedia*, 67 A.3d at 483.

[48] Def. Br. 37 (citing SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150-01, 45151 & 52 n.14 (Aug. 19, 1999)).

[49] SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. at 45151.

[50] *Id.* at 45152. Notably, the SEC Staff indicated that evidence of intent can be "particularly compelling" when determining materiality.

Defendant also misreads *McMillan*, which makes clear that termination fees are designed "to deter and make more expensive alternative transactions," and that a 3.5% termination fee is "at the high end of what our courts have approved."[51] This fact is not diminished by the finding that, where the fee is only payable if stockholders vote for a better deal, 3.5% is not so draconian as to preclude all rival offers[52]; some such offers likely will still be deterred,[53] demonstrating the materiality of such a fee.

[51] *McMillan*, 768 A.2d at 506 & n.62.

[52] *Id.* at 505.

[53] *Id.* at 506.

II. THE COURT SHOULD REJECT DEFENDANT'S BASELESS ARGUMENTS FOR DISMISSAL PREDICATED ON GROUNDS DISREGARDED BY THE TRIAL COURT

A. PLAINTIFF'S UNFAIRNESS ALLEGATIONS ARE SUFFICIENT UNDER *PARNES/PRIMEDIA*

Recycling an argument presented unsuccessfully below, Defendant asserts that Plaintiff's direct claims fail because the *Parnes*/*Primedia* doctrine does not permit a direct claim based "on an alleged failure to adequately value an extinguished derivative claim."[54] That argument—which the trial court correctly did not credit—fails.

The very case law on which Defendant relies undermines its argument. In both *Massey* and *Primedia*, the court expressly held that the *Parnes* doctrine "permits a plaintiff to attack a merger directly if the target board agreed to a materially inadequate, and therefore unfair, price *because the price did not reflect the value of certain assets—in this case, the Derivative Claims*."[55] That is precisely what the *Massey* and *Primedia* plaintiffs alleged,[56] and precisely what Plaintiff

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[54] Def. Br. 25.

[55] *Massey*, 2011 WL 2176479, at *17; *see also Primedia*, 67 A.3d at 477 (quoting same).

[56] *See Massey*, 2011 WL 2176479, at *17 ("[T]he plaintiffs say that the Merger price is materially suspect ***because of the Board's failure to value the Derivative Claims***." (emphasis added)); *Primedia*, 67 A.3d at 459 ("[P]laintiff alleges that the terms of the Merger were unfair ***because*** the [] directors failed to obtain any value for the [derivative] claim." (emphasis added)).

alleges here. As the trial court recognized,[57] Plaintiff explicitly alleges that the Roll-Up terms "were patently unfair and unreasonable to SEP and its public unitholders, and [] could not have been approved in good faith …. Specifically, the New Conflicts Committee and the SEP GP Board utterly failed to attempt to (i) appropriately value the Derivative Claim, or (ii) secure any value for the Derivative Claim[.]"[58]

Defendant's contrary argument relies on *Golaine v. Edwards*, 1999 WL 1271882 (Del. Ch. Dec. 21, 1999), which pre-dated both *Massey* and *Primedia* by more than a decade, and is patently inapposite. Defendant acknowledges that *Golaine* did not involve a failure to obtain merger consideration for a corporate asset, but instead an "ancillary transaction[]"[59]—i.e., a $20 million investment banking fee paid in connection with a merger.[60] The language Defendant extracts from *Golaine* reflects the showing necessary for an attack on a transaction that is *ancillary* to a

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[57] Op. at 25.

[58] A0077 at ¶105. *See also, e.g.*, A0079 at ¶111 (referring to the "unfair Roll-Up Transaction"), 106 (alleging that "SEP's former public limited partners have suffered damages" from the unfair Roll-Up), *id.* at ¶112 (alleging that "SEP's former limited partners have suffered damages" from the unfair Roll-Up). Defendant's suggestion that Jefferies' fairness opinion somehow negates Plaintiff's pleading-stage unfairness allegations fails because Jefferies conducted no independent quantitative analysis of the Derivative Claims. *See* Def. Br. 26. Rather, Jefferies' opinion was predicated on its false assumption that the Committee had properly valued the Derivative Claims.

[59] Def. Br. 25.

[60] *Golaine*, 1999 WL 1271882, at *1.

merger—rather than a direct attack on the merger consideration itself—to qualify as direct rather than derivative.[61] The *Golaine* court held that "[t]here [wa]s simply no link" between the $20 million fee and "the Exchange Ratio,"[62] particularly where the $20 million fee was equal to "2/10 of 1% of the [$8.3 billion] total merger consideration" and thus "quite immaterial[.]"[63]

By contrast, the failure to obtain merger consideration for a material corporate asset directly impacts the economic terms—and in turn, the economic fairness—of a merger. Thus, as confirmed in *Massey* and *Primedia*, the failure to obtain value for a derivative claim confers direct standing so long as the three-part *Parnes*/*Primedia* test is satisfied, as it is here.[64]

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[61] Def. Br. 25 (quoting *Golaine*, 1999 WL 1271882, at *6).

[62] *Golaine*, 1999 WL 1271882, at *8-9; *see also id.* ("Put differently, there is nothing in the complaint that supports the notion that [the $20 million fee] took anything off the table that would have otherwise gone to all the [] stockholders; ***indeed, by its silence on the matter, the complaint suggests that the Exchange Ratio was fixed before the [] fee was set***.") (emphasis added).

[63] *Id*.

[64] Even if generalized allegations of unfair process or price were necessary (they are not), Plaintiff would satisfy that requirement. *See, e.g.*, A0048 ¶54 (describing Enbridge's opportunistic attempt to squeeze out the minority for no premium); A0049 at ¶57 (alleging the July FERC announcement's impact on value, which the Committee failed to consider, thus amplifying the unfairness of the Roll-Up); A0078 at ¶110 (describing the Roll-Up as "patently unfair and unreasonable to SEP").

B. PLAINTIFF ADEQUATELY ALLEGES THAT THE NEW COMMITTEE'S PROCESS GIVES RISE TO AN INFERENCE OF BAD FAITH

Defendant recognizes that Plaintiff may rebut the LPA's good faith presumption through allegations supporting an inference that the New Committee did not subjectively believe that assigning a *zero percent* likelihood of success to the Derivative Claim was in SEP's best interests.[65] Nevertheless, Defendant argues that Plaintiff's allegations fail to do so.[66] That argument—which the trial court did not credit—also fails.

To plead a lack of good faith, a plaintiff need only "plead facts supporting an inference that [the defendant] did not reasonably believe that the … transaction was in the best interests of the [Company]."[67] The inference of bad faith "need not be the only possible inference, nor even the most likely inference. The inference need only be reasonably conceivable."[68]

In touting the "double good faith hurdle" facing Plaintiff,[69] Defendant ignores that Plaintiff *already* surmounted the first hurdle in 2017, when the trial court sustained the Derivative Action and found that given Plaintiff's allegations

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[65] Def. Br. 41.

[66] *Id*.

[67] *Brinckerhoff v. Enbridge Energy Co.*, 159 A.3d 242, 260 (Del. 2017).

[68] *Voigt v. Metcalf*, 2020 WL 614999, at *26 (Del. Ch. Feb. 10, 2020).

[69] Def. Br. 43.

establishing that SEP GP "seized … a Partnership asset, which it knew was worth $1.5 billion, in return for a payment of less than $1 billion, it is reasonably conceivable that [SEP GP] acted in subjective bad faith."[70] As detailed in Plaintiff's opening brief, the Derivative Action only grew stronger through discovery.[71]

Thus, Plaintiff's lone remaining "hurdle" is to allege facts supporting a reasonably conceivable inference that the New Committee did not subjectively believe that it was in SEP and its minority unitholders' best interests to declare the Derivative Claims worthless and refuse to even try to negotiate additional consideration for it. Plaintiff's well-pled allegations that the majority-conflicted New Committee conducted a woefully deficient process then diverged from defense counsel—and the trial court, which initially sustained Plaintiff's Derivative Action and then ascribed to it a 25% likelihood of success—in self-servingly finding a *zero percent* likelihood that the Derivative Claim would succeed easily clear that hurdle.

Two of three members of the New Committee tasked with valuing the Derivative Claim (including the Chairman) were the same individuals already determined by the trial court to have conceivably approved the Reverse Dropdown

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[70] *Morris v. Spectra Energy Partners (DE) GP, LP*, 2017 WL 2774559, at *16 (Del. Ch. June 27, 2017) ("*Morris I*").

[71] Pl. Br. 12-20.

in "subjective bad faith[.]"[72] By attributing *any* likelihood of success to the Derivative Claim, the New Committee would publicly acknowledge that the Court might adjudge the New Committee's conflicted members guilty of bad faith. Thus, a majority of the New Committee were severely conflicted by their vested interest in denouncing the Derivative Action to shed the specter of their own bad faith.[73]

As detailed in Plaintiff's briefing before the trial court,[74] consistent with its unique motivations, the majority-conflicted New Committee's process tilted the playing field against assigning any value to the Derivative Action. Even in a vacuum, the New Committee's process and ultimate conclusion were plainly improper.[75] But the failures are particularly stark when juxtaposed against the contemporaneous EEP roll-up process, which the New Committee itself deemed "most comparable."[76] For example:

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[72] *Morris I*, at *16.

[73] *See, e.g.*, *London v. Tyrrell*, 2010 WL 877528, at *15 (Del. Ch. Mar. 11, 2010) ("[I]f evidence suggests that the [committee] members prejudged the merits of the suit based on [their] prior exposure or familiarity, and then conducted the investigation with the object of putting together a report that demonstrates the suit has no merit, this will create a material question of fact as to the [committee's] independence.").

[74] A0248-257.

[75] *Id.*

[76] A0558.

- Faced with a substantively identical conflict to that afflicting the SEP New Committee, the EEP committee formed an independent subcommittee to separately value the underlying derivative claim. By contrast, the SEP New Committee took no action to address its clear conflict.

- Whereas the EEP subcommittee worked with a financial advisor and hired experienced Delaware counsel to evaluate the underlying derivative claim, the SEP New Committee forewent Delaware counsel in favor of hiring a law firm without expertise in complex Delaware alternative entity litigation.[77]

- Whereas the EEP committee met multiple times directly with plaintiff's counsel, the New Committee restricted Plaintiff's counsel to a single telephone call with the New Committee's advisors, the substance of which the New Committee's advisors conveyed to the New Committee in a matter of minutes more than a week later.

Predictably, the EEP committee's appropriate process produced a notably different result: the EEP committee valued the underlying EEP derivative action at $99.8 million, then negotiated significant additional consideration for EEP's

[77] Despite effectively conceding that the conclusive presumption contemplated in §7.10 of the LPA "does not override the conflicted transaction provision in §7.9 of the LPA," Defendant argues in a footnote that the presumption "is nevertheless relevant to the facts that evince Defendant's good faith." Def. Br. 40 & n.12. False. No good faith is evinced where (i) the New Committee ***diverged*** from defense counsel in the Derivative Action by self-interestedly assigning a zero percent likelihood of success to the Derivative Claims, and (ii) Jefferies' fairness opinion was premised on falsely valuing the Derivative Claims at nominal defense costs ***as directed by the New Committee***. *See* Def. Br. 19 ("The Roll-up Committee then risk-adjusted the value of the Derivative Litigation to the cost of defense, approximately $4 million, and instructed Jefferies to reflect that value in an updated valuation.").

minority unitholders.[78] By contrast, although the Derivative Claim survived a motion to dismiss and even defense counsel in the Derivative Action refused to quantify Plaintiff's likelihood of success at trial, the SEP Committee exonerated its conflicted majority (and Chairman) by declaring a *zero percent* likelihood that the Derivative Action would succeed. Simply put, if it was reasonably conceivable that the Derivative Claim had value, then it is reasonably conceivable that the majority-conflicted Committee reached that extreme conclusion in bad faith. Here, there can be no serious dispute that the Derivative Claim had value because (i) it had already survived a motion to dismiss, (ii) it grew stronger in discovery, and (iii) despite being hamstrung by a pleadings-stage record curated by Defendant, even in dismissing the Action the Court found a significant (i.e., 25%) likelihood that the Derivative Claim would succeed.

C. THE IMPLIED COVENANT IS APPLICABLE

Delaware's implied covenant of good faith and fair dealing "seeks to enforce the parties' contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them."[79] As Plaintiff alleged, SEP and its limited partners never would have

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[78] A0028 at ¶10.

[79] *Gerber v. Enter. Prod. Holdings, LLC*, 67 A.3d 400, 418 (Del. 2013) (quotation omitted); *see also id.* at 419 (acknowledging that the implied covenant requires a

expected or agreed that SEP GP ostensibly could secure "Special Approval" of the Roll-Up through a scheme whereby the majority-conflicted Committee (i) forewent a fair or meaningful analysis of the Derivative Claim in favor of self-servingly declaring it worthless, and (ii) refused to even attempt to secure any merger consideration for the claim.[80]

In a single paragraph, Defendant urges dismissal of Plaintiff's implied covenant claim on the basis that the trial court dismissed Plaintiff's implied covenant claim in the Derivative Action.[81] But the trial court (i) only did so after *sustaining* Plaintiff's breach of contract claim, and (ii) explicitly noted that if it later determined that Plaintiff's breach of contract claim was barred, "it may be necessary to revisit the implied covenant claim which I reject [] in light of my finding that only the rebuttable presumption attaches and there is therefore no gap to fill."[82]

Thus, although Plaintiff has alleged a meritorious breach of contract claim as discussed *supra*, if the Court were to find otherwise, then the LPA would contain a

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party to refrain from "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of its bargain.").

[80] A0078-79 at ¶110.

[81] Def. Br. 45.

[82] *Morris I*, at *13.

gap for the implied covenant to fill, and Plaintiff's implied covenant claim would be meritorious.

CONCLUSION

The trial court's Order Granting Motions to Dismiss, dated October 25, 2019, should be REVERSED.

Dated: February 21, 2020

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