IN THE SUPREME COURT OF THE STATE OF DELAWARE

EL PASO PIPELINE GP COMPANY, L.L.C.,

Defendant Below,
Appellant/Cross-Appellee,

and

EL PASO CORPORATION, DOUGLAS L. FOSHEE, JOHN R. SULT, RONALD L. KUEHN, JR., D. MARK LELAND, ARTHUR C. REICHSTETTER, WILLIAM A. SMITH, AND JAMES C. YARDLEY,

Defendants Below,
Cross-Appellees,

and

EL PASO PIPELINE PARTNERS, L.P.

Nominal Defendant Below,

v.

PETER R. BRINCKERHOFF, TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR. U/A DTD 10/17/97

Plaintiff Below,
Appellee/Cross-Appellant.

No. 103, 2016

Court Below: Court of Chancery of the State of Delaware, Consolidated C.A. No. 7141-VCL

APPELLANT'S REPLY BRIEF ON APPEAL AND CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

Plaintiff's appeal brief attacks several venerable doctrines of Delaware law and fundamental principles concerning the conduct of trials.

Standing Must Be Decided Separately from the Merits. The trial court did not resolve Plaintiff's standing to assert his overpayment claim until after it had decided the merits and then used its liability determination to justify its standing decision. Plaintiff repeats this error. Specifically, Plaintiff relies on the trial court's liability determinations in his standing analysis (which belatedly begins on page 38 of his brief), embracing notions of "forfeiture," "windfall," and the "inequity" of allowing an "adjudicated wrongdoer" to escape accountability. Whether the GP ought to have been adjudicated a wrongdoer is in fact one subject of this appeal, but standing and liability are and must be independent inquiries.

A Claim that an Entity Overpaid for an Asset Belongs to the Entity. This appeal arises from the claim that the Partnership was harmed because it overpaid for the assets acquired in the Fall Drop-Down. This was Plaintiff's claim in the complaint, at trial, and throughout the post-trial submissions. Plaintiff has never offered any evidence, much less proved, that unitholders were harmed independently of the alleged harm to the Partnership. Whether one looks at the nature of the claim, or at who was harmed and who is entitled to a remedy, the claim is quintessentially one that belongs to the Partnership. This case implicates duties the GP owed to the entity, making it fundamentally different than the fraud claim by securities holders in *Citigroup* or the breach of a commercial contract claim in *NAF*. Accordingly, the overpayment claim belonged to the Partnership, and Plaintiff's standing to assert it was derivative.

Under the Continuous Ownership Rule, a Merger Ends a Plaintiff's Standing to Assert Derivative Claims. At bottom, this dispute is about ownership of a litigation asset. Plaintiff never owned the underlying claim, even when he was procedurally permitted to control it by virtue of his derivative standing. Along with all the rest of the Partnership's assets, ownership of the claim passed to the Partnership's successor (KMI) by operation of law in the Merger. Under long-settled decisions such as *Lewis*, which Plaintiff relegates to a single footnote, Plaintiff lost standing to litigate the claim when the Merger closed.

A Plaintiff Whose Standing Has Ended Must Challenge the Merger Itself. If Plaintiff believed that the $76 billion Merger involving three publicly traded entities did not fairly value his claim, his recourse was to challenge the Merger. If he had, then his perceived inequity would have been legally relevant, however flawed his arguments might still be. But without challenging the Merger, a former unitholder may not continue to litigate a Partnership-owned claim. Plaintiff's proclaimed "simple math"—taking a Partnership asset and distributing it directly to certain unitholders—undermines the certainty provided by Delaware's merger statute and continuous ownership requirement. Under Delaware law, the surviving entity in the Merger now owns the only claim Plaintiff elected to try and to prove.

A Plaintiff Must Prove Each Element of His Claim and a Defendant Need Only Respond to the Proof Presented. If, contrary to Plaintiff's own pleading, the claim asserted was direct and belonged to him, then he could prevail only if he proved damages to him that were independent of any damages to the Partnership. Plaintiff bore this burden of proof at trial. But he concedes, as the trial court found, that he offered proof only of injury to the Partnership and that he never attempted to prove that the unitholders suffered a distinct harm. The GP had no obligation to "respond" to the non-existent proof of any supposed direct harm to unitholders. While Plaintiff argues that the GP was on notice that he might pursue his claim on a "quasi-class" basis after the Merger, any such notice could not alter the burden of proof. It was Plaintiff who needed (and failed) to offer evidence of any direct harm to unitholders. It would be improper and unfair to fault the GP for failing to defend at trial an element of a claim that Plaintiff never presented and concededly never proved.

Where the Injury Proven Is to the Entity, Any Recovery Must Go to the Entity. The only injury allegedly proved at trial was to the Partnership, but the trial court ruled that it had the equitable power to distribute the Partnership's damages on a pro-rata basis to an uncertified "quasi-class" of unitholders. This is not the law in Delaware and would constitute an improper misappropriation of an asset that belongs to the Partnership.

Subjective Bad Faith Requires More than a Disagreement with the Criteria Applied by the Entity Decision-Makers. The Committee members who approved the Fall Drop-Down were independent under the LPA. The trial court found as a matter of fact that these directors believed that: (i) accretion (increasing cash flow to the limited partners) was the single most important factor in assessing a drop-down given the unique investment profile of an MLP, and (ii) the Fall Drop-Down would be meaningfully accretive. This might not be the only way to assess a drop-down from the Partnership's perspective, and it might not even be the best way in the trial court's view. But it belies a finding of subjective bad faith, which requires an actual intent to do harm or a conscious disregard of a duty. The trial court substituted its judgment on the importance of accretion for that of the Committee's. This is reversible error.

ARGUMENT

I. PLAINTIFF LOST STANDING TO CHALLENGE THE FALL DROP-DOWN.

A plaintiff's standing must be determined separately from, and logically prior to, a court's consideration of the merits.[1] In the Opening Brief, the GP demonstrated under *Tooley* that the overpayment claim asserted in this case belonged to the Partnership, and that Plaintiff therefore lost standing to assert the claim when it passed by operation of law to the surviving entity in the Merger.[2]

Since the filing of the Opening Brief, this Court in *Citigroup* responded to a certified question from the United States Court of Appeals for the Second Circuit inquiring whether a claim was direct or derivative under Delaware law. As was the case in *NAF*, where this Court responded to another "direct/derivative" inquiry from the Second Circuit, *Citigroup* did not involve a fiduciary duty claim or one relating to a business entity's internal corporate governance. *Citigroup* employed a common-sense approach to standing that assessed, as a threshold matter, the "nature of the claim" to determine whether the claim plausibly could belong to the entity, its equityholders, or both.[3] Where it is clear following that initial assessment that the claim belongs only to the equityholders, that is the end of the

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[1] Def.'s Op. Br. at 20-22. Capitalized terms are defined in the Opening Brief.

[2] Def.'s Op. Br. at 20-44.

[3] *Citigroup Inc. v. AHW Inv. P'ship*, 2016 WL 2994902, at *9 (Del. May 24, 2016).

inquiry.[4] But where the claim could plausibly belong to both the entity and its equityholders, *Citigroup* and *NAF* recognize that a court should then assess "to whom the relevant duty is owed."[5] If the relevant duty is shared between the entity and its equityholders, as in a corporate case involving an alleged breach of fiduciary duty, the *Tooley* questions then apply: (i) "who suffered the alleged harm;" and (ii) "who would receive the benefit of any recovery or other remedy."[6] In other words, where the relevant duty is owed at least in part to the entity "the inquiry should focus on whether an injury is suffered by the [equityholder] that is not dependent on a prior injury to the [entity]."[7] This analytical framework is designed to answer an important threshold question under Delaware law: who owns the claim?

Whether employing the "nature of the claim" analysis from *Citigroup* or the *Tooley* test, the overpayment claim at issue here was plainly owned by the Partnership. That is, of course, why Plaintiff brought the claim derivatively on behalf of the Partnership.

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[4] *Id.* at *1, *9.

[5] *Id.* at *9 n.66 (citing *Agostino v. Hicks*, 845 A.2d 1110, 1122 n.54 (Del. Ch. 2004)); *NAF Holdings, LLC. v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 179 n.10 (Del. 2015) (same).

[6] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

[7] *Agostino*, 845 A.2d at 1122, *cited with approval in Citigroup*, 2016 WL 2994902, at *9 n.68.

A. The "Nature of the Claim" Makes Plain that the Partnership Owns the Claim.

The "nature of the claim" in this case is a purported overpayment by an entity in a related-party transaction. Plaintiff consistently argued, and the trial court determined, that the Partnership overpaid for the assets purchased in the Fall Drop-Down. As demonstrated in the Opening Brief, this is the type of claim which classically belongs to the entity.[8] Indeed, Plaintiff does not seriously argue that his claim was solely direct, and it is undisputed that Plaintiff pled, prosecuted, and tried his claim derivatively on the Partnership's behalf. His rationale for doing so, until the announcement of the Merger, was based on the very nature of the claim—an alleged overpayment for assets by the Partnership.

Just as it was obvious in *Citigroup* and *NAF* that the claims belonged to the equityholders, here it is obvious that the claim belongs to the Partnership. In *Citigroup*, a stockholder asserted a disclosure-based "holder" claim against Citigroup, alleging that the stockholder decided not to sell its shares in reliance on Citigroup's false and misleading statements, and then saw the price of Citigroup common stock plummet during the 2008 financial crisis.[9] The only alleged harm was to the stockholder for the decline in value of his Citigroup stock as a result of

[8] Def.'s Op. Br. at 23-26.

[9] *Citigroup*, 2016 WL 2994902, at *2-3.

false disclosures.[10] It is hard to imagine a more clear-cut example of a claim belonging solely to equityholders than the one before this Court in *Citigroup*. Similarly, *NAF* involved a suit by a stockholder to enforce its own rights under a commercial contract.[11] Neither *Citigroup* nor *NAF* involved a situation in which the entity itself was harmed by the breach of duty. Nor did either case involve an "internal affairs" claim concerning duties owed to the entity itself.[12]

By contrast, this case involved alleged harm *to the entity* and a dispute among the Partnership's constituents regarding the duties owed by the GP to *the Partnership*. The question here is whether the Committee failed to act in the "best interests of *the Partnership*," leading to the alleged overpayment by and injury *to the Partnership.* Based on *Citigroup*'s pragmatic focus on the "nature of the claim," and viewed through the lens with which Delaware courts have traditionally viewed overpayment claims, the claim belonged to the Partnership, which, again, is why Plaintiff brought and tried the claim derivatively on the Partnership's behalf.

B. The Contractual Duty Was Owed Solely to the Partnership, and the Partnership Therefore Owned the Claim.

Because Plaintiff has no serious argument that the claim for the alleged corporate overpayment belongs to him, Plaintiff falls back on the argument that his mere status as a party to the LPA is enough to confer standing.

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[10] *Id.* at *1, *3-4.

[11] *NAF*, 118 A.3d at 176-77.

[12] *Citigroup*, 2016 WL 2994902, at *1-4; *NAF*, 118 A.3d at 176-77.

As demonstrated in the Opening Brief, not all claims for breach of a limited partnership agreement are direct.[13] If that were so, every claim in the publicly traded limited partnership or LLC context would belong to the investors.[14] Plaintiff's approach would undermine thirty years of jurisprudence, most recently affirmed by this Court in *Culverhouse*, that the test for determining claim ownership is "substantially the same" in the partnership and corporation contexts.[15]

Similarly, Plaintiff's approach would override the General Assembly's policy determinations, expressed in Delaware Revised Uniform Limited Partnership Act (DRULPA) and the LLC Act, that would-be incorporators could waive all fiduciary duties while still benefitting from the demand requirements and other procedural protections in the context of derivative suits.[16] Plaintiff's rule would also impose a penalty, with no statutory basis, on alternative entities that have modified fiduciary duty schemes by taking litigation assets that would otherwise belong to those entities under traditional notions of claim ownership and giving them to their equityholders (as would be the case here).

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[13] Def.'s Op. Br. at 26-30.

[14] The vast majority of publicly traded limited partnerships and LLCs take advantage of the statutory authorization and "totally waive" fiduciary duties or "eliminate liability arising from the breach of fiduciary duties." Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 J. CORP. L. 555, 558 (Spring 2012).

[15] *Culverhouse v. Paulson & Co.*, 133 A.3d 195, 198 n.9 (Del. 2016).

[16] Def.'s Op. Br. at 35-36.

While *Citigroup* cites to the Standing Opinion when discussing NAF's conclusion that a commercial contract can be enforced directly by a signatory, the specific outcome in any case must depend on the provisions at issue. More precisely, *Citigroup* itself asks "to whom the relevant duty is owed."[17] Here, the duty was owed to the Partnership. Under Section 7.9(b) of the LPA, the GP "must believe that [its] determination or other action is in the best interests *of the Partnership*."[18] This standard required the GP to consider only the Partnership's interests,[19] and thus the duty is owed solely to the Partnership.[20]

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[17] *Citigroup*, 2016 WL 2994902, at *9 n.66 (*Tooley* applies to fiduciary duty claims where the duty is owed to both the equityholders and the entity, whereas "[i]n other contexts, the focus upon to whom the relevant duty is owed will allow the segregation of derivative claims") (citing *Agostino*, 845 A.2d at 1122 n.54); *see also NAF*, 118 A.3d at 179 n.10 (same); *Agostino*, 845 A.2d at 1122 n.54 (same); *Tooley*, 845 A.2d at 1036. The focus on the beneficiary of the contractual "duty" is consistent with the basic underpinnings of the standing rule itself—a plaintiff must demonstrate that "the interests she or he seeks to be protected are within the zone of interests to be protected." *HLSP Holdings Corp. v. Fortune Mgmt., Inc.*, 991 A.2d 18, 2010 WL 528470, at *3-4 (Del. Feb. 15, 2010) (affirming dismissal of claim where plaintiff was a party to breached contract but not injured by the breach).

[18] A923, LPA § 7.9(b) (emphasis added).

[19] *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 179 (Del. Ch. 2014) ("The contractual standard does *not* require the Conflicts Committee to make a determination regarding the best interests of the limited partners as a class" and eliminates any duty "to prefer the interests of the limited partners."), *aff'd*, --- A.3d ---, 2015 WL 803053 (Del. Feb. 26, 2015); *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 WL 4975270, at *8 (Del. Ch. Aug. 20, 2015), *aff'd sub nom. Haynes Family Trust v. Kinder Morgan G.P., Inc.*, 2016 WL 912184 (Del. Mar. 10, 2016).

[20] Plaintiff argues in a footnote that Section 7.9(b) is merely the "standard" and does not address "to whom the duty was owed." Ans. Br. at 43 n.144. But how could a standard favoring only one party of a multi-party contract impose a duty in favor of anyone other than that party? The limited partners have no claim provided the transaction is in the Partnership's best interests. *See, e.g., Kinder Morgan*, 2015 WL 4975270, at *8.

Plaintiff's status as a party to the LPA consequently did not automatically grant him standing to challenge all aspects of that agreement. By way of example, assume there is a three-party contract between Alan, Beth, and Charles. In the contract, Alan promises to pay Beth $10. Alan breaches that provision and does not pay. As a party to the contract, does Charles have standing to sue for Alan's failure to pay Beth? No. Only Beth has standing to enforce the duty by Alan to Beth, and only Beth was injured by the breach.[21] There can be only one recovery from Alan, and if Charles were permitted to sue and recover, he would be wrongfully taking Beth's litigation asset: the right to be paid by Alan.

Yet, that is exactly the case here. Each of the GP, the Partnership, and the limited partners is a party to the LPA.[22] In the LPA, the GP promised to act in the Partnership's best interests, including in the context of conflict transactions. The trial court held that the GP failed to do so, and now Plaintiff, a former limited partner, is attempting to recover for that breach. Just as Charles cannot recover for Beth's claim in the example above, neither can a limited partner recover for what

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[21] *HLSP*, 2010 WL 528470, at *3-4 (affirming dismissal of a party to the contract who alleged that the contract had been breached where only its investors were harmed); *Kelly v. Blum*, 2010 WL 629850, at *14 (Del. Ch. Feb. 24, 2010) (dismissing claim by party to contract based on lack of standing where it could not plead the relevant provision created any duties owed to it).

[22] *See* 6 *Del. C.* § 17-101(12) ("[a] limited partnership is bound by its partnership agreement").

was allegedly owed to the Partnership. In short, a plaintiff has no right to enforce directly a contract duty owed to another party.[23]

Plaintiff attempts to avoid this reality by arguing that Section 7.9(a), the safe harbor provision for conflict transactions, creates a duty owed to limited partners. But this argument fails for three reasons. First, Section 7.9(a) never mentions that a conflict transaction must be fair to the limited partners or in their best interests; rather it refers only to the Partnership's interests.[24] Second, although Section 7.9(a) refers generally to proceedings brought by a limited partner or the Partnership challenging "Special Approval," the language should be read to address Plaintiff's right to bring a proceeding derivatively on behalf of the Partnership challenging application of the safe harbor. And standing to commence an action derivatively neither transfers ownership of the Partnership's claim to the limited partners nor changes the nature of the underlying duty to act in the Partnership's best interests. Third, Section 7.9(a) is a safe harbor that cannot be breached but instead provides optional contractual pathways that create defenses to

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[23] Plaintiff proposes as a hypothetical that if the LPA required a transaction to be fair to "the emperor of China," Plaintiff would have the ability to challenge transactions directly for breaching that section. Ans. Br. at 43 n.145. Unlike the emperor of China, however, the party protected here by the LPA is not a third party, but rather the Partnership itself. By statute, the "partnership agreement may provide rights to any person, including a person who is not a party to the partnership agreement . . . ." 6 *Del. C.* § 17-101(12). Therefore, the primary person who should be able to challenge a transaction as unfair "to the emperor of China" would be the emperor himself.

[24] A922-23, LPA § 7.9(a) (providing a safe harbor for transactions that are "fair and reasonable to the Partnership").

a claim that the GP failed to satisfy an affirmative obligation.[25] It is Section 7.9(b) that imposes on the GP the duty to act "in the best interests of the Partnership."[26]

C. Even if the Contractual Right Was Shared, the Claim Was Owned by the Partnership.

Even if this Court determines that the "duty" underlying Plaintiff's claim was not owed exclusively to the Partnership, then at most the duty was owed to *both* the limited partners and the Partnership. And where a duty "runs to the corporation and the shareholder," as in the case of corporate fiduciary duties, *Tooley* applies to determine the owner of the claim because "plainly not all fiduciary duty claims are individual claims."[27] As explained in the Opening Brief, applying *Tooley* yields a finding that the claim belongs to the Partnership.

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[25] *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 356, 364-66 (Del. 2013) (conflict of interest provision creates contractual safe harbor, "not an affirmative obligation"); *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 410, 419 (Del. 2013) ("Section 7.9(b) imposes a contractual fiduciary duty to act in 'good faith,'" and Section 7.9(a) provides a layer of "protection designed to insulate the Defendants from judicial review of whether the general partner or its 'Affiliates' had satisfied their contractual duty"), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013); *Dieckman v. Regency GP LP*, 2016 WL 1223348, at *1-3 (Del. Ch. Mar. 29, 2016) (describing "series of safe harbors to address potentially conflicted transactions"); *Emps. Ret. Sys. of St. Louis v. TC Pipelines GP, Inc.*, 2016 WL 2859790, at *4 n.26 (Del. Ch. May 11, 2016) (similar provision is a "safe harbor"). Plaintiff's attempt to distinguish this authority fails. *See infra* Part III.A.

[26] A922-23, LPA § 7.9(a). Plaintiff suggests that the duty in Section 7.9(b) cannot apply to conflict scenarios because it yields to Section 7.9(a), which qualifies as an express standard found elsewhere in the Agreement that overrides Section 7.9(b). Ans. Br. at 26-27 (quoting A923, LPA § 7.9(b)). But Section 7.9(a) has been held to be a "safe harbor" notwithstanding analogous language. *Gerber*, 67 A.3d at 409 (Section 7.9(a) is a "safe harbor" even where comparable provision to Section 7.9(b) applied "unless another express standard is provided for").

[27] *See Agostino*, 845 A.2d at 1122 & n.54 (fiduciary duties run to corporation and stockholders, but "plainly not all fiduciary duty claims are individual claims," therefore "the focus should be on the nature of the injury"), *cited with approval in Citigroup*, 2016 WL 2994902, at *9 nn.66 & 68).

Plaintiff essentially concedes that his claim is not solely direct, and instead argues at length that his claim is dual-natured because "the Fall Drop[-D]own reallocated value from the unaffiliated limited partners to the Parent."[28] But the Fall Drop-Down involved only an exchange of money for the acquired assets and, as Plaintiff concedes, did not involve any dilution.[29] The unaffiliated limited partners had the same rights before the Fall Drop-Down as after it. The claim—a reduction in the value of the Partnership (and each limited partner's fractional ownership thereof) as a result of the alleged overpayment—is therefore classically derivative because any alleged injury to the limited partners derives solely from the reduction in value of his proportionate interest in the Partnership.[30]

In contrast, each of *Tri-Star*, *Gentile*, and the other "expropriation" decisions cited by Plaintiff and the trial court involved dilution. In each of those cases, the controller extracted equity from the minority,[31] such that the minority owned a decreased percentage of the entity (irrespective of the entity's value at any given time) as a result of the challenged transaction, and the minority's voting power was

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[28] Ans. Br. at 48 (citing Standing Op. at 62-71); *id.* at 44-48.

[29] *See* Ans. Br. at 48-49 ("this expropriation of economic value to a controller was not coupled with any voting-rights dilution").

[30] *See* Def.'s Op. Br. at 25-26 n.83 (citing cases).

[31] Def.'s Op. Br. at 38-41. The cases alternately refer to the interests taken from the minority as "voting power" and "the percentage of the shares owned." *See, e.,g., Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006); *Robotti & Co. v. Liddell*, 2010 WL 157474, at *7 (Del. Ch. Jan. 14, 2010). The minority's "voting power" is one part of the bundle of rights represented by its "percentage of the shares owned," and the focus is appropriately on the minority's ownership percentage, including, without limitation, its voting power.

similarly diminished.[32] But a claim for damages arising from an entity overpaying for an asset that does not increase a controller's ownership percentage of the entity at the minority's expense is solely derivative, and does not become "dual" simply because the challenged transaction involves a payment to a controller.[33] And contrary to Plaintiff's assertion, the limited partners' voting rights were not meaningless; they possessed a right to vote on matters integral to the Partnership such as amending the LPA, removing the GP from power, and approving or rejecting a merger.[34] Thus, whether characterized as "cash-value expropriation" or "overpayment" to a controller, the result is the same: the claim belongs to the Partnership.

D. Ownership of the Claim Passed to the Surviving Entity in the Merger, Divesting Plaintiff of His Derivative Standing.

When a corporation suffers harm, it alone owns the claim, and "[t]he traditional concept of standing confers upon the corporation the right to bring a

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[32] *See, e.g.*, *Gentile*, 906 A.2d at 95, 101 (controller's interest increased from 61.19% to 93.49%, minority's interest reduced from 38.81% to 6.51%); *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 320-22, 330-32 (Del. 1993), *as corrected* (Dec. 8, 1993) (controller's interest increased from 36.8% to 80%, minority's interest reduced from 43.4% to under 20%), *disapproved of on other grounds by Tooley*, 845 A.2d 1031; *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *17 (Del. Ch. Sept. 4, 2014) (control group's interest increased 54% to 80%, plaintiffs' interest reduced from 26% to 2%), *aff'd sub nom. Fuchs v. Wren Holdings, LLC*, 129 A.3d 882 (Del. 2015); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 634 (Del. Ch. 2013) (common stockholders' ownership reduced to 2.18%, while significant stockholders' and management's increased).

[33] *See* Def.'s Op. Br. at 40 n.134 (citing cases).

[34] Ans. Br. at 49 n.172; A942, LPA § 13.2 (amendments), A935, LPA § 11.2 (removal of the GP), A949-50, LPA § 14.3 (merger approval).

cause of action for its own injury."[35] Derivative standing places control of an entity's legal claim in the hands of an equityholder, but that control is temporary. Derivative standing is always subject to involuntary divestment.[36] And derivative standing affects only control of the claim; it does not displace the entity's ownership of its litigation asset or its right to any recovery.[37] "The stockholder does not bring [a derivative] suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court* . . . . In fact, the plaintiff has no such *direct* interest; the defendant corporation alone has a direct interest . . . ."[38]

Because the entity retains ownership of its claim at all times, even while an equityholder is controlling the litigation, the equityholder's derivative standing is coterminous with his or her equity ownership in the entity. Accordingly, "[a] plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit."[39] This continuous

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[35] *Schoon v. Smith*, 953 A.2d 196, 201 (Del. 2008).

[36] *See generally Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

[37] *See, e.g.*, *Zapata Corp.*, 430 A.2d at 784-85; *In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *9 (Del. Ch. Mar. 31, 2009); *Oliver v. Boston Univ.*, 2006 WL 1064169, at *19 (Del. Ch. Apr. 14, 2006); *Schoon*, 953 A.2d at 202.

[38] *Schoon*, 953 A.2d at 202 (quoting 4 *Pomeroy's Equity Jurisprudence* § 1095, at 278 (5th ed. 1941)).

[39] *Lewis v. Anderson*, 477 A.2d 1040, 1049 (Del. 1984).

ownership requirement applies through final judgment,[40] and "has been a staple of Delaware law for over [three] decades."[41] It has been described as "sacrosanct" and is a "bedrock tenet of Delaware law" that "is adhered to closely."[42]

Importantly for purposes of this appeal, the continuous ownership rule applies with equal force to non-corporate business entities, including limited partnerships.[43] And in the context of mergers involving limited partnerships, its application has an unambiguous statutory basis: Section 211(h) of DRULPA provides that, as of the effective time of a merger, all of a constituent limited partnership's "rights, privileges and powers" as well as its "causes of action" "shall be vested in the surviving or resulting domestic limited partnership or other business entity."[44]

The fundamental dispute in this appeal concerns ownership as opposed to control of the claim. Plaintiff in fact had temporary control of the claim—*i.e.*, derivative standing—when he was a unitholder of the Partnership that owned the

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[40] *Strategic Asset Mgmt., Inc. v. Nicholson*, 2004 WL 2847875, at *3 (Del. Ch. Nov. 30, 2004).

[41] *In re New Valley Corp. Deriv. Litig.*, 2004 WL 1700530, at *3 (Del. Ch. June 28, 2004).

[42] *Id.*; *Parfi Holding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 940 (Del. Ch. 2008); *Zimmerman v. Crothall*, 2013 WL 5630992, at *5 (Del. Ch. Oct. 14, 2013), *rev'd in part on other grounds*, 94 A.3d 733 (Del. 2014).

[43] *See* Def.'s Op. Br. at 22 n.70 (citing cases); *see also Kelly*, 2010 WL 629850, at *9 n.57 ("merger that eliminates" plaintiff's LLC membership "must also negate" derivative claim standing).

[44] 6 *Del. C.* § 17-211(h); *see also Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 355 (Del. 1988) ("Title to [derivative] claims has passed by operation of law" to the acquiror, who "alone has the right to determine whether to pursue such claims against the defendants.").

claim. But Plaintiff never owned the claim, and he acknowledged as much by not only pleading it derivatively but also prosecuting it that way through trial.[45] The Partnership therefore owned the claim when KMI negotiated and signed a merger agreement to acquire the Partnership, and ownership of the claim passed to the surviving entity in the Merger.

Plaintiff, having lost standing to assert the derivative claim under the continuous ownership rule, no longer had the right to control the claim following the Merger. Nor did he have any logical argument to the contrary:

> [W]hat logical justification can there be for permitting the plaintiff [Brinckerhoff], who is no longer a [unitholder] of the entity possessing the claim, to continue to prosecute the action on behalf of the [post-Merger entity] without regard to the feelings of its present 100 percent shareholder, [Kinder Morgan]? Offhand, I can think of none.[46]

Plaintiff's policy arguments and pleas for equitable standing similarly

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[45] Whether a plaintiff has the ability to enforce a claim is not necessarily the same inquiry as who owns the claim and the right to recover. There are at least two bodies of case law recognizing that contract claims can be enforced directly without divesting the entity of ownership of the claim or the right to recovery. Under the first, a plaintiff may proceed without making a demand when it has made sufficient allegations that a board violated a stock plan. *Sanders v. Wang*, 1999 WL 1044880, at *5 (Del. Ch. Nov. 8, 1999); *Pfeiffer v. Leedle*, 2013 WL 5988416, at *6 (Del. Ch. Nov. 8, 2013) ("*Sanders* teaches that when a plaintiff presents particularized factual allegations that indicate that the board clearly violated an unambiguous provision of a stock plan, it is proper to infer that such violation was committed knowingly or intentionally and, therefore, that demand should be excused."). The second allows stockholders to sue to enforce a charter or statutory violation, where "only injunctive or prospective relief" is sought. *Grimes v. Donald*, 673 A.2d 1207, 1211-13 (Del. 1996), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Grayson v. Imagination Station, Inc.*, 2010 WL 3221951, at *6 (Del. Ch. Aug. 16, 2010).

[46] *Lewis v. Anderson*, 453 A.2d 474, 479 (Del. Ch. 1982), *aff'd*, 477 A.2d 1040 (Del. 1984). Plaintiff all but ignores *Lewis* in his answering brief.

succumb to the statutory and contractual expectations of the surviving entity.[47] As discussed above, standing is a separate inquiry from the merits. There is no "strong claim" exception to fundamental principles of standing,[48] as embodied in the "sacrosanct" continuous ownership requirement.

If there were, *Massey Energy* would have been such a case. There, plaintiffs alleged "a myriad of particularized facts" creating a pleading-stage inference that Massey's top management "knowingly caus[ed] it to seek profit by violating the law," resulting in an explosion killing 29 coal miners.[49] In the face of these gravely serious allegations, then-Vice Chancellor Strine concluded that even though the plaintiffs had stated strong derivative claims, it was "black letter law" that those claims would pass to the acquiror in a merger.[50] *Massey Energy* thus left the plaintiffs to challenge the merger directly.

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[47] *See CML V, LLC v. Bax*, 28 A.3d 1037, 1042 (Del. 2011) ("When statutory text is unambiguous, we must apply the plain language without any extraneous contemplation of, or intellectually stimulating musings about, the General Assembly's intent."); *see also Great Hill Equity Partners IV, L.P. v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 160 (Del. Ch. 2013) ("Whatever the case may be in other states, members of the Delaware judiciary have no authority to invent a judicially-created exception to the plain words [of a statute] and usurp the General Assembly's statutory authority.").

[48] *See Brown v. Automated Mktg. Sys., Inc.*, 1982 WL 8782, at *3 (Del. Ch. Mar. 22, 1982) ("It is [the plaintiff's] right, not the defendant's wrongdoing, that is the basis of recovery. When it is disclosed that [the plaintiff] has no standing in equity, the degree of wrongdoing of the defendant will not avail him.") (citation omitted). *But see* Standing Op. at 17, 20-22 (holding that "strong claims" should continue).

[49] *In re Massey Energy Co. Deriv. & Class Action Litig.*, 2011 WL 2176479, at *1, *20 (Del. Ch. May 31, 2011).

[50] *Id.* at *2.

So too here. If Plaintiff believed that the GP's approval of the Merger, including the extinguishment of derivative claims, breached the LPA, then Plaintiff could have challenged the Merger directly on that basis.[51] Indeed, other unitholders did challenge the Merger, alleging that the derivative claim here was not adequately valued, a point Plaintiff ignores entirely.[52] A direct challenge to the Merger would have been the only arena in which Plaintiff's arguments about "forfeiture" would have legal relevance.

Instead, Plaintiff repeatedly makes those arguments in the context of a zombie derivative suit,[53] asking the Court to disregard: (i) DRULPA's unambiguous text, (ii) the Partnership's existence as a separate entity and the direct owner of its assets before the Merger, and (iii) the Plaintiff's burden to prove that the Merger itself was a breach of duty. This is too much to ask of a Court under the guise of case-specific equity, particularly where Plaintiff litigated the Partnership's claim derivatively knowing that he could be divested of standing at any time.

The trial court erred, therefore, as does Plaintiff, in importing concepts of "equity," "windfall" and "forfeiture" into what should be a straightforward analysis

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[51] Plaintiff's unsupported, but oft-cited, refrain that the GP and its affiliates "orchestrated" the "post-trial Merger"—part of a $76 billion corporate reorganization that consolidated three separate publicly traded entities—strains credibility. *See* Ans. Br. at 4, 6, 64.

[52] *See* Def.'s Op. Br. at 44.

[53] Ans. Br. at 4, 6, 47-48, 54-55, 64-65.

of standing based upon principles of claim ownership.[54] Plaintiff complains that the continuous ownership requirement is a bright-line rule, but this is a virtue, not a flaw. Claim ownership in the context of a merger is one area of business entity law that correctly prioritizes certainty and predictability over case-specific complaints about inequities attendant to lost standing.

Plaintiff urges that the Court of Chancery can simply award the remedy for the claim that once belonged to the Partnership to "the innocent [but uncertified] class of unitholders."[55] But then what happens to the post-Merger entity's statutory ownership of the claim? Does it evaporate because the trial court, post-merger, decides it is a valuable claim? Does the answer depend on the identity of the acquiror? The statutory text is unequivocal and permits no such inquiries or exceptions.

Accordingly, because the claim was at all times owned by the Partnership or its successor by Merger, and as Plaintiff no longer owns his Partnership units, Plaintiff cannot satisfy the continuous ownership requirement and lacks standing.

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[54] *See, e.g.*, Standing Op. at 2, 75-76, 106; Ans. Br. at 4, 53, 57.

[55] Ans. Br. at 60.

II. THE COURT ERRED IN AWARDING PRO RATA DAMAGES.

A. The Judgment Should Be Reversed Because Plaintiff Presented No Evidence of Damages to Former Unitholders.

Plaintiff never attempted to prove any unitholder-level harm. On the contrary, Plaintiff concedes, and the trial court found, that the only injury proved at trial was to the Partnership.[56] Accordingly, even assuming that the overpayment claim was direct and belonged to him, the Judgment should be reversed because Plaintiff failed to satisfy his burden of proof on an essential element of his claim—that the unitholders were directly injured by the Fall Drop-Down.[57] None of the arguments Plaintiff offers demonstrates otherwise.

First, Plaintiff asserts that, notwithstanding his failure of proof, the trial court could simply "convert" the entity-level harm into "damages in favor of the unaffiliated unitholders" through "simple math" because they are the "same damages."[58] But these are not the "same damages."[59] Plaintiff ignores the distinction between direct and derivative harm. To obtain a direct recovery,

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[56] *See* Standing Op. at 13 (finding no "evidence at trial regarding specific harm to the unaffiliated limited partners"); Ans. Br. at 63 (contending an award of "pro rata damages . . . required no additional evidence or testimony" beyond the evidence of harm to the Partnership).

[57] *See* Def.'s Op. Br. at 45-48; *see also Nemec v. Shrader*, 991 A.2d 1120, 1130-31 (Del. 2010) ("Because the plaintiffs have failed to demonstrate each required element, the Chancellor properly dismissed Count III."); *Connelly v. State Farm Mut. Auto. Ins. Co.*, --- A.3d ---, 2016 WL 836983, at *6 (Del. Mar. 4, 2016) (a cause of action for breach of contract "includes damages as an element.").

[58] Ans. Br. at 63-64.

[59] *See, e.g.*, *Tooley*, 845 A.2d at 1036 (direct injury suffered by a stockholder is "distinct from an injury caused to the corporation alone").

Plaintiff was required to demonstrate direct harm, *i.e.*, that the unitholders were injured by the Fall Drop-Down separate from, and independent of, any injury to the entity.[60] As Plaintiff acknowledges, and the trial court held, he failed to make any such showing.

Where, as here, a plaintiff demonstrates that the harm to an equityholder is "exactly the same as" that suffered by the entity, the injury "is properly regarded as injury to the [entity] and not to the [equityholders]."[61] Plaintiff cannot "bootstrap the harm and damages causatively linked to a derivative claim onto what . . . was an independently arising direct cause of action."[62] Indeed, Plaintiff's "simple math" conflates what are two very distinct types of injury and thereby misappropriates a litigation asset that at all times belonged to the Partnership.

Second, Plaintiff's talismanic invocation of the term "dual" to describe his claim does not solve his proof problem. Dual claims are not, as Plaintiff suggests, claims that transform from derivative to direct at a plaintiff's whim or depending

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[60] *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006) (rejecting plaintiffs' theory that the direct and derivative damages are the same, in part, because "if the plaintiffs' damages theory is valid, the directors of an acquiring corporation would be liable to pay both the corporation and its shareholders the same compensatory damages for the same injury"); *Agostino*, 845 A.2d at 1122 (in order to pursue a direct claim, plaintiff must allege "an injury [that was] suffered by the shareholder that is not dependent on a prior injury to the corporation"). Plaintiff seeks to distinguish *J.P. Morgan* as involving "a direct claim for injury to voting rights." Ans. Br. at 63 n.232. But Plaintiff nowhere explains why that supposed distinction matters, given that he is now himself seeking a direct unitholder recovery, or why the burden of proof differs between voting rights and breach of contract claims.

[61] *Feldman v. Cutaia*, 951 A.2d 727, 733 (Del. 2008).

[62] *Id*. (citing *J.P. Morgan*, 906 A.2d at 771-74).

on the stage of the litigation. Rather, a dual claim arises where "the same set of facts" gives rise to two separate injuries, *i.e.*, one to the entity and a distinct harm to the equityholders.[63] In this circumstance, an equityholder plaintiff can litigate the latter harm directly and the former derivatively on behalf of the entity.[64] But any recovery after trial goes to the constituency proven to have been harmed by the wrongful conduct. A dual claim is not a "one size fits both" proposition that permits a plaintiff to decide how it wishes to route the remedy.

For example, in *Tri-Star*, the Court of Chancery dismissed plaintiffs' derivative claims on standing grounds where a subsequent merger had terminated plaintiffs' standing to assert derivative claims, leaving only a disclosure claim for money damages against Tri-Star's directors.[65] When defendants moved for summary judgment premised on the plaintiffs' failure to show any cognizable injury to the putative class, plaintiffs offered "no specific evidence of damage" to the class but rather presented a number of "factors" to justify the damages sought, including the "Court's equitable discretion," the defendants' "wrongful intent," and "benefit" to the acquiror.[66] The court granted the motion, holding that, "despite

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[63] *Loral Space & Commc'ns, Inc. v. Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 869 (Del. 2009).

[64] *Id.*

[65] *In re Tri-Star Pictures, Inc. Litig.*, 1992 WL 37304, at *1 (Del. Ch. Feb. 21, 1992); *Tri-Star*, 634 A.2d at 320-21 (Del. 1993).

[66] *Tri-Star*, 1992 WL 37304, at *2-3.

having had ample opportunity," plaintiffs had "not adduced evidence of individual damage to the members of the class flowing from" the alleged wrongful conduct.[67]

The court found that the *Tri-Star* plaintiffs' "factors," which mirror those stressed by Plaintiff here, were not "probative of the fact or the extent of individual damage suffered by" the equityholders, but rather bore on, among other things, the "claims of damages to the corporation, which are no longer recoverable in this action" as their ability to bring derivative claims had been extinguished.[68] It rejected the notion that a plaintiff could "sidestep" its obligation to prove unitholder damages "by enumerating elements of a derivative recovery and then labeling them as 'factors' to be considered as evidence of the former [equityholders'] individual damage claim."[69] Plaintiff's argument here suffers the same fatal flaw.

Third, Plaintiff argues that his failure of proof is inconsequential because the GP had notice before trial that if the Merger closed, he intended to pursue a "quasi-

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[67] *Id.* at *4.

[68] *Id.* at *3.

[69] *Id.* On appeal, this Court held that the plaintiffs were entitled to nominal damages for the disclosure violation at issue in that case, but stated: "[t]his does not suggest, however, that the Court approves the means by which plaintiffs have sought to establish the measure of their damages. If plaintiffs seek more than nominal damages arising out of their claim for breach of the fiduciary duty of disclosure, the Court would expect that plaintiffs' present hypothetical estimates will give way to the more generally accepted practice of offering expert testimony on the amount of damages *actually suffered by the class*." *Tri-Star*, 634 A.2d at 334 n.18 (emphasis added); *see also Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997) (noting this Court had "cautioned" in *Tri-Star* that "if plaintiff sought more than nominal damages," it would have to prove such damages, including through expert testimony).

class" recovery.[70] Any such "notice," however, could not displace Plaintiff's burden to prove damages or shift the burden of proof to the GP to disprove a theory of direct damages that Plaintiff did not offer.[71]

If anything, Plaintiff's desired optionality to proceed on a "quasi-class" basis after the Merger closed underscored both the need for the procedural protections contained in Rule 23 and that Plaintiff needed to fulfill his burden to prove unitholder-level damages if he wanted a post-Merger recovery for a "quasi-class." Again, as Plaintiff concedes, he did nothing to satisfy his burden, having failed to seek any new discovery, amend his expert report (which focused solely on harm to the Partnership), or submit any evidence demonstrating injury to the unitholders.

Plaintiff's failure of proof should have resulted in a judgment against him. But the trial court excused Plaintiff, post-trial, from his obligation to demonstrate a unitholder injury so as to allow a recovery for damages he neither pled nor proved. The court thus altered the fundamental rules governing trials and belatedly reallocated the burden of proof to defendants. This was reversible error.

B. The Court Erred in Awarding a Pro Rata Recovery.

Plaintiff argues that the trial court properly found that "a pro rata award was

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[70] Ans. Br. at 63.

[71] Plaintiff makes much of the trial court's invitation for the GP—*after* trial and *after* the Liability Opinion had been issued—to submit additional evidence regarding unitholder damage. But if any additional evidence should then have been submitted, it should have come from Plaintiff because it was his burden to demonstrate the requisite injury. Had Plaintiff presented any such evidence, the GP would have responded along the lines addressed herein and in the Opening Brief. *See* Def.'s Op. Br. at 48 n.159.

possible, even pre-Merger, because an entity-level remedy would have benefitted the GP by preserving its control over funds it wrongfully expropriated and thus benefit the 'guilty.'"[72] Plaintiff's position is contrary to Delaware law, and ignores a long line of decisions, including this Court's, holding that equityholders cannot recover on a pro rata basis for a harm suffered by an entity.[73] Rather, where the suit is brought on its behalf, and the only injury proven is to the entity, it is settled that the recovery "must go to the" entity and "only to the" entity.[74]

This rule applies even where a wrongdoer remains an equityholder and

[72] Ans. Br. at 62 (quoting Standing Op. at 103-04); *id.* at 63.

[73] *See, e.g.*, *Bokat v. Getty Oil Co.*, 262 A.2d 246, 250 (Del. 1970) (rejecting pro rata recovery as such a remedy "is not the law of Delaware"), *disapproved of on other grounds by Tooley*, 845 A.2d 1031; *Levien v. Sinclair Oil Corp.*, 1975 WL 1952, at *3-4 (Del. Ch. Aug. 12, 1975) (denying corporation's application for pro rata distribution even where entity was argued to be "for all practical purposes, in a state of virtual liquidation and is about to cease to exist as a viable entity for shareholder investment"); *see also* Donald J. Wolfe, Jr. & Michael A Pittenger, CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 9.02[a], at 9-7 (16th rev. 2015) ("[W]here the substantive nature of the alleged injury is such that it falls directly on the corporation as a whole and collectively . . . . it is the corporation itself to which any ultimate relief must exclusively run . . . .").

[74] *Tooley*, at 1036; *Zapata Corp.*, 430 A.2d at 784 (citing *Keenan v. Eshleman*, 2 A.2d 904 (Del. 1938), derivative suits "enforce corporate rights and any recovery obtained goes to the corporation"). This principle was first established in *Eshleman v. Keenan*, 194 A. 40, 43 (Del. Ch. 1937). There, the Court of Chancery rejected a demand for a pro rata damages award where the only relief sought was for injury to the entity. Chancellor Wolcott held that where the claim is "a cause of action belonging to the corporation, it is improper for the decree to be so framed as in effect to turn it into one for the complainant's individual relief." *Id.* This Court affirmed the ruling, stating that paying a derivative award directly to the stockholders would be improper because "transform[ing]" a "derivative action into one for the benefit of the individual" would "not accord with . . . the inherent nature of the wrong sought to be addressed." *Keenan*, 2 A.2d at 912. While Plaintiff relies on *Eshleman* (presumably for its noting the possibility of a direct award in "exceptional cases") he nowhere acknowledges this Court's subsequent decision in *Bokat*, which demonstrates that a merger was not such an exceptional circumstance justifying a pro rata recovery.

would benefit from the award: "[t]he relief to be obtained in a derivative action is relief to the corporation in which all stockholders, whether guilty or innocent of the wrongs complained of, shall share indirectly."[75] Such a rule appropriately gives effect to the separate legal existence of business entities and their ownership of assets, including legal claims. Equally unavailing are Plaintiff's protestations that equity requires a pro rata remedy to ensure accountability and discourage future misconduct. Indeed, this Court in *Bokat* rejected those very same arguments in the context of a merger, holding that any recovery on a derivative claim nevertheless belongs to the acquiror.[76]

While Plaintiff claims that the trial court's remedy is "supported" by Delaware cases "recogniz[ing] that where a general partner is proven to have breached an LP agreement the Court of Chancery may award the remedy to the innocent class of unitholders," Plaintiff tellingly identifies *no Delaware authority* that actually awards a pro rata recovery for damages suffered by an entity.[77] Instead, Plaintiff, like the trial court, relies on *dicta* from *Gaylord* positing that where directors "created the harm" to the corporation, "this factor would support

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[75] *Taormina v. Taormina Corp.*, 78 A.2d 473, 476 (Del. Ch. 1951).

[76] *Bokat*, 262 A.2d at 250 (dismissing claim where plaintiff did not challenge the merger).

[77] Ans. Br. at 59-60.

awarding relief to the class of innocent stockholders, not to the corporation."[78] *Gaylord*, however, did not actually award damages to a class of stockholders; it merely considered the defendant directors' conduct as one factor in deciding whether the plaintiffs' challenge to takeover defenses was direct or derivative.[79]

The other Delaware cases Plaintiff cites are equally inapposite. Each involved a challenge to an essentially end-of-life event for an entity (*e.g.*, a sale of all of the entity's assets, a liquidation, or dissolution), not to an ordinary course asset purchase like what is at issue here.[80] Whereas a liquidated entity by statute is able to pursue civil claims in its own right and distribute any recovery to the equityholders,[81] an entity's claims in a merger pass by operation of law to the

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[78] *Id.* at 59-60 (quoting *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 80 (Del. Ch. 1999)).

[79] *Gaylord*, 747 A.2d at 80-84; *see also Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097, 1110-11 (Del. Ch. 2014) (granting motion to certify class and in *dicta*, relying on *Gaylord* to note possibility of awarding relief to unaffiliated unitholders).

[80] *See In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *6-7 (Del. Ch. Jan. 27, 2000) (claims "related to" liquidation of the partnership); *Fischer v. Fischer*, 1999 WL 1032768, at *1-3 (Del. Ch. Nov. 4, 1999) (denying motion to dismiss on standing grounds where defendant caused the corporation to dissolve after challenged asset sale and plaintiff alleged that defendants "unfairly conspired to eliminate plaintiff's continued involvement in [the company]"); *Boyer v. Wilm. Materials, Inc.*, 754 A.2d 881, 885, 903 (Del. Ch. 1999) (awarding damages to plaintiff where plaintiff proved that defendants sold substantially all of the company's assets and deprived plaintiff "from continued participation in the ownership and management" of company' assets and business). Plaintiff's reliance on two cases where the court "remedied the generally derivative harm that a corporation suffered by altering rights at the stockholder level" (Ans. Br. at 60 n.213) are irrelevant; neither case ordered a monetary distribution of funds owed the entity to "innocent" equityholders. *In re Loral Space & Commc'ns, Inc.*, 2008 WL 4293781, at *32 (Del. Ch. Sept. 19, 2008) (reforming securities purchase agreement); *Linton v. Everett*, 1997 WL 441189, at *7 (Del. Ch. July 31, 1997) (invalidating issuance of shares, not ordering investor-level recovery).

[81] *See* 6 *Del. C.* § 17-803(b).

acquiror who is then entitled to any recovery on that litigation asset.[82] Indeed, the Partnership here did not "end" after the Merger, but rather merged with and into an indirect subsidiary of KMI, which now owns all of the Partnership's assets, including the right to the proceeds from any claims belonging to the Partnership.[83]

Nor can Plaintiff rely on the cases from other jurisdictions cited by the trial court as supporting a pro rata remedy here.[84] As this Court held in *Bokat*, if a decision from another jurisdiction "holds that stockholders in a derivative action are entitled to recover in their own right, [it] is not persuasive, *for such is not the*

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[82] Def.'s Op. Br. at 41. For the same reason, Plaintiff's repeated citations to *Gentile* to support a pro rata recovery are inapposite. In *Gentile*, the entity had been merged into another entity and then liquidated, leaving the minority stockholders "in [that] specific case" as "the sole" beneficiary of "relief that [was] presently available." *Gentile*, 906 A.2d at 103. Whereas here, the Partnership merged with and into an indirect subsidiary of KMI, and the "surviving or resulting" entity retains the right to recover on the claim. *See* 6 *Del. C.* § 17-211(h).

[83] Plaintiff asserts that this remedy was appropriate because the court "warned" that it might apply its suggestion in *Brinckerhoff v. Texas Eastern Products Pipeline Co.*, 986 A.2d 370 (2010), and award a pro rata recovery. Ans. Br. at 63. But any such warning cannot trump controlling precedent. Further, the trial court's reliance on derivative settlements is unavailing. *See* Standing Op. at 100-02. A settlement is different—it is one thing for a court to approve a voluntary agreement providing for a direct distribution for efficiency purposes and quite another to force a distribution when only the entity was harmed. The entity is a party to (and approves) a settlement, thus making a determination about its claim. Here, the trial court bypassed this process and unilaterally distributed the entity's funds to the equityholders.

[84] Ans. Br. at 62; Standing Op. at 94-99. *Bokat* and *Eshleman* reject or distinguish several of the non-Delaware cases cited in the Standing Opinion. *See, e.g.*, *Bokat*, 262 A.2d at 250 (rejecting reliance on *Perlman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955) (cited in Standing Op. at nn.72, 73); *Eshleman*, 194 A. at 42-44 (rejecting or distinguishing each of *Fougeray v. Cord*, 24 A.499 (N.J. Ch. 1892) (cited in Standing Op. at n.72), *rev'd sub nom. Laurel Springs Land Co. v. Fougeray*, 26 A. 886 (N.J. 1893); *Dill v. Johnston*, 179 P. 608 (Okla. 1919) (Standing Op. at n.72); *Matthews v. Headley Chocolate Co.*, 100 A. 645 (Md. 1917) (Standing Op. at nn.72, 76); *Brown v. DeYoung*, 47 N.E. 863 (Ill. 1897) (Standing Op. at nn.73 & 76)).

law of Delaware."[85]

Finally, Plaintiff fails to show that the trial court could award damages directly to the former unitholders without first complying with Rule 23. Citing no authority supporting the exemption of his self-denominated "quasi-class" from the Rule, Plaintiff dismisses this as a non-issue because the GP never challenged his adequacy to serve as a class representative. But Plaintiff never moved for class certification and, in any event, adequacy of representation is but one of numerous requirements established by the Rule. Plaintiff cannot have the benefits of a "quasi-class"—essentially a traditional class action—without satisfying all the procedural requirements embodied in Rule 23.

Plaintiff does not account for when "quasi-class" treatment would apply or what procedures would govern in place of Rule 23, if any. Would notice ever be given to the "quasi-class" members of the action or the judgment? Would unitholders be permitted to object to their inclusion or exclusion from the "quasi-class"? Do the other "quasi-class" members have a say on the attorneys' fees that will diminish their ultimate recovery? What are the judgment's collateral and preclusive effects? Would the court have any say with respect to a settlement? Plaintiff's *ad hoc* approach promises confusion and disorder and is inconsistent with the rules governing representative litigation.

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[85] *Bokat*, 262 A.2d at 250 (emphasis added).

III. THE COURT ERRED IN SUBSTITUTING ITS OWN JUDGMENT FOR THE CONTROLLING CONTRACTUAL PRESUMPTION AND STANDARD OF CONDUCT.

A. The Court Failed to Apply Section 7.10(b).

As explained in the Opening Brief, the GP's approval of the Fall Drop-Down in reliance upon Tudor's fairness opinion is "conclusively" presumed to have been in good faith under the LPA.[86] Plaintiff does not dispute that the requirements of Section 7.10(b) have been met—that the Committee relied on an expert's opinion on a matter within the expert's competence. This acknowledgement warrants dismissal of his claim under *Norton*, which applied an identical provision to bar a challenge to a conflict transaction.[87]

Plaintiff seeks to distinguish *Norton* by arguing that the conclusive presumption does not apply here because a different provision, Section 7.9(a), contains a rebuttable presumption of good faith for conflict transactions.[88] But that is a distinction without a difference.[89]

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[86] Def.'s Op. Br. at 54 (citing A924, LPA § 7.10(b)).

[87] *Id.* at 54-55; *see also Norton*, 67 A.3d at 367-68 (GP's reliance on its financial advisor "satisfied K-Sea GP's contractual duty to exercise its discretion in 'good faith'").

[88] Ans. Br. at 28.

[89] Indeed, this Court has applied *Norton* to agreements containing both rebuttable and non-rebuttable safe harbors. In *Encore*, the partnership agreement contained the same rebuttable presumption for conflict transactions as the LPA here, and the Court nevertheless applied *Norton* in construing the agreement. *See Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 102 (Del. 2013) (quoting Encore LPA § 7.9(a)); *id.* at 102-03 (citing *Norton*, 67 A.3d at 362-63, 367-68; *Gerber*, 67 A.3d at 418-21)). Plaintiff's attempt to distinguish *Encore* on the basis that the court noted it "did not have to address" the application of Section 7.10(b) makes no sense. Ans. Br. at 36 (quoting *Encore*, 72 A.3d at 109 n.58).

Plaintiff's use of then-Chancellor Strine's bench ruling denying the GP's motion to dismiss the Spring Drop-Down based on Section 7.10(b)'s reliance-on-bankers defense is equally misplaced.[90] Then-Chancellor Strine stated that Section 7.10(b) should apply only in a "non-conflicts situation that doesn't implicate the conflicts committee."[91] But *Norton*, decided one year later, is to the contrary.[92]

Indeed, *Norton* rejected each of the underpinnings of the court's reasoning below at the motion to dismiss stage: (i) that Section 7.9(a) specifically governs all conflict transactions, whereas Section 7.10(b) only applies more generally; (ii) that the committee (not the board) approved the deal and obtained the opinion in the first instance; and (iii) that investors would not have "sign[ed] up" if they knew that the GP could engage in related-party transactions "and be conclusively presumed to have acted in good faith" merely by relying on an expert.[93] All of these factors were also present in *Norton*, yet the Court nevertheless applied the conclusive presumption of Section 7.10(b).[94]

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[90] Ans. Br. at 34-35 & n.121.

[91] *Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 7141-CS, Tr. at 10-11, 16-17, 20 (Del. Ch. Oct. 26, 2012) (B10-11, B16-17, B20).

[92] *Norton*, 67 A.3d at 366-68.

[93] *Brinckerhoff*, Tr. at 10-12, 16, 20-21, 55 (B10-12, B16, B20-21, B55); *but see Norton*, 67 A.3d at 363, 366-68; *id.* at 367 (although the committee actually obtained the fairness opinion, "it is unreasonable to infer that the entire . . . Board" did not rely on it); *id.* at 368 (plaintiff "willingly invested in" an entity "that provided fewer protections" than those "provided under corporate fiduciary duty principles" and "is bound by his investment decision").

[94] *See supra* note 93. Then-Chancellor Strine also stated that the conflicts provision was the sole applicable provision because Section 7.9(b) provides that where the GP's conduct is governed by

Plaintiff's remaining arguments are without merit. He waived any reliance on the implied covenant for the Fall Drop-Down by not appealing the dismissal of that claim.[95] And Plaintiff's argument the GP could not rely on Section 7.10(b) because the Tudor opinion failed to address whether the transaction was fair to the Partnership or separately address the Elba portion of the sale is at odds with *Norton*.[96]

B. The Court Misapplied the Contractual Standard of Subjective Good Faith Under Section 7.9.

Plaintiff characterizes the trial court's liability determination as one based entirely on credibility assessments subject to the deferential "clearly erroneous" standard. Plaintiff's argument misses the point. As demonstrated in the GP's Opening Brief, the trial court erred because its disagreement with the Committee's criteria for approving the transaction—that it was accretive to the limited partners—does not, as a matter of law, translate into subjective bad faith (*i.e.*, an actual intent to do harm or a failure to act in conscious disregard of a duty to do

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a particular standard, "no other or different standard" shall apply. *See Brinckerhoff*, Tr. at 19, 54 (B19, B54). A similar provision was also present in *Norton*. *See Norton v. K-Sea Transp. P'rs. L.P.*, Appellants' Op. Br., 2012 WL 2395642, at *12-13 (filed June 18, 2012).

[95] *See Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996) ("A cross-appeal is necessary if the appellee seeks affirmative relief from a portion of the judgment, *i.e.*, enlarging the appellees' own rights or lessening the rights of an adversary.").

[96] *See Norton*, 67 A.3d at 366-67 (applying presumption where opinion stated that the consideration paid to unitholders was financially fair and did not "specifically address" all of its components). Indeed, it could hardly be inappropriate for the opinion to address the transaction the GP actually approved, rather than a single component of it.

so).[97] Whether the GP ultimately acted in good faith here is a legal question—not one that turns on credibility determinations, "factual findings," or whether the trial court agreed with the Committee's conclusion.

Despite devoting the majority of his 83-page brief to the merits, Plaintiff confines his substantive discussion of accretion to two short paragraphs at pages 32-33. This is telling. Plaintiff does not argue that the Committee members had disabling self-interests, acted with intent to harm the Partnership, or failed to form a view that the Fall Drop-Down was meaningfully accretive. In fact, the Committee members consistently testified that they "wanted the [P]artnership to acquire [the] assets at a price that would enable them to continue to increase the cash flows available for distributions."[98]

Rather, Plaintiff argues that the Committee should have focused not on accretion, but on whether the Partnership was paying a "fair price" for the assets.[99] But "fair price" appears nowhere in the LPA, and it was thus error for the trial court to hold the Committee to this objective standard.[100] Nor does Plaintiff

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[97] Def.'s Op. Br. at 58-61.

[98] A693-94, Trial Tr. at 451-52; *see also id.* at 81 (A572) (explaining the importance that "[there is] sufficient cash flow from the transaction to increase distributions"); *id.* at 163-64 (A592) ("drop-downs" are done to "grow and if you can grow, cash flows, you can grow distributions"); *id.* at 508-09 (A708) ("[I]n an MLP, cash is king. You are acquiring an asset with the purpose of increasing your ability . . . to increase the distributions you are able to pay . . . .").

[99] Ans. Br. at 32.

[100] Def.'s Op. Br. at 59.

attempt to address why it was "inexplicable" for the Committee to have approved an accretive transaction given the fundamental purpose of an MLP to ensure steadily increasing distributions to limited partners over time.[101] Whether Plaintiff (or the trial court) believes that accretion is the optimal way to assess a drop-down is irrelevant—this disagreement does not constitute a finding of an actual intent to harm the entity or reflect a conscious indifference to duty.

Finally, even if the focus on fair value were appropriate, the trial court simply disregarded the Committee member's views as to the value of the Elba assets. The pipeline assets' value primarily depended on the future cash flows from revenue paid to the Partnership under long-term supply contracts.[102] In determining fair value for purposes of damages, the court held that the Committee *subjectively believed* that the Partnership would ultimately receive all of this revenue.[103] Thus, in their minds the Partnership would not be overpaying for the assets. Yet, the court disregarded the Committee's subjective good faith belief and found that they were wrong to make that assessment resulting in an overpayment for Elba. The court should not have substituted its judgment for the Committee's.

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[101] Moreover, Plaintiff offers no response to the argument raised in the Opening Brief that the LPA contains a separate safe harbor for transactions that are objectively "fair and reasonable" to the Partnership, which indicates that no "fairness" requirement applies to transactions subject to Special Approval. *See id*. (citing A922-23, LPA § 7.9(a)).

[102] *See* Liability Opinion at 56.

[103] *Id.*

IV. THE COURT ABUSED ITS DISCRETION IN AWARDING THE UNAFFILIATED UNITHOLDERS 58.6% OF THE OVERPAYMENT.

Even if Plaintiff were entitled to damages, he fails to rebut the GP's showing that the trial court erred in: (i) awarding the unitholders 58.6% of the overpayment (when they held a 47.6% stake in the Partnership at the time of the purchase), and (ii) ignoring the GP's contractual rights to funds received by the Partnership. As a result, and for the reasons explained in the Opening Brief, the unaffiliated unitholders are entitled only to $39,330,000, if anything.

Contract damages are limited to "the reasonable expectations of the parties that existed before or at the time of the breach."[104] Even if all of the unaffiliated unitholders at the time of the Merger were entitled to share in the relief, the *amount* of damages could not increase with the passage of time or the addition of new units.[105] Because the limited partners owned 47.6% of the units at the time of the Fall Drop-Down, 47.6% of the total overpayment is the most they could have expected. Allowing new units to increase the unaffiliated unitholders' damage award would penalize the GP for growing the Partnership.

Furthermore, in allowing holders of new units to recover, the trial court conferred a windfall on those unitholders who were not harmed (even derivatively) by the alleged breach. In support of its ruling, the trial court speculated that

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[104] *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1132-33 (Del. 2015) (citation omitted).

[105] Because there was no class certified, the question of who could recover was never resolved.

purchasers of the newly issued units "paid a market price that did reflect the contingent prospect of participating in the potential recovery."[106] In fact, there was no evidence or testimony on the subject.[107] A trial court cannot supply facts in this manner.

Second, Plaintiff asserts that the liability award should be treated as a "capital asset" and distributed to the unaffiliated unitholders despite the contractual limitations in place on the date of the harm.[108] But Plaintiff presented no such evidence at trial, and his brief is tellingly devoid of any legal support for this position. In any event, the trial court never addressed this contention, and thus it should not be considered by this Court in the first instance.

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[106] Standing Op. at 107.

[107] *Id.*

[108] Ans. Br. at 69.

SUMMARY OF CROSS-APPEAL ARGUMENT

1. Denied. Plaintiff impermissibly relies upon the trial testimony and the post-trial Standing Opinion in support of his argument that there were triable issues of fact with respect to the Committee members' subjective good faith in connection with the Spring Drop-Down. Because neither the trial record nor the post-trial opinion existed at the time of summary judgment, they cannot constitute grounds for reversing the trial court's grant of summary judgment.

The trial court correctly granted summary judgment in the GP's favor on Plaintiff's claim for breach of the implied covenant of good faith and fair dealing. The trial court explained that it was unlikely that the drafters of the LPA would have agreed to require the GP to volunteer information about a transaction unrelated to a drop-down had they addressed the matter at the time of drafting. Thus, any failure by the GP to disclose information regarding Parent's decision not to purchase LNG assets—a separate potential transaction from the Spring Drop-Down—did not breach the implied covenant. Moreover, for all of the reasons explained in Section I, supra, the claims challenging the Spring Drop-Down should be dismissed because Plaintiff lacks standing. Likewise, because the GP complied with the "reliance on advisor" provision (Section 7.10(b)), the claims for breach of contract fail.

V. THE COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON THE SPRING DROP-DOWN.

A. Question Presented

Did the trial court correctly determine that Plaintiff had failed to raise an issue of disputed fact with regard to the Spring Drop-Down?[109]

B. Scope of Review

This Court reviews *de novo* "questions of contract interpretation" and a trial court's decision to grant or deny summary judgment.[110]

C. Merits of the Argument

Plaintiff's claim is that the Partnership was harmed because it overpaid for the assets acquired in the Spring Drop-Down. For the reasons set forth in Section I, *supra*, this claim belongs to the Partnership, and Plaintiff therefore lost standing to assert it after the Merger closed. And, for the reasons explained in Part III.A, *supra*, the breach of contract claim must be dismissed due to the GP's compliance with Section 7.10(b). The cross-appeal should be denied on these grounds alone.[111]

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[109] This question was presented below at A204-59; A330-80.

[110] *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).

[111] In contending that the Plaintiff lost standing to challenge the Spring Drop-Down and that Section 7.10(b) bars any claim for breach of contract, the GP is not relying on any additional arguments herein other those set forth above in Section I and Part III.A, *supra*, and therefore Plaintiff's Cross-Appeal Reply Brief must be limited to the Cross-Appeal issues raised herein at Parts V.C.1 and V.C.2.

1. Plaintiff Improperly Relies Upon The Trial Record.

In support of his argument seeking to reverse the trial court's dismissal of the Spring Drop-Down Claims, Plaintiff impermissibly relies upon his speculation as to what the evidence would have shown at a trial on the Spring Drop-Down (based on what happened at the Fall Drop-Down trial), and the trial court's post-trial opinion.[112] But Plaintiff appeals only the court's *Spring Drop-Down* Summary Judgment Opinion. Neither the trial record nor the post-trial opinion existed at the time of summary judgment and thus are not part of the summary judgment record. Because it relies on evidence not presented to the trial court at summary judgment—and, thus, on arguments not presented below—Plaintiff's cross-appeal should be rejected.[113]

2. The Court Correctly Determined that the Implied Covenant Did Not Create a Duty to Disclose Facts Regarding A Different Transaction Considered By Parent.

The "implied covenant of good faith and fair dealing involves inferring contractual terms" to address "'developments or contractual gaps that neither party anticipated.' It does not apply when the contract addresses the conduct at issue."[114] The trial court concluded that the LPA had a gap insofar as it did not address

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[112] *See* Cross-Appeal. Br. at 80-82.

[113] *See* Sup. Ct. R. 8 (only questions "fairly presented" to the trial court may be presented to this Court for review); *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013) (argument "never presented to the Court of Chancery" is "waived" on appeal).

[114] *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 896 (Del. 2015) (quoting *Nemec*, 991 A.2d at 1125) (internal ellipses removed).

whether the GP had an obligation to volunteer information that could be material to the Committee's decision.[115] But after reviewing the LPA, the trial court held that it was unlikely that its drafters would have agreed to require the GP to volunteer non-public information about other transactions to the Committee had they thought to address the matter.[116] The trial court then correctly granted summary judgment in the GP's favor on Plaintiff's implied covenant claim.

Plaintiff contends that this Court's decision in *Gerber v. Enterprise Products Holdings, LLC* established a blanket rule that "when a controller withholds material non-public facts when seeking approval of a conflict transaction, it breaches the implied covenant."[117] But *Gerber* rejected the very argument that Plaintiff presses on his cross-appeal, *i.e.*, that the implied covenant imposes free-floating duties, such as a duty of disclosure, unconnected to the parties' contractual agreement. As this Court made clear in *Gerber*:

> An implied covenant claim, by contrast [to a fiduciary duty claim], looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but rather what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time

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[115] *In re El Paso Pipeline Partners., L.P. Deriv. Litig.*, C.A. No. 7141-VCL, mem. op. at 41 (Del. Ch. June 12, 2014) (Ans. Br. Ex. A) ("SJ Op.").

[116] *Id.* at 49.

[117] Cross-Appeal Br. at 75.

of contracting.[118]

Gerber does not support Plaintiff's implied obligation of disclosure.[119]

Finally, Plaintiff's attempt to refute the court's reasoning is without merit. The LPA eliminated all fiduciary duties and expressly provided that the GP was not obligated to disclose corporate opportunities to the Partnership.[120] The implied covenant cannot "infer language that contradicts a clear exercise of an express contractual right," and courts should avoid "implying a contractual protection when the contract could easily have been drafted to expressly provide for it."[121]

Here, the LPA established a mechanism by which the GP could obtain Special Approval of conflict transactions.[122] And Section 7.5 provides that the GP

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[118] *Gerber*, 67 A.3d at 418 (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012), *rev'd on other grounds*, 68 A.3d 665 (Del. 2013)).

[119] Plaintiff also suggests that one of the hypotheticals discussed in *dicta* in *Gerber* is "exactly what happened here." Cross-Appeal Br. at 75. The hypothetical posits that there could be a breach of the implied covenant where "a qualified financial advisor may be willing to opine that a transaction is fair even though (unbeknownst to the advisor) the controller has intentionally concealed material information that, if disclosed, would require the advisor to opine that the transaction price is in fact not fair." *Gerber*, 67 A.3d at 420. The trial court correctly reasoned that *Gerber* does not hold that the failure to volunteer information would always constitute an implied covenant breach, as suggested by Plaintiff. SJ Op. at 44-45. Moreover, the question raised on summary judgment is distinguishable from the hypothetical in that, here, the trial court was required to answer whether the drafters of the LPA would have imposed an affirmative duty on the GP to disclose material information about *other transactions* to the Committee. The trial court correctly held that the answer is no.

[120] A924, LPA § 7.9(e); *see also* A918-19, LPA § 7.5(c) ("[T]he doctrine of corporate opportunity, or an analogous doctrine, shall not apply to any Indemnitee (including the General Partner).").

[121] *Nemec*, 991 A.2d at 1127; *Nationwide Emerging Managers*, 112 A.3d at 897.

[122] A922-23, LPA § 7.9(a).

"shall not be liable to the Partnership" for failing to inform it about potential corporate "opportunit[ies] or information" that "may be an opportunity for the Partnership."[123] This demonstrates that if the drafters wanted to impose a disclosure duty on the GP, they would have done so.[124]

The trial court also correctly determined that it was inappropriate to infer that the GP had an obligation to volunteer information to the Committee given that the Special Approval process was designed to "replicate an arm's-length, non-fiduciary negotiation."[125] Plaintiff complains that the simulation of an arms-length negotiation was a fiction because the Partnership lacked the "personnel resources or expertise" of Parent.[126] It is undisputed, however, that when the Committee requested information from the GP, it received it, and indeed the Committee had its own banker and other professionals.[127] There is simply no basis to infer, that the LPA's drafters would have required the GP to voluntarily disclose all potentially relevant information for the Committee's consideration.

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[123] A918-19, LPA § 7.5(c). Plaintiff contends that this fact "undermines the trial court's conclusion" because it purportedly shows that fiduciary duties must "be excluded specifically." Cross-Appeal Br. at 79. But the trial court correctly determined that the disclaimer in Section 7.5 suggested that when the drafters did in fact address a similar disclosure obligation arising under the common law, they chose to exclude it.

[124] SJ Op. at 49.

[125] *Id.* at 50.

[126] Cross-Appeal Br. at 75-76. Plaintiff also suggests that without disclosure from the GP of non-public, material facts, the parties would not be "similarly situated." *Id.* at 78. But this ignores the fact that in a traditional arms-length transaction, a party would have no duty to disclose such information to a counterparty in a negotiation.

[127] SJ Op. at 8, 41.

CONCLUSION

For all the foregoing reasons, the Court should reverse the judgment below except for its holding granting Defendants' Motion for Summary Judgment with respect to the Spring Drop-Down, which should be affirmed.

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