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
C.A. NO. 7141-VCL

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

(caption cont'd.)

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PRELIMINARY STATEMENT

Plaintiff respectfully submits this Reply Brief in further support of his cross-appeal from the Court of Chancery's decision granting summary judgment to defendants on plaintiff's claims for the Spring Dropdown.[1] Plaintiff's evidence on summary judgment was sufficient to demonstrate triable issues of fact as to the Committee's state of mind in approving the Spring Dropdown. In addition, plaintiff showed that GP breached the Implied Covenant when it sought Special Approval but failed to disclose material facts to the Committee.

Defendant's Answering Brief argues: (i) plaintiff "impermissibly" relied upon the trial record; and (ii) GP had no duty to disclose material information to the Committee. Neither argument has any merit. We address them below seriatim.[2]

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[1] Capitalized terms are defined in plaintiff's Answering Brief on Appeal and Opening Brief on Cross-Appeal ("Pl. OB"). Defendant's Answering Brief on Cross-Appeal is cited as "Def. AB." Plaintiff's Brief in Support of His Motion for Summary Judgment as to Liability Against All Defendants and in Opposition to Defendants' Motion for Summary Judgment, dated December 6, 2013 ("SJ Br.") is included in defendant's Appendix at pages A260-329.

[2] Defendant erroneously argues that the Court of Chancery's summary judgment order should be affirmed because plaintiff lost standing to pursue these claims and because defendant is entitled to a conclusive presumption of good faith under Section 7.10(b). Def. AB 40. These arguments fail for the reasons set forth in plaintiff's Answering Brief on Appeal. Further, defendant argues that plaintiff cannot rely upon the Implied Covenant as to Section 7.10(b) because plaintiff "failed to appeal dismissal of that claim." Def. AB 34. Again, defendant errs. Plaintiff may rely on any ground in the record to defend the Court of Chancery's judgment and need not file a cross-appeal from a judgment in his favor. *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808, 815 n.13 (Del. 2013).

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY GRANTING SUMMARY JUDGMENT ON THE SPRING DROPDOWN

A. Material Issues of Fact Required a Trial as to the Committee's Good Faith in Approving the Spring Dropdown.

The Post-Trial Opinion described a slew of acts to support the Court of Chancery's finding that the Committee failed to approve the Fall Dropdown in good faith. That evidence included the Committee's negotiation and approval of the Spring Dropdown.[3] On summary judgment, all these facts relating to Special Approval for the spring, including deposition transcripts and exhibits, were before the Court of Chancery.

Plaintiff's evidence on summary judgment met, at minimum, his Rule 56 burden to raise disputed issues of fact as to the Committee's subjective good faith. However, the Court of Chancery interpreted facts and drew inferences in favor of defendant, and granted summary judgment. As a matter of law, that decision was error.

On summary judgment, as to the Fall Dropdown, the Court of Chancery found that a trial was necessary to determine whether the Committee could credibly explain its actions. After trial, the Court of Chancery saw, much to its surprise, that the Committee, for the very most part, had no credible explanations for its actions when

[3] Tr. Op. 9-18.

it approved the Fall Dropdown. The Court of Chancery's findings concerning the Committee's acts in the fall (and the spring) may not prove, but suggest strongly, that the Court of Chancery erred on summary judgment.

For example, the evidence submitted on summary judgment demonstrated:

1. All of the El Paso MLP dropdowns followed the same playbook. The same GP directors sat on the Committee; Parent always padded its initial offers so that the Committee could "negotiate" a price reduction; the Committee retained Tudor; Tudor opined that the resulting deal was "fair;" and Tudor obtained its $500,000 fee;[4]

2. In the spring, the Committee believed that the 51% interest in Elba was worth approximately $725–780 million (8.5-9x EBITDA), yet the Committee agreed to pay a multiple of 11.1x EBITDA.[5] Reichstetter bargained for the Committee. As to any good faith rationale for Reichstetter's bargaining for the Spring Dropdown, "Reichstetter had no explanation . . . ."[6]

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[4] SJ Br. 2-3, 59 (A268-69, A325); Tr. Op. 6-9. *See* Footnotes Table appended hereto. The Footnotes Table sets forth the citations to the relevant evidence as to the Spring Dropdown in plaintiff's summary judgment brief. All of the documents cited were submitted to the court as exhibits to the Affidavit of Jeffrey H. Squire, Esquire, in Support of Plaintiff's Opening Brief in Support of His Motion for Summary Judgment as to Liability Against All Defendants (D.I. No. 125) or the Second Affidavit of Jeffrey H. Squire, Esquire, in Support of Plaintiff's Motion for Summary Judgment as to Liability Against All Defendants and in Opposition to Defendants' Motion for Summary Judgment (D.I. No. 147). The deposition exhibit number references correspond to the number references in the Squire Affidavits (for example, Dep. Ex. 7 is also Squire Aff. Ex. 7 and Dep. Ex. 3 is also Second Squire Aff., or S.II., Ex. 3). All of the depositions transcripts were lodged at D.I. No. 122.

[5] SJ Br. 46-48 and n.117 (A312-14); Tr. Op. 15-17, 43-44. *See* Footnotes Table appended hereto.

[6] Tr. Op. 17. In the Trial Opinion, the Court of Chancery looked back at summary judgment and wrote that Reichstetter's bargaining did not support an inference of bad faith "standing alone." *Id.* at 44. But this act of bad faith did not "stand alone." As the Court of Chancery explained, "But at some point, the story is no longer credible. This was such a case." *Id.* at 54. The Spring Dropdown also was such a case; the record on summary judgment showed an accumulation of acts that the Committee committed in bad faith. In the Trial Opinion, the Court of Chancery found that

3. In the spring, Parent's own analysis of its opening offer for the Spring Dropdown showed that its offer price represented a premium to Parent over implied value of nearly a quarter billion dollars. And, Parent calculated that price using a 10% discount rate for this deal even though Parent's normal discount rate for Elba was 12%.[7]

4. In the spring, Tudor arbitrarily changed its discounted cash flow analysis by lopping off the top of the discount range in order to make Parent's proposed price appear more reasonable. That inexplicable, unchallenged and unquestioned change increased the supposed "fair price" by $145 million.[8]

5. In the spring, the Committee relied on a "Comparable Transactions" analysis that divided transactions between majority and minority acquisitions to support Parent's excessive proposed price for a 51% interest, yet the Committee admitted that when GP sold assets to the MLP, there should be no "control premium."[9]

6. In the spring, Tudor projected that Elba's revenue would grow, even though the Committee knew that Elba's revenues would, in fact, not grow.[10]

7. In the spring, the Committee hired Tudor to provide facts that the Committee could use to bargain for a lower price, but Tudor did not provide any such facts, and the Committee did not ask for any.[11]

Hindsight may be 20-20, but wholly apart from hindsight, these facts as to the Spring Dropdown, submitted for summary judgment – and now all undisputed –

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the Committee approved the Spring Dropdown at a price far above its valuation because the Committee "wanted to please Parent." Tr. Op. 44. This is a hallmark of bad faith.

[7] SJ Br. 47-48 (A313-14) and nn.120 & 121; Tr. Op. 10. *See* Footnotes Table appended hereto.

[8] SJ Br. 50-52 (A316-18) nn.129 & 130; *compare* Tr. Op. 52-53. *See* Footnotes Table appended hereto.

[9] SJ Br. 9, 49 (A275, A315); Tr. Op. 14, 25, 43-44, 48-50. *See* Footnotes Table appended hereto.

[10] SJ Br. 54-55 (A320-21). *See* Footnotes Table appended hereto.

[11] SJ Br. 52 (A318); *compare* Tr. Op. 53-54. *See* Footnotes Table appended hereto.

were excused by the court *on summary judgment*, saying "reasonable minds could disagree."[12] Where a committee agrees to a price almost 17% above the committee's estimated own value; where a committee, when presented with its financial advisor's errors and manipulations in its analysis, repeatedly "sees nothing," and where the committee knows that its financial advisor provided no facts to help negotiate a better price for the Partnership, there exist – at a minimum – disputed issues for trial as to the committee's good faith.[13]

On summary judgment, plaintiff submitted copious evidence demonstrating that the Committee ignored its obligations under the LPA and that its members did not form a belief that the Spring Dropdown was in the best interests of the Partnership.[14] Plaintiff showed that defendant, in its summary judgment submissions, made conclusory assertions that only showed that the Committee had gone through the motions.[15] Defense counsel's positive spin on the Committee's disloyal acts lacked evidentiary support.[16] That absence of evidence could not, and should not, have justified summary judgment.

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[12] SJ Op. 32.

[13] Plaintiff conceded in its Opening Brief on Cross-Appeal that there were differences between the Spring and Fall Dropdowns, but these differences did not mandate different outcomes between the spring and fall as to liability. In its brief, defendant does not argue otherwise.

[14] *See* Footnotes Table annexed hereto.

[15] *See* SJ Br. 57 (A323).

[16] *Id.*

The difference between the rulings as to the Spring and Fall Dropdowns was that on summary judgment, the Court of Chancery determined the Committee's credibility from written evidence and the Committee's counsel's polished presentations. At trial, the Court of Chancery heard and observed the Committee members, unvarnished. The Committee's credibility as to the Spring Dropdown should have been determined after a trial, rather than summarily. On summary judgment, the Court of Chancery jumped the gun; it should have observed the Committee members at trial and under cross-examination, the "greatest legal engine ever invented for the discovery of truth."[17]

B. The Trial Court Erred in Holding that GP Was Not Obligated to Disclose to the Committee All Material Facts.

On summary judgment, plaintiff presented evidence that GP wrongfully withheld material facts that, for purposes of Special Approval, the Committee needed in order to evaluate the proposed Spring Dropdown. By failing to disclose those material facts, GP breached the Implied Covenant.

Defendants do not contest that the evidence on summary judgment showed that Parent had declined to exercise a right of first refusal ("ROFR") to acquire comparable LNG assets at a 9.1x EBITDA multiple at the same time as Parent

[17] *McGriff v. State*, 781 A.2d 534, 538 (Del. 2001) (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

offered the Elba assets to the Partnership at an 11x EBITDA multiple. In fact, El Paso's representative wrote that, even at the lower price, Gulf LNG was "[n]ot a pretty picture."[18] Plaintiff argued that GP's failure to disclose these material facts during the Special Approval process breached the Implied Covenant. The Court of Chancery held that, if the LPA obligated GP to disclose these material facts, the omission would have required a trial.[19] However, the Court of Chancery held, as a matter of law, that GP had no such duty.[20] This holding also was error.

As we showed in our Opening Brief, this Court has said on many occasions, the LPA substituted, for common law fiduciary duties, contractual fiduciary duties.[21] The LPA provided that the Committee would evaluate conflict transactions to determine if they were in the best interests of the Partnership. To fulfill this role, in a genuine way, the Committee needed to have material information as to the proposed transaction. El Paso MLP's Prospectus and its Form 10-K represented to the public unitholders that GP stood in a "fiduciary" relationship to the Partnership and the unitholders.[22] The circumstances at the time of contracting demonstrate that

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[18] B243 (Dep. Ex. 136); *see also* SJ Br. 23 (A289); Tr. Op. 11.

[19] SJ Op. 41.

[20] SJ Op. 49-50.

[21] Pl. OB 77 n.277.

[22] Pl. OB 76 n.273; El Paso Pipeline Partners, L.P. Prospectus, Nov. 15, 2007 (JX10) at 150-51 (B204-05); El Paso MLP's SEC Form 10-K for year ended December 31, 2012 (JX151) at 18-19 (B391-92).

if the parties had considered it, they would have required GP, during the Special Approval process, to disclose material facts to the Committee.

Defendant's Answering Brief ignores that El Paso MLP represented in its Prospectus and its Form 10-K that GP stood as a fiduciary. Defendant also fails to respond effectively to the fact that where GP wanted the LPA to eliminate the Parent's fiduciary duty to disclose certain information to the Partnership, it did so expressly.[23]

Defendant's attempt to distinguish this Court's decision in *Gerber v. Enterprise Prods. Holdings, LLC*[24] fails. *Gerber* teaches that a general partner breaches the Implied Covenant during the Special Approval process by deliberately concealing material facts. Defendant asserts that the Court of Chancery held only that GP could withhold material facts concerning other transactions, and defendant attempts to distinguish *Gerber* on this point.[25] Nothing in *Gerber* suggests that a controller may withhold material information simply because it concerns a different transaction.[26] The relevant factor is whether the information was *material* to the

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[23] LPA 7.5(c) (expressly eliminating GP's common law duty to disclose all corporate opportunities to the Partnership).

[24] 67 A.3d 400, 420 (Del. 2013).

[25] Def. AB 39, 42, 43 n.119.

[26] 67 A.3d at 420. Further, this Court wrote in *Gerber* that the scenarios it identified, including withholding material facts, "would" be arbitrary and unreasonable and "frustrate the fruits" of the parties' bargain. 67 A.3d at 420. The Court of Chancery erred when it concluded, on summary judgment, that this Court merely identified "potential reasons for concern." SJ Op. 45.

transaction under review. Defendant cannot dispute that what unrelated parties would pay in an arm's-length transaction for comparable assets are routinely considered when valuing a deal. Surely, what Parent *would not pay* for a comparable asset should have been of utmost importance to the Committee when negotiating the price for Parent's proposal.

Defendant incorrectly asserts that plaintiff is arguing for a "free floating" duty unconnected to the LPA language.[27] Plaintiff seeks to enforce a rule that *Gerber* enunciated – that the controller, when seeking Special Approval of a conflicted transaction, must not conceal material, non-public facts. Indeed, the Court of Chancery recognized that it might have misread *Gerber* when it refused to apply its rule in this case.[28]

It is insufficient to argue that the Committee or Tudor could have requested information on Gulf LNG.[29] Parent's decision to decline to exercise its ROFR for Gulf LNG was not public, and, therefore, the Committee could not have known to request that information.

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[27] Def. AB 42.

[28] SJ Op. 45. Further, it is notable that the Trial Opinion did adopt a portion of the language from *Gerber*'s hypothetical, finding that "[t]his was a case in which 'the financial advisor, eager for future business, compromises its professional values and standards to achieve the controller's unfair objective.'" Tr. Op. 48 (citing *Gerber*, 67 A.3d at 420).

[29] Def. AB 44.

The LPA did not create a third-party "arm's-length" relationship between GP and the Committee.[30] The Committee was a committee of GP, whose members were GP directors, appointed by Parent, and who had close ties to GP. The Committee was negotiating on behalf of an entity – El Paso MLP – related to the controller. The Committee members were only *de jure* independent. The facts show that they were conflicted.[31]

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[30] SJ Op. 50; Def. AB 44.

[31] Tr. Op. 5-6 (setting forth Kuehn's and Smith's long-term relationship with Parent). Indeed, at trial, plaintiff proved the Committee was not only conflicted but, in fact, *disloyal*.

CONCLUSION

For the reasons set forth above, the Court should reverse the Court of Chancery's June 12, 2014 Memorandum Opinion and vacate the Final Judgment insofar as it dismissed Plaintiff's claims arising out of the Spring Dropdown and remand the Spring Dropdown claims for trial.

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FOOTNOTES TABLE	
Footnote 4	*Compare* Tr. Op. 6-9, 36-37 *with* SJ Br. 2-3 (A268-69) (Reichstetter Dep. 9:11-14, 70:12, 98:9-10, 128:19-21; Simmons Dep. 12:21-22, 36:15; Kuehn Dep. 9:13-24, 16:2-5; Smith Dep. 7:10-15, 8:7-11, 38:5-13, 39:13-17; Leland Dep. 15:8-11, 16:13-18; B312 (Dep. Ex. 7, TPH – Project Emperor Special Committee Presentation, March 24, 2010) at 331, 333-34; Dep. Ex. 10 (TPH – Special Committee Discussion Materials, November 12, 2010); Dep. Ex. 61 (TPH – Project Eagle Special Committee Presentation, June 4, 2010) at 23-24). *Compare* B331 (Dep. Ex. 7) *with* Dep. Ex. 61 at 22; Dep. Ex. 211 (Email from Sult to Reichstetter, August 7, 2009); Dep. Ex. 213 (TPH Retainer Letter, July 2, 2009); Dep. Ex. 214 (TPH Retainer Letter, May 19, 2010); Yardley Dep. 139:16-140:8; Dep. Ex. 80 (Email from Sult to Yardley, February 4, 2010, with attachment, El Paso Corp Value Uplift) at EP144251.
Footnote 5	*Compare* Tr. Op. 10, 15-17, 43-44 *with* SJ Br. 46-48 (A312-14) (Foshee Dep. 79-81, 83; Dep. Ex. 124 at TPHB0001653 (Simmons Hand-Written Notes, March 10, 2010); B311 (Dep. Ex. 25, Email from Kuehn to Reichstetter, Smith, March 1, 2010); Kuehn Dep. 78:4-6, 79:14-19, 21-22; Dep. Ex. 187 (Email from Reichstetter to Smith, March 5, 2011); B324 at 333 (Dep. Ex. 7); Dep. Ex. 184 (Email from Reichstetter to Guay, March 4, 2010); Dep. Ex. 46 (TPH – El Paso Pipeline Partners EBITDA Multiples Analysis, September 2011) at 6; Dep. Ex. 80 at EP144251; Yardley Dep. 39:2-4, 47:2-6; Dep. Ex. 80 at EP144251; Ashley Dep. 116:18-22, 128:13-16, 134:9-16).
Footnote 7	*See* SJ Br. 48 (A314) (Dep. Ex. 80; Yardley Dep. 39:2-4, 47:2-6; Ashley Dep. 116:18-22, 128:13-16, 134:9-16; Dep. Ex. 84A (tmpexcels.xls. Assumption Tables, including SLNG and Elba A).
Footnote 8	*Compare* Tr. Op. 36, 52 *with* SJ Br. 50-51 (A316-17) (B330, B332, B334 (Dep. Ex. 7); Simmons Dep. 174:13-23; Dep. Ex. 10 at 19; Kuehn Dep. 105:8-13, 106:5-16, 110:20-111:4).

Footnote 9	*Compare* Tr. Op. 14, 25, 43-44, 47 *with* SJ Br. 49 (A315) (B294, B297 (Dep. Ex. 3, TPH – Project Emperor Special Committee Presentation, February 24, 2010); B333 (Dep. Ex. 7); Simmons Dep. 95:16-17; Dep. Ex. 8 (TPH – Special Committee Discussion Materials, October 21, 2010) at 39; Dep. Ex. 9 (TPH – Special Committee Discussion Materials, October 26, 2010) at 37; Reichstetter Dep. 128:2-15).
Footnote 10	*See* SJ Br. 54-55 (A320-21) (Dep. Ex. 209 (EPB's Prospectus) at 83, 97; B324 (Dep. Ex. 7); Kuehn Dep. 30:2-4; Simmons Dep. 53:17-54:1).
Footnote 11	*Compare* Tr. Op. 53-54 *with* SJ Br. 52-54 (A318-20) (Reichstetter Dep. 100:10-14, 147:6-13; Simmons Dep. 23:1-10, 114:23-115:7, 117:6-8, 120:16-121:4; Kuehn Dep. 44:17-24, 70:2-8; Dep. Ex. 34 (Email from Kuehn to Reichstetter and Smith, October 22, 2010); Dep. Ex. 186 (Reichstetter Email to the Conflicts Committee and TPH, October 12, 2010); Dep. Ex. 10; Dep. Ex. 174 (EPB Press Release, November 15, 2010); Smith Dep. 55:5-19, 83:22-23).