IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

Defendant Below,
Appellant,

v.

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

Plaintiff Below,
Appellee.

No. 103, 2016

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

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal arises from highly unusual circumstances: a trial and a post-trial ruling on the merits *before* a determination on the threshold legal issue of Plaintiff's standing, and a post-trial judgment awarding over $100 million for a direct claim that Plaintiff never pled, tried, or proved. The judgment also requires payment of the damages award directly to former public unitholders without any class treatment having been sought, much less certified. How all of this came to pass is explained below.

The underlying action challenges the acquisition of assets by a master limited partnership, El Paso Pipeline Partners, L.P. (the "Partnership"), from its sponsor, El Paso Corporation ("Parent"). At the time of the transactions, Parent controlled the publicly traded Partnership through its ownership of the entity's general partner, Appellant, El Paso Pipeline GP Company, L.L.C. (the "GP").

The Partnership acquired the assets in two separate "drop-down" transactions. The first occurred in March 2010 and entailed the Partnership's purchase of Parent's 51% interest in certain assets involved in the transportation and storage of liquefied natural gas (the "Spring Drop-Down"). The second occurred in November 2010 and involved the purchase of the remaining 49% of those assets, plus a 15% interest in a different company (the "Fall Drop-Down"). Both transactions were approved by the GP through a contractual "Special

Approval" process set forth in the governing Limited Partnership Agreement (the "LPA").

On December 22, 2011, Plaintiff filed a complaint challenging the Spring Drop-Down.[1] During the briefing on defendants' motion to dismiss, Plaintiff filed a second complaint challenging the Fall Drop-Down.[2] Plaintiff styled both complaints as derivative. Each complaint alleged that the Partnership (named as a nominal defendant) had overpaid for the assets acquired in the Spring and Fall Drop-Downs and was injured as a result.[3] Each sought an order directing defendants to account, and make restitution, to the Partnership for the resulting injury to the entity.[4] Plaintiff made no class action allegations and did not seek any individual recovery for the limited partners.

In May 2012, Kinder Morgan, Inc. ("KMI"), the largest energy infrastructure company in North America, acquired Parent and assumed its interest in the Partnership and indirect control over the GP. That transaction was unrelated to the challenged drop-down transactions and had no immediate effect on the litigation.

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[1] A77-114, Verified Derivative Complaint, dated Dec. 22, 2011 (the "Spring Complaint").

[2] A115-48, Verified Derivative Complaint, dated Mar. 5, 2012 (the "Fall Complaint").

[3] A79-80, Spring Complaint ¶¶ 5, 7; A118-19, Fall Complaint ¶¶ 6, 8.

[4] *See, e.g.*, A113-14, Spring Complaint at 38-39; A147, Fall Complaint at 32. The cases were subsequently consolidated; no consolidated amended complaint was ever filed. A59, A1-76.

On June 12, 2014, the Court of Chancery granted defendants' motion for summary judgment on all claims relating to the Spring Drop-Down, holding that Plaintiff had not raised any triable issue "about whether the members of the Conflicts Committee subjectively believed in good faith" that the acquisition was in the "best interests of the Partnership."[5] But the court issued a separate order that same day holding that a trial would be necessary as to the same Committee members' "state of mind" when they approved the Fall Drop-Down.[6] Rather than press for trial on the remaining claim, Plaintiff sought an interlocutory appeal.[7]

On August 10, 2014, KMI announced a proposed reorganization that would consolidate, by year's end, under a single corporate umbrella, the Partnership and two other publicly traded entities in a related series of transactions valued in excess of $70 billion. Under the terms of the proposed reorganization, the Partnership would be merged into a wholly owned subsidiary of KMI, and public unitholders would receive cash and/or shares of KMI common stock (the "Merger"). This announcement should have foreshadowed the end of the case. Indeed, under this Court's decision in *Lewis v. Anderson*, consummation of the announced Merger

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[5] *In re El Paso Pipeline Partners, L.P. Deriv. Litig*., 2014 WL 2768782, at *16 (Del. Ch. June 12, 2014).

[6] *In re El Paso Pipeline Partners, L.P. Deriv. Litig*., C.A. No. 7141-VCL, Order at 2 (Del. Ch. June 12, 2014) (Exhibit A hereto).

[7] Specifically, Plaintiff sought a partial final judgment under Court of Chancery Rule 54(b) for interlocutory appeal purposes as to his other claims, contending that without this relief he could be forced "to mount two separate trials against the General Partner." A465-66, Pl.'s Mot. for Entry of Final J. Pursuant to Ct. of Chancery Rule 54(b), at 6-7.

would extinguish Plaintiff's standing to prosecute both of his drop-down claims on behalf of the Partnership, derivative claims that he had pursued as such since the case's inception.[8]

The announcement of the Merger prompted Plaintiff to change his litigation strategy. Abandoning his plan to appeal from the summary judgment ruling, Plaintiff on August 22, 2014 moved for a "prompt" trial on his Fall Drop-Down claim, hoping to try his case before becoming an "empty plaintiff" without standing. Plaintiff also suggested, for the first time, that he could continue his claims "directly and on a quasi-class-basis post-Merger" because the LPA imposed contractual limitations on the GP's conduct.[9] Apart from making this suggestion, Plaintiff did nothing to pursue this newly-minted direct-claim theory. Specifically, Plaintiff did not amend his complaint to recast his claims, did not move for class certification, and did not seek additional discovery or permission to supplement his expert reports regarding any direct harm to the unitholders from the Fall Drop-Down.

Defendants opposed Plaintiff's motion for prompt trial, arguing that a trial would be futile because the claim was derivative and therefore would be

[8] 477 A.2d 1040, 1049 (Del. 1984).

[9] *See* A473, Pl.'s Mot. for a Prompt Trial Date, at 7 (citing expert report on harm to the Partnership).

extinguished by the Merger long before it could be finally resolved.[10] Defendants argued that a determination regarding whether Plaintiff maintained standing post-Merger should be made on full briefing prior to any trial on the merits.[11]

The court below disagreed. At a September 9, 2014 hearing, the Vice Chancellor declined to rule on the open standing issues, stating that he wished to avoid a "whole big briefing mess" on the "complex issues of Delaware law" the standing issues raised.[12] Accordingly, rather than follow the normal route—adjudicating the threshold question of whether Plaintiff had standing to prosecute his claim before trial—the court decided to address the merits first. The Vice Chancellor later explained that in making this ruling, he had "expected" defendants to prevail at trial and thereby allow the court to avoid the standing issue.[13] The court set trial for just two months later, shortly before the anticipated closing date of the Merger.

Trial was held November 12, 13, and 17, 2014. Plaintiff presented his case as exclusively derivative, just as he had pled and argued from the case's inception. All of Plaintiff's evidence at trial tracked the quintessential derivative claim that

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[10] A487, The El Paso Defs.' Opp'n to Pl.'s Mot. for a Prompt Trial Date, at 10.

[11] A480, *id.* at 3 ("Court should set a trial date, if at all, cognizant of the reality that the claims may be extinguished by year-end"); *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, slip op. at 11 (Del. Ch. Dec. 2, 2015) ("Standing Op.") (Exhibit C hereto).

[12] A520-23, Hr'g Tr. on Pl.'s Mot. for Prompt Trial, at 15-18.

[13] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, mem. op. at 2-3 (Del. Ch. Apr. 20, 2015) ("Liability Op.") (Exhibit B hereto).

the Partnership had been injured because it paid too much for the assets in the Fall Drop-Down; he offered no proof of any direct harm to the unaffiliated unitholders. And Plaintiff did not address, let alone present evidence as to: (i) the transaction's impact on unitholders; or (ii) whether unitholders would have been "better" or "worse" off if the transaction had not occurred.

The GP defended the claim Plaintiff presented at trial, introducing evidence that the Committee believed in good faith that purchasing the assets at the negotiated price would be accretive to the Partnership, thereby increasing distributable cash flow to the unitholders. While the parties vigorously disputed the "fair value" of the Fall Drop-Down assets, and whether the Committee and its advisors had overlooked facts that it could have employed to negotiate a lower price, there was no dispute that the Committee: (i) was composed of independent and experienced individuals;[14] (ii) met on multiple occasions to discuss the transaction; (iii) hired an investment banker and a law firm to provide expert advice; (iv) negotiated with the GP for a price reduction; and (v) then considered an array of factors, including price, the deal's accretive impact, and the MLP structure. As described below, the MLP structure incentivized Parent (who owned directly or indirectly a majority of the publicly traded units and whose stock traded

[14] The Committee's Chair had invested $2 million of his own funds to purchase Partnership units, fully aligning his financial interests with those of the other, unaffiliated limited partners. A592, Trial Tr. at 162:5-163:3.

in part on the Partnership's value), not to harm the Partnership by "dropping down" poorly performing assets.

The Merger closed on November 26, 2014, just nine days after the trial ended. The closing extinguished the publicly traded Partnership units and, along with them, Plaintiff's standing to assert the claim tried, which passed by operation of law to the acquiring entity in the Merger. The GP thus promptly moved to dismiss the case on December 2, 2014. That motion was not briefed at the time, however, because of the trial court's prior decision to address the merits first.[15]

On April 20, 2015, the Court of Chancery issued its post-trial "Liability Opinion" on the merits (Exhibit B hereto). The Vice Chancellor found that the Committee approved the Fall Drop-Down primarily because it had the accretive effect of increasing quarterly distributions to unaffiliated unitholders, which is, of course, the core goal of MLP investors and the *raison d'etre* of MLPs like the Partnership. But the court took issue with the independent directors' focus on accretion. Specifically, the court found that the Committee members (each of whom testified) could not have believed in subjective good faith that the transaction was in the Partnership's best interests because they received shoddy work product from their financial advisor and overlooked facts that should have led them to seek a lower price for the assets. Applying an entire-fairness-like

[15] A1117-18, Letter of Brian C. Ralston to Vice Chancellor Laster, dated December 2, 2014.

analysis rather than the subjective "good faith" standard required by the LPA, the court held that the Partnership had overpaid Parent by $171 million (in the context of a $1.13 billion transaction), which amount constituted the damages the GP owed to the Partnership for breaching the LPA.[16]

In the shadow of this merits determination, the parties were finally provided an opportunity to brief the threshold issue of standing raised by the GP before trial. On December 2, 2015, in a 110-page "Standing Opinion" (Exhibit C hereto), the court held that Plaintiff's claims were not derivative—as they had been pled, prosecuted, and tried—but were instead direct or "dual" claims that Plaintiff still had standing to assert notwithstanding that he no longer owned Partnership units. The court further held that its equitable power enabled it to award damages directly to unitholders even if the claim was derivative. The court then ordered that the damages be distributed pro rata—that is, directly—to the unaffiliated unitholders who held units at the time of the Merger, not at the time of the alleged wrong to the Partnership (i.e., the date of the Fall Drop-Down).

As explained below, the Standing Opinion failed to correctly apply this Court's well-settled standard in *Tooley* for determining whether a representative

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[16] The court dismissed the claims against the other defendants named in the Fall Complaint. *See* Liability Op. at 32-33 ("[P]laintiff sought to impose secondary liability on the other defendants under theories of aiding and abetting a breach of contract and tortious interference," but he "did not devote meaningful effort to presenting the claims for secondary liability, which were waived.").

action is direct or derivative, and it awarded a nine-figure, pro rata recovery directly to former unitholders even though no class was certified and Plaintiff failed to assert, let alone prove, damages to individual unitholders. Ultimately, the decision penalizes KMI, a third-party buyer of the Partnership, who is now responsible for paying unitholders who chose to accept the Merger consideration with full knowledge that the consideration had not been adjusted to reflect any value for the derivative claims.

Whether a claim is derivative or direct dictates the proof presented at a trial. And while a court of equity is not bound at the pleading stage by a party's characterization of a claim, a different dynamic must control at trial. Where, as here, a plaintiff bears the burden of proof at trial, a defendant need only defend the claim asserted and respond to the proof presented. Having chosen to try a purely derivative claim of overpayment, Plaintiff was not entitled to a remedy for a direct claim he neither asserted nor proved.

The Judgment should be reversed both for lack of standing and on the merits.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred as a matter of law in holding that Plaintiff had standing to maintain his breach of contract action following the Merger.

a. The trial court incorrectly held that this Court's decision in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*[17] does not apply because Plaintiff's claim arises from the alleged breach of a limited partnership agreement. *Tooley* applies in the limited partnership context as it does in the corporate context. Plaintiff's claim, which he pursued derivatively *ab initio*, that the Partnership overpaid for the assets acquired in the Fall Drop-Down, thereby causing injury to the Partnership, is classically derivative under *Tooley*.

b. The trial court incorrectly held that the claim is direct or "dual" (i.e. both direct and derivative) because the Fall Drop-Down "reallocated" assets from the Partnership to Parent. The court's recasting of Plaintiff's overpayment claim does not bring it within the narrow paradigm for "dual" claims established in *Gentile* and its progeny where a controlling stockholder increases both its equity *and* voting power at the minority's expense.

c. The trial court incorrectly held that Plaintiff did not lose standing following the Merger. As a result of the continuous ownership requirement, the Merger extinguished Plaintiff's standing to continue this litigation.

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[17] 845 A.2d 1031 (Del. 2004).

2. The trial court erred by awarding a direct recovery because: (a) even if the claim could have been characterized as direct or dual, Plaintiff did not assert or prove any direct injury to the individual limited partners, therefore failing to establish an essential element of his claim; and (b) if the claim is derivative, the trial court's equitable powers did not permit it to reach the merits or award a remedy after the claim passed by operation of law to the acquirer in the Merger.

3. The court erred as matter of law in holding that the GP breached the LPA. First, the court erroneously failed to grant judgment in the GP's favor under Section 7.10(b), which provides a conclusive presumption of good faith where, as here, the directors relied upon the opinion of a financial advisor. Second, it misapplied the subjective good faith standard governing Special Approval by determining that the transaction needed to satisfy a judicially imposed, objective "fair price" test.

4. Even if Plaintiff had standing and the trial court correctly found a breach of the LPA, its determination of damages was erroneous in two respects: (a) using the unaffiliated unitholders' equity interest as of the date of the Merger and not as of the date of the alleged harm; and (b) failing to account for the GP's entitlement to incentive distribution payments in the event any distribution to unitholders was to be made. This error resulted in a windfall to those unitholders.

STATEMENT OF FACTS

A. The Parties

Plaintiff/Appellee Peter R. Brinckerhoff, Trustee of The Peter R. Brinckerhoff Revocable Trust U/A DTD 10/17/97, was a unitholder of the Partnership, a Delaware Master Limited Partnership ("MLP") formed in 2007.[18] Before the Merger, the Partnership's common units traded on the New York Stock Exchange under the ticker symbol "EPB."[19]

Defendant/Appellant El Paso Pipeline GP Company, L.L.C. (the "GP"), a wholly-owned subsidiary of Parent, served as the Partnership's general partner.[20] Parent owned a 2% general partnership interest in the Partnership.[21] The GP was managed by a seven-member board of directors, three of whom—Ronald L. Kuehn, William A. Smith, and Arthur C. Reichstetter—comprised the Conflicts Committee that evaluated the transactions at issue (the "Committee") in accordance with the LPA provision governing conflict of interest transactions.[22]

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[18] A530-31, Pre-Trial Stipulation and Order, at 4-5, *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL (Del. Ch. Nov. 10, 2014) ("Pre-Trial Stip.").

[19] Liability Op. at 4.

[20] A530-31, Pre-Trial Stip. at 4-5.

[21] A531, *id.* at 5; Liability Op. at 4.

[22] A531, 533, 534, Pre-Trial Stip. at 5, 7, 8. The LPA disclaims all fiduciary duties and establishes procedures and standards governing potential conflict of interest transactions. Approval of such a transaction does not breach the LPA if one of four permissive safe harbors is invoked. Here, the GP elected to proceed by the Special Approval safe harbor, in which consideration of the transaction is delegated to a "Conflicts Committee" of independent directors, whose determination is accorded a presumption of good faith. A plaintiff can

Parent, through the GP and its affiliates, owned approximately 52% of the outstanding limited partnership units when the Fall Drop-Down occurred.[23] Non-party KMI acquired Parent in May 2012 and there is no suggestion that KMI played any role in either drop-down transaction at issue in this case.[24]

B. Nature and Purpose of a Master Limited Partnership

MLPs, like the Partnership, are typically publicly traded limited partnerships that are taxed as pass-through entities for federal income tax purposes under the Internal Revenue Code.[25] MLPs are frequently created, or "sponsored," by corporations to maximize the market valuation of qualified assets through a more tax-efficient environment for individual investors.[26] As here, the sponsoring corporation owns the MLP's general partner while offering limited partnership units to public investors.[27]

For investors, the primary motivation to purchase MLP units is a steady, and hopefully increasing, stream of cash flow from quarterly distributions, a feature

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overcome this presumption only by showing that the directors did not subjectively believe their decision to be in the Partnership's best interests. A922-23, LPA § 7.9(a); A923, LPA § 7.9(b); A855, LPA §1.1.

[23] Liability Op. at 4.

[24] *Id.*

[25] John Goodgame, *Master Limited Partnership Governance*, 60 BUS. LAW. 471, 471-72 (2005); Liability Op. at 6-7.

[26] Goodgame, 60 BUS. LAW. at 472-74; Philip H. Peacock, *Master Limited Partnerships: At the Crossroads*, 4 TEX. J. OIL GAS & ENERGY L. 397, 400-10 (2009).

[27] Goodgame, 60 BUS. LAW. at 471, 473-74.

that makes them particularly attractive in low-interest rate environments.[28] As Plaintiff testified here, he focused on "total return" with "a significant portion" of that return to be "realized in current cash distributions and/or dividends."[29] The Partnership met his investment goal by increasing cash distributions every quarter from when he first purchased units through late 2013.[30]

A sponsored MLP often grows, not through open-market purchases from third parties, but rather through "drop downs" from the parent corporation of MLP-qualifying income-producing assets.[31] These sales are designed to be "accretive," which means that, after the closing, they will "increase Distributable Cash Flow per Unit either immediately or over time after taking into account the cost of the acquisition."[32] To incentivize the drop down of valuable assets to the MLP, and thus grow distributions, MLP operating agreements typically provide the general partner with incentive distribution rights ("IDRs"), which entitle it to an increasing share of the distributions as the MLP increases its cash distributions to

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[28] Peacock, 4 TEX. J. OIL GAS & ENERGY L. at 402-03 ("MLPs are designed not just to pay a regular cash distribution every quarter, but to pay a distribution that *increases* over time").

[29] A554, Trial Tr. at 10:23-11:9; *see also* A558-59, Trial Tr. at 27:17-28:2.

[30] A559, Trial Tr. at 29:2-17.

[31] *See* Peacock, 4 TEX. J. OIL GAS & ENERGY L. at 418.

[32] Latham & Watkins LLP, *The Book of Jargon: MLPs (Master Limited Partnerships)*, https://www.lw.com/bookofjargon-apps/BOJ%E2%80%93MLPs (last visited Apr. 18, 2016); *see also* Goodgame, 60 BUS. LAW. at 502.

unitholders.[33] Both of the transactions at issue here were part of the Partnership's continuing effort to grow its assets and thereby increase cash distributions to the limited partners.

C. The Drop-Down Transactions[34]

In February 2010, Parent offered to sell the Partnership a 49% stake (later increased to 51%) in its SLNG and Elba X assets.[35] The GP Board invoked the LPA's Special Approval safe harbor to consider the transaction, appointing a Committee comprised of independent directors Kuehn, Smith, and Reichstetter.[36] The Vice Chancellor held that each met the independence standard for service on the Committee.[37] The Committee retained independent advisors as well, hiring Tudor, Pickering, Holt & Co. ("Tudor") as financial advisor, and Akin Gump Strauss Hauer & Feld LLP ("Akin") as its legal counsel.[38] After considering a fairness opinion from Tudor, the Committee unanimously approved the purchase,

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[33] Peacock, 4 TEX. J. OIL GAS & ENERGY L. at 403; *see also* Goodgame, 60 BUS. LAW. at 476-79; Latham & Watkins, *supra*.

[34] We recount briefly the undisputed transactional facts concerning the two drop-downs challenged by Plaintiff. We address below in Part III.C.2, *infra*, the trial court's liability ruling as to the Fall Drop-Down in the context of the controlling "subjective good faith" legal standard.

[35] A533, Pre-Trial Stip. at 7.

[36] *Id.*

[37] Liability Op. at 5.

[38] A533, Pre-Trial Stip. at 7.

believing that acquiring the assets would be accretive (increase cash distributions).[39]

On October 8, 2010, Parent offered to sell the Partnership the remaining 49% interest in each of SLNG and Elba Express, plus an interest in Southern Natural Gas.[40] The Committee, comprised of the same three independent directors, again engaged Tudor and Akin to advise it.[41] As with the Spring Drop-Down, the Committee considered the new proposal over the course of several meetings and negotiated with the GP as to price.[42]

Tudor opined that the Fall Drop-Down was fair from a financial point of view to the unaffiliated unitholders, and provided a written fairness opinion.[43] After considering Tudor's opinion, among other things, the Committee unanimously approved the Fall Drop-Down, believing it would be accretive.[44]

D. KMI's Acquisition of the Partnership

On August 10, 2014, KMI announced its intention to acquire all of the outstanding equity securities in the Partnership it did not own (as well as those of two other publicly traded entities also within the KMI umbrella) for cash and/or

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[39] A600, Trial Tr. at 193:4-194:6 (Reichstetter).

[40] A534, Pre-Trial Stip. at 8.

[41] *Id.*

[42] *See generally* Liability Op. at 22-31.

[43] A967-70, Tudor Fairness Opinion, dated Nov. 12, 2010 (JX 129); Liability Op. at 29.

[44] Liability Op. at 29, 39.

KMI common shares.[45] As defendants advised the court, the Merger was expected to close by year-end subject to a majority vote of unitholders.[46]

The Partnership's unitholders—including a majority of the unitholders unaffiliated with the GP—voted in favor of the Merger, and it closed on November 26, 2014 with unitholders receiving a premium for their limited partnership units.[47] KMI acquired all of the Partnership's outstanding common units that it did not already own, including Plaintiff's, and the Partnership and the GP merged with a wholly owned subsidiary of KMI.[48] There was no change in control of the Partnership. Plaintiff's status as a unitholder was terminated.

E. Trial and the Post-Trial Decisions

As set forth in the Nature of Proceedings, *supra*, Plaintiff's prosecution of his case shifted into high gear following announcement of the proposed Merger and Plaintiff's realization that he would lose standing when the Merger closed. Accordingly, on August 22, 2014, Plaintiff filed a "Motion for Prompt Trial Date,"

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[45] Standing Op. at 10.

[46] A479, El Paso Defs.' Opp'n to Pl.'s Mot. for a Prompt Trial Date, at 2.

[47] Standing Op. at 12-13; El Paso Pipeline Partners, L.P. (Form 425), at 1-2 (Nov. 20, 2014), *available at* https://www.sec.gov/Archives/edgar/data/1410838/000110465914082379/a14-24937_3425.htm; El Paso Pipeline Partners, L.P. (Schedule 14A), at 20 (Oct. 22, 2014) ("EPB Proxy"), *available at* https://www.sec.gov/Archives/edgar/data/1410838/000104746914008477/a2221842zdefm14a.htm. The public filings cited herein were presented to the trial court below as citations during briefing. *See, e.g.*, A1240, A1281. The Court may also take judicial notice of the Partnership's SEC filings under Delaware Rule of Evidence 201. *See generally In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 n.9 (Del. 1995) ("[C]ourts may consult [SEC filings] to ascertain facts appropriate for judicial notice under D.R.E. 201.").

[48] Standing Op. at 13-14.

with "prompt" being a euphemism for "before the Merger closed."[49] Defendants objected, arguing that Plaintiff's standing would be extinguished by the Merger long before the case was fully and finally resolved.[50] Deferring its decision on standing,[51] the trial court scheduled trial for November 12, 13, and 17, 2014.

The sole issue at trial was whether Plaintiff had proved that the Committee failed to make a subjective determination in good faith that the Fall Drop-Down was in the Partnership's best interest. Both sides presented fact and expert evidence as to whether the Committee acted in subjective good faith under the LPA and, if not, how the Partnership was harmed (if at all). Each of the three Committee members testified. Importantly, Plaintiff did not proffer any evidence of direct harm to unitholders, but rather presented expert testimony that the Partnership had overpaid by $171 million for the assets purchased in the Fall Drop-Down for $1.13 billion.[52]

On April 20, 2015, the trial court issued its Liability Opinion, holding that the independent Committee members had "failed to form a subjective belief that

[49] A467, Pl.'s Mot. for Prompt Trial Date, at 1.

[50] A487, El Paso Defs.' Opp'n to Pl.'s Mot. for a Prompt Trial Date, at 10.

[51] Standing Op. at 11; A523-24, Hr'g on Mot. for Prompt Trial Tr., at 18-19.

[52] Standing Op. at 13; Liability Op. at 58-60.

the Fall Drop-Down was in the best interests of" the Partnership.[53] The court held that the Partnership suffered damages by overpaying for those assets.[54]

More than seven months later, on December 2, 2015, the trial court issued its 110-page Standing Opinion in response to Defendants' Motion to Dismiss. Although Plaintiff had pled, prosecuted, and tried his claim as exclusively derivative throughout the nearly four years of litigation, the court nevertheless held that the claim should be treated as either a direct or dual-natured one.[55] The trial court awarded pro rata damages to the unaffiliated unitholders of $100,206,000, which represented 58.6% of the total adjudicated overpayment (their collective ownership interest at the time of the Merger rather than their ownership interest at the time of the Fall Drop-Down).[56]

A Final Order and Judgment was entered on February 4, 2016, and this appeal followed.

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[53] Liability Op. at 3.

[54] *Id.* at 59-60.

[55] Standing Op. at 2-3.

[56] *Id*. at 23, 104; *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, order at 3 (Del. Ch. Feb. 4, 2016) (Final Order & Judgment) (Exhibit D hereto).

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN CONCLUDING THAT PLAINTIFF MAINTAINED STANDING FOLLOWING THE MERGER.

A. Question Presented

Did the Court of Chancery err by holding that the Merger did not extinguish Plaintiff's standing where his claim was classically derivative under *Tooley*?[57]

B. Scope of Review

"This Court reviews the trial court's determination of questions of law *de novo*."[58] Plaintiff bears the burden of establishing that he has standing.[59]

C. Merits of the Argument

It is a fundamental principle of law that if a plaintiff lacks standing its suit must be dismissed.[60] Standing is a "threshold question" that "refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance."[61] "The issue of standing is concerned 'only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter in

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[57] This question was presented below at A478-93, A511-18, A1229-60, A1326-48, and A1357-79.

[58] *Activision Blizzard, Inc. v. Hayes*, 106 A.3d 1029, 1033 (Del. 2013).

[59] *See Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003) ("The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing.").

[60] *Ala. By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 264 (Del. 1995) ("[A] party must have standing to sue in order to invoke the jurisdiction of a Delaware court.").

[61] *Dover Historical Soc'y*, 838 A.2d at 1110 (standing determination "ensure[s] that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers.").

controversy.'"[62] Although a plaintiff may have standing when the suit is initiated, it can lose standing at any time, based on a change in fact or law.[63] And once standing is lost, the court lacks the power to adjudicate the matter.[64] Indeed, where a "plaintiff does not have standing" a court "cannot consider the merits of the argument."[65] A litigant has no right to be heard on—and Delaware courts do not address—the merits of a claim, let alone award a remedy, if the plaintiff has not proved that it has the legal capacity to assert that claim.[66]

If a court decides the merits of a suit before deciding whether the plaintiff has a right to bring that suit, the court (consciously or not) may be swayed to find standing in order to prevent a wrong from going unremedied. That is exactly what happened here. Having found an overpayment, the trial court determined that in

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[62] *Id.* (quoting *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)).

[63] *Gen. Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 824 (Del. 1997) ("A change in the parties' standing may result from a myriad of subsequent legal or factual causes that occur while the litigation is in progress.").

[64] *Id.* at 823-24 ("According to the mootness doctrine, although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist" because a "party must have continued standing throughout the pendency of the action to avoid an invocation of the mootness doctrine.") (emphasis omitted); *Mitchell v. Bd. of Adjustment of Sussex Cty.*, 706 A.2d 1027, 1029 (Del. 1998) ("Under the doctrine of mootness, an action must be dismissed when it fails to present a controversy which is capable of judicial resolution, or if a party has been divested of standing.").

[65] *Office of the Comm'r, Del. Alcoholic Beverage Control v. Appeals Comm'n, Del. Alcoholic Beverage Control*, 116 A.3d 1221, 1226 (Del. 2015); *see also Gerber v. EPE Holdings, LLC*, 2013 WL 209658, at *12 (Del. Ch. Jan. 18, 2013) ("[s]tanding is properly a threshold question that the Court may not avoid. If there is no standing, there is no justiciable substantive controversy").

[66] *Ala. By-Products*, 657 A.2d at 264 ("The standing doctrine enables Delaware courts, as a matter of self-restraint, to 'avoid the rendering of advisory opinions at the behest of parties who are mere intermeddlers.'") (citations omitted).

order to hold the GP "accountable" for the Judgment (and thereby prevent a "windfall" to the GP), it was appropriate to avoid the continuous ownership requirement that mandated dismissal of Plaintiff's claims.[67] This was error.

Under the continuous ownership requirement, "[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."[68] This "settled" rule "has been consistently followed since 1984."[69] Created in the corporate context, this rule applies with equal force to limited partnerships and LLCs,[70] and, as here, often renders the decision of whether a claim is direct or derivative case-dispositive. Here, any derivative claims were, by definition, owned by the Partnership while they were being litigated by Plaintiff, and they passed by operation of law to KMI in the

[67] Standing Op. at 2 ("If the General Partner is correct about how the law operates, then the limited partners never will receive any benefit from the Liability Award, and the General Partner will evade accountability for breaching the LP Agreement."); *id.* at 75-80 (citing "accountability" as a consideration to avoid applying the continuous ownership rule); *id.* at 2 ("[g]ranting the motion to dismiss would generate a windfall for the General Partner").

[68] *Lewis v. Anderson*, 477 A.2d at 1049.

[69] *Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 894-95, 897 (Del. 2013) (discussing, "ratify[ing] and "reaffirm[ing]" the continuous ownership rule recognized in *Lewis v. Anderson*).

[70] *See, e.g.*, *Gerber v. Enter. Prods. Holdings, LLC*, 2012 WL 34442, at *8 (Del. Ch. Jan. 6, 2012) ("*Gerber I*") (applying the continuous ownership requirement in the limited partnership context), *aff'd in part, rev'd in part on other grounds*, *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400 (Del. 2013) ("*Gerber II*"); *Zimmerman v. Crothall*, 2013 WL 5630992, at *5-6 (Del. Ch. Oct. 14, 2013) (applying the continuous ownership requirement in the LLC context), *rev'd on other grounds*, 94 A.3d 733 (Del. 2014).

Merger.[71] Thus, because Plaintiff's claim is exclusively derivative, the Merger extinguished Plaintiff's standing.[72]

1. Plaintiff's Claim Is Derivative Under *Tooley*.

Delaware courts apply the corporate law test to distinguish between direct and derivative suits where the claims involve alternative entities.[73] Under this Court's decision in *Tooley,* the determination of whether a claim is direct or derivative "turn[s] *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"[74] Accordingly, to establish that a claim is direct, a "stockholder must demonstrate that the duty breached was owed to the stockholder *and* that he or she can prevail without showing an injury to the corporation."[75]

Plaintiff here has never tried to do so. Instead, he has consistently asserted, from his complaint to his post-trial brief, that the Partnership was harmed. In his derivative complaint, Plaintiff names the Partnership as the nominal defendant and

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[71] 6 *Del. C.* § 17-211(h) (without exception, acquirer takes all "rights, privileges and powers . . . as well as all other things and causes of action" belonging to the constituent limited partnership in a merger).

[72] *Lewis v. Anderson*, 477 A.2d at 1049.

[73] *See, e.g., Culverhouse v. Paulson & Co.*, --- A.3d ---, 2016 WL 304186, at *3 n.9 (Del. Jan. 26, 2016) (determination of whether a claim is direct or derivative "'is substantially the same' for claims involving limited partnerships").

[74] 845 A.2d at 1033.

[75] *Id.* at 1039 (emphasis added).

alleges that "the terms of the [Fall Drop-Down] were not fair and reasonable to [the Partnership]" because the Partnership paid "hundreds of millions of dollars more than the value of those assets."[76] During trial, Plaintiff's counsel prefaced questions by describing "plaintiff's contention" as being "that the partnership paid too much" for those assets.[77] In his post-trial brief, Plaintiff argued that "Plaintiff's expert, Dr. Nye, showed that [the Partnership] paid approximately 20% over fair value" in the Fall Drop-Down, "resulting in an overpayment to [Parent] of approximately $170 million."[78] Indeed, one of Plaintiff's headings in his opening *post-trial* brief reads: "The Partnership was damaged in the amount of $171 million."[79] In contrast, Plaintiff offered no allegations or proof of any direct impact on the unitholders from the Fall Drop-Down.

When considering "who was injured" under *Tooley,* the trial court thus correctly described Plaintiff's "core theory" as his assertion that "'the Partnership was injured' when the defendants caused El Paso MLP to pay too much for the

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[76] *See, e.g.*, A144, Fall Complaint ¶ 100.

[77] A691, Trial Tr. at 443:6-16.

[78] A1125, Pl.'s Post-Trial Opening Br., at 1; *see also* A608, Trial Tr. at 227:13-15 (plaintiff's expert asked only to express opinion on the "fair market value of [the assets] at the time [of the transaction]"); A974, Report of Zachary Nye, dated August 21, 2013, at 2 (JX 158) ("Specifically, I have been asked to determine if the purchase prices paid" by the Partnership were "'fair and reasonable to the Partnership' . . . and, if not, to determine the amount of damages incurred by [the Partnership] as a result of the two transactions.").

[79] A1150, Pl.'s Post-Trial Opening Br., at 26.

member units that El Paso Parent sold to it."[80] As a remedy, Plaintiff correspondingly sought restitution to the Partnership in an amount equal to the amount of the alleged overpayment, and the court agreed that any damages award for derivative harm "generally goes to the entity" and that an "entity-level remedy is the most obvious."[81] Indeed, the court's post-trial decision expressly "adopt[ed] [Plaintiff's expert's] calculation of the overpayment" in finding that the "General Partner breached the LP Agreement and caused $171 million in damages."[82] Thus, under *Tooley*, the claim was derivative because the harm proved was to the Partnership and any benefit would revert to the Partnership.

Claims of overpayment are traditionally classified as derivative—the reason (expressed in *Tooley* terms) is that the entity is the party that suffers the injury (a reduction in its assets or their value), and the entity is also the party to whom the remedy (a repayment to the entity of the amounts overpaid) would flow.[83] A

[80] Standing Op. at 8.

[81] Standing Op. at 72, 90.

[82] Liability Op. at 60.

[83] *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818-19 (Del. Ch. 2005) (holding claims derivative where stockholders alleged their interests were diluted when company overpaid in a stock-for-stock merger; claim that an entity overpaid for an asset is "clearly" derivative because any harm is suffered by the entity, and "[t]he only harm to the stockholders would have been the natural and foreseeable consequence of the harm to JPMC"), *aff'd*, 906 A.2d 766 (Del. 2006); *Protas v. Cavanagh*, 2012 WL 1580969, at *6 (Del. Ch. May 4, 2012) (stating, in Delaware statutory trust case applying *Tooley*, that "[c]laims of overpayment naturally assert that the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders only derivatively so far as their stock loses value"); *Gerber I*, 2012 WL 34442, at *6 (holding that claims were derivative in nature where "the Defendants, who controlled [a limited partnership], caused [the limited partnership]

diminution of the entity's value is "not normally regarded as direct, because any dilution in value of the corporation's stock is merely the unavoidable result (from an accounting standpoint) of the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction."[84]

Accordingly, Plaintiff correctly characterized and litigated his overpayment claim as derivative throughout this litigation, just as courts applying *Tooley* have correctly characterized overpayment claims, including those involving limited partnerships, as classically derivative.

2. *Tooley* Applies Even Though the Claim Sounds in Contract.

The Court of Chancery held that, as a "threshold" matter, the *Tooley* test did not apply to the claims in this case because they were based on a breach of the LPA.[85] This was error. "[T]hat a claim is based on contract does not necessarily make it a direct claim. Regardless of the source of the claim—fiduciary duty or contract—the *Tooley* analysis still provides the basic analytical approach to the

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to enter into a transaction that was, for [the limited partnership], a bad deal, and that the Defendants benefited from that transaction").

[84] *Feldman v. Cutaia*, 951 A.2d 727, 732 (Del. 2008) (internal quotations omitted); *see also id.* at 733 ("Where all of a corporation's stockholders are harmed and would recover *pro rata* in proportion with their ownership of the corporation's stock solely because they are stockholders, then the claim is derivative in nature. The mere fact that the alleged harm is ultimately suffered by, or the recovery would ultimately inure to the benefit of, the stockholders does not make a claim direct under *Tooley*.").

[85] Standing Op. at 49 ("In my view, the two-part test that the Delaware Supreme Court created in *Tooley* does not apply to contract rights.").

direct-derivative question."[86]

Indeed, in at least five decisions by three different judges, the Court of Chancery has consistently held that claims for breach of a partnership agreement were derivative under *Tooley*.[87] As one decision aptly observed, "unless *Tooley* does not apply to limited partnerships, it is difficult to see how [plaintiff's] claims" that a partnership "paid too much" for certain assets "are anything other than derivative."[88]

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[86] *Gerber v. EPE*, 2013 WL 209658, at *12 (citing *TIFD III-X LLC v. Fruehauf Prod. Co., LLC*, 883 A.2d 854, 859-60 (Del. Ch. 2004)).

[87] *See DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *24-25 (Del. Ch. Sept. 30, 2013) (determining that a claim "best described as a corporate overpayment claim" was derivative under *Tooley*, where plaintiffs alleged that the general partner breached its "'fiduciary and/or contractual' duties"); *Gerber v. EPE*, 2013 WL 209658, at *12 (applying *Tooley* and holding that a claim was derivative where a plaintiff alleged that a controller caused the partnership to pay too much to its controller's affiliates when it purchased an asset even if claim was viewed as a breach of the partnership agreement); *Gerber I*, 2012 WL 34442, at *3, 6 (where the partnership "suffered the alleged harm (it got a bad deal), and any recovery would go to [the partnership] ([because the partnership] needs to be made whole as a result of that bad deal)," the claim for breach of express and implied duties under the partnership would be derivative, but for a merger which, unlike here, has as its principal purpose terminating the derivative claims); *Brinckerhoff v. Enbridge Energy Co.*, 2011 WL 4599654, at *4, 6 (Del. Ch. Sept. 30, 2011) (claims for breach of partnership agreement based on entry into "financially unfair" agreement derivative), *aff'd*, 67 A.3d 369 (Del. 2013); *TIFD*, 883 A.2d at 859-60 (applying *Tooley* and holding that recoupment claims based on supposed breaches of a limited partnership agreement alleging that the misconduct caused the entity "to be less profitable" were derivative because "any harm suffered was to the Partnership as a whole," "any recovery would go to the Partnership," no harm had been caused to the plaintiff directly, and the suing partner's alleged loss of its contractual right "only affected [the suing partner] indirectly, as a consequence of its ownership interest in the Partnership").

[88] *Gerber v. EPE*, 2013 WL 209658, at *12 (citing *TIFD*, 883 A.2d at 859-60).

The court below extensively examined the issue but never addressed the contrary holdings in four of the five cases discussed above.[89] Instead, in support of its theory that contract-based claims are exempt from *Tooley*, the trial court relied heavily on this Court's recent decision in *NAF Holdings, LLC. v. Li & Fung (Trading) Limited*, which did not address the issue presented here: whether a claim advanced by an equity holder relating to the governance of the entity is derivative or direct.[90] *NAF*, in contrast, involved a commercial contract signed by a parent corporation to benefit its subsidiaries and had nothing to do with fiduciary duty claims or the internal affairs of either the parent or its subsidiaries. It did not concern, as this case does, a claim by "a disgruntled [equity holder] who objects that decisions of the [entity's] management were made under a conflict of interest."[91]

The Court in *NAF* declined to apply *Tooley* and held that the parent corporation was entitled to sue to protect the rights it had under its own

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[89] *Gerber I*, 2012 WL 34442, and *TIFD* were never cited in the Standing Opinion. The trial court cited *DiRienzo* only to note that it "treat[ed an] overpayment claim as derivative for purposes of Rule 23.1." Standing Op. at 17 n.2. The opinion cited *Brinckerhoff v. Enbridge* only to support the statement that the "test for distinguishing between direct and derivative claims in the limited partnership context is substantially the same as in the corporate context." *Id.* at 55 & n.39. Finally, *Gerber v. EPE*, 2013 WL 209658, was discussed with respect to its subsequent settlement hearing and for a general proposition as to limited partnerships, but never with respect to its analysis on standing. Standing Op. at 54 n.37, 102.

[90] 118 A.3d 175, 179-80 (Del. 2015).

[91] *Id.* at 179 n.9 (quoting *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 772 F.3d 740, 751 (2d Cir. 2014)).

commercial contract.[92] The Court did not hold, however, that all claims sounding in contract are direct and therefore outside the scope of the *Tooley* analysis,[93] and this Court nowhere suggested that *Tooley* is inapplicable to internal affairs-type claims in the limited partnership context based on the "constitutive entity agreement" of a limited partnership.[94] *NAF* does not support a holding that Plaintiff's internal-affairs-related claim, premised on an injury to the Partnership, is anything other than derivative.

There is no "contract exception" to *Tooley*. Although language in certain pre-*Tooley* cases suggested that stockholders could assert a direct claim "involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation," that language was part of the old "special injury" test.[95] In *Tooley*, this Court disavowed the special injury test and held that whether a claim is direct or derivative turns instead "solely" on the questions of who suffered the alleged harm and who would receive

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[92] *Id.* at 180-81.

[93] *See id.* at 179.

[94] Standing Op. at 29 n.18

[95] *See, e.g.*, *Lipton v. News Int'l Plc*, 514 A.2d 1075, 1077-79 (Del. 1986) (harm to plaintiffs' "contractual voting rights" constituted a "special injury" that allowed plaintiff to bring a direct claim); *Moran v. Household Int'l Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985) (to "set out an individual action," injury must be "separate and distinct from that suffered by" other stockholders or involve a "contractual right" of a shareholder which "exists independently of any right of the corporation"), *aff'd*, 500 A.2d 1346 (Del. 1985).

the benefit of any recovery.[96] The fact that a duty is based in contract as opposed to the common law has no effect on the answers to those questions.[97] Rather, cases that held that claims were direct are "better explain[ed]" by the fact that the alleged harm was to an individual right of the equity holders—such as the right to vote—and not to the entity, than by the source of that right.[98]

3. Breach of Contract Claims Are Direct Only Where the Contractual Duty Is Owed to the Equity Holders Independently of the Entity.

The trial court held that even if it considered the claim under *Tooley*, the claim was direct because the claim was for breach of contract.[99] Not so. *Tooley* itself instructs courts to consider the identity of "the person or entity to whom the relevant duty is owed" in analyzing who was harmed.[100] If a defendant breaches a contractual obligation owed to the entity, the entity owns the claim, and the claim

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[96] 845 A.2d at 1033. The trial court determined that the *Tooley* court intended to overrule only the first part of the special injury test, but not the second that provided an exception for contract claims. Standing Op. at 48. Nothing in *Tooley* supports that reasoning. Moreover, as discussed below, the second part of the special injury test acknowledged that a stockholder must have an *independent* contractual right in order to sue directly.

[97] *Gerber v. EPE*, 2013 WL 209658, at *12.

[98] *See In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 79 (Del. Ch. 1999) ("[T]he *contractual* nature of the voting right – which itself is usually limited to the simple right to cast a vote on certain corporate matters – has had little to do with the actual cases finding an individual injury because the voting power of stockholders was diminished, coerced, or rendered misinformed by fiduciary breaches. Instead, a recognition that a wrongful impairment by fiduciaries of the stockholders' voting power or freedom works a personal injury to the stockholders.") (emphasis in original).

[99] Standing Op. at 2.

[100] *Tooley*, 845 A.2d at 1036 n.9.

is derivative. To state a direct claim, however, the contractual right at issue must be a right of the stockholders "independent[ ]" of any right of the corporation.[101]

For example, in *Gerber v. EPE*, faced with an allegation that an overpayment constituted a breach of a partnership agreement, the Court of Chancery determined that "there [was] no separation" between the limited partners' contractual rights and the partnership's contractual rights.[102] Rather, because "the effect of [the partnership's] payment of too much was immediately and discretely upon [the partnership]," the claim was derivative.[103]

Similarly, here there was no breach of any "separate" and "independent" contract right owed to the limited partners. As an initial matter, the provision the Vice Chancellor found to have been breached, Section 7.9(a), does not impose any enforceable contractual duty: it is merely a "permissive" safe harbor that cannot be breached. As this Court has previously held when interpreting nearly identical language in another limited partnership agreement, the GP "may (if it so chooses) take advantage of Section 7.9(a)'s safe harbor provisions to resolve any conflict of

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[101] *Gerber v. EPE*, 2013 WL 209658, at *12.

[102] *Id.*

[103] *Id.*; *see also Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *6 (Del. Ch. Dec. 19, 2002), *aff'd*, 825 A.2d 239 (Del. 2003) (where plaintiffs alleged they had a contractual right to receive disclosures, the Court of Chancery determined that the claim was derivative, reasoning that "[e]ven if such a legal duty may in some context be properly characterized as a contractual right, such a right cannot be characterized as belonging *solely* to the shareholders because it is also a right of the corporation.").

interest," but if the GP "does not meet that standard . . . that does not automatically put [the GP] in breach of the LPA."[104]

Instead, the GP's actions must only comport with its obligations under Section 7.9(b) to act in a way that it "believe[s]" is "in the best interests of the *Partnership*."[105] This provision protected the Partnership's interests, but did not give the limited partners any separate contractual rights. Indeed, as the Court of Chancery has determined, and this Court has affirmed, the "best interests of the Partnership" standard set forth in Section 7.9(b) did not create any direct duties owed to the limited partners.[106] Even in the context of an "end of life" merger transaction for limited partners, the contractual "best interests of the Partnership" standard requires a general partner to consider only the Partnership's interests.[107]

As in *Gerber v. EPE* (and in contrast to cases in which investors sued to enforce a contractual right that was "separate and distinct from" the rights of the

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[104] *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 364-65 (Del. 2013).

[105] A923, LPA § 7.9(b) (emphasis added) ("Whenever the General Partner makes a determination or takes or declines to take any other action . . . the General Partner . . . shall make such determination or take or decline to take such other action in good faith," meaning that the GP "must believe that the determination or other action is in the best interests of the Partnership"); *see Dieckman v. Regency GP LP*, 2016 WL 1223348, at *6, *12 (Del. Ch. Mar. 29, 2016) (holding in context of similar agreement that Section 7.9(b) imposes a duty on the general partner, while Section 7.9(a) acts as an "optional safe harbor" to meet its contractual duties).

[106] *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 180-81 (Del. Ch. 2014), *aff'd*, --- A.3d ---, 2015 WL 803053 (Del. Feb. 26, 2015) (ORDER).

[107] *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 WL 4975270, at *7 (Del. Ch. Aug. 20, 2015), *aff'd sub nom, Haynes Family Trust v. Kinder Morgan, G.P., Inc.*, --- A.3d ---, 2016 WL 912184 (Del. Mar. 10, 2016).

entity[108]), the "best interests of the Partnership" standard provides no "separation" between the Partnership's contractual rights and any rights that allegedly would flow to the limited partners.[109] Instead, the "overpayment" by the Partnership and the effect of the alleged breach were "immediately and discretely upon [the Partnership]," and the claim is therefore derivative.[110] This Partnership-based standard is in contrast with other rights that are granted to the limited partners *separately* under the LPA—such as the right to vote or the right to remove the GP—which could therefore be asserted directly.[111]

Likewise, that the limited partners are parties to the Partnership Agreement—and duties could therefore potentially flow to either the limited partners or the Partnership, or both—does not mean that every breach of any provision of the Partnership Agreement was necessarily "dual."[112] If a "dual" claim existed anytime duties extended to both the entity and the equity holders, then all claims for breach of fiduciary duty would be "dual," because fiduciary

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[108] *Compare Ruffalo v. Transtech Serv. Partners Inc.*, 2010 WL 3307487, at *9 (Del. Ch. Aug. 23, 2010) (applying *Tooley* and holding that claim for breach of charter provision was direct where charter provision "distinguishes between the rights of the IPO Shareholders and the rights of [the corporation]" regarding interest income from the Trust Fund).

[109] *Gerber v. EPE,* 2013 WL 209658, at *12.

[110] *Id.*

[111] *See* A946, LPA § 13.12 (right to vote); A935, LPA §11.2 (right to remove GP).

[112] *See* Standing Op. at 56-57.

duties extend to both a corporation and its stockholders.[113] Consequently, Plaintiff's status as a limited partner and party to the LPA does not mean that he can litigate directly every claim arising from that contract.

The court below erred, therefore, in concluding that *Tooley* does not apply to breach of contract claims, and that the analysis instead turns on "whether the limited partner has identified a specific provision of the partnership agreement that governed the conduct in question."[114] This framework conflicts with extensive

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[113] *See Agostino v. Hicks*, 845 A.2d 1110, 1122 (Del. Ch. 2004) ("[T]he inquiry should focus on whether an injury is suffered by the shareholder that is not dependent on a prior injury to the corporation. In the context of a complaint asserting breaches of fiduciary duty—duty that under Delaware law runs to the corporation *and* the shareholder—the test may be stated as follows: Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?") (footnotes omitted); *see also Tooley*, 845 A.2d at 1036 (citing *Agostino* with approval).

[114] *See* Standing Op. at 51, 58. The court below referenced two decisions that it previously decided, holding that a breach of the partnership agreement could be asserted directly and/or could be continued post-merger. *Id.* (citing *Brinckerhoff v. Tex. E. Prods. Pipeline Co.*, 986 A.2d 370 (Del. Ch. 2010); *Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097 (Del. Ch. 2014)). Neither of those decisions was appealed, however, as they were decided in the context of a settlement hearing and class certification motion, respectively. Apart from those decisions, the Vice Chancellor cited only three *pre-Tooley* cases to support his ruling: *Cencom*, *Anglo American*, and *Litman*. None of these cases supports the outcome here. *In re Cencom Cable Income Partners*, 2000 WL 130629 (Del. Ch. Jan. 27, 2000), has been limited based on its "unique set of facts," where the entity was in liquidation. *See, e.g.*, *Agostino*, 845 A.2d at 1125 (stating that *Cencom* is "limited to its own unique set of facts"). The claims in *Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P.* were very different from those here: (i) one claim, seeking to recover for the diminution of the fund's value, entailed conduct that conferred only a "fleeting injury to the Fund" and which would have provided a windfall to one class of limited partners at the expense of another; and (ii) "the disclosure claim seems to implicate a contractual right of the limited partners that is *not similarly a right of the Fund itself*." 829 A.2d 143, 152-53 (Del. Ch. 2003) (emphasis added). *Anglo American* indicated, moreover, that claims for breach of the partnership agreement could be derivative. *Id.* at 152 n.30. Finally, *Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992), supports defendant's position here, holding that claims that the general partners injured the limited partners' right to distributions were derivative because plaintiffs did not allege that "the

precedent holding that the contractual right must be "independent" of the entity's right, as well as this Court's guidance in *Tooley* to consider "to whom the relevant duty is owed."[115]

Partnerships are creatures of contract in which the partnership agreement establishes the contours of the general partner's duties.[116] Because these duties are typically defined in the contract, allowing every alleged breach of any section of a partnership agreement to support a direct claim would effectively eradicate derivative actions for the countless alternative entities that take advantage of the General Assembly's invitation to create a contractual governance structure.

Although the trial court determined that alternative entities with restricted fiduciary duties should not be allowed to "have [their] cake and eat it too" by benefitting from "non-contractual doctrines," that holding implicitly rejects a policy decision that the General Assembly has already made.[117] In effect, the Court of Chancery improperly determined that in deciding between whether to form a corporation or an alternative entity, would-be incorporators should have to choose

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general partners breached" a contractual right owed to them, but rather "that the Partnership received a lower amount of income because of the alleged misconduct."

[115] *Tooley*, 845 A.2d at 1036 n.9.

[116] 6 *Del. C.* § 17-1101(c), (d), (f) ("it is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements" and permitting the "elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties)"); *Norton*, 67 A.3d at 360 ("Limited partnership agreements are a type of contract.").

[117] Standing Op. at 55-56.

between (i) a corporation with full fiduciary duties and derivative suits and (ii) an alternative entity with contractual duties and only direct suits.[118]

The decision below, if allowed to stand, announces a new rule which would permit "classically derivative" claims to be litigated directly as long as the entity involved is a limited partnership (as opposed to a corporation) and plaintiff frames the claim as one for breach of contract.[119] Such an expansion of unitholder standing would undermine the sound policies of internal-dispute resolution and protection against excessive litigation that this Court and the General Assembly have advanced by embracing the demand requirement and the contemporaneous and continuous ownership requirements.[120] The policies underlying those rules[121] have equal force in the alternative entity context.

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[118] *Id.* at 51-53, 55-56.

[119] For example, partnership agreements frequently establish a "good faith" standard of conduct for general partners, while the fiduciary duty of loyalty requires directors of Delaware corporations to act in "good faith." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). Yet under the Court of Chancery's reasoning, a suit to challenge bad-faith conduct in the corporate context for harm to the corporation will face the demand requirement, and a heightened pleading burden under Rule 23.1, but a suit in the limited partnership context challenging the exact same conduct will be treated as direct because the claim is cast as a breach of contract.

[120] *Ala. By-Products*, 657 A.2d at 265; *see also* 6 *Del. C.* §§ 17-1001-1003 (setting forth procedural requirements to bring derivative suits on behalf of limited partnerships).

[121] *See Lewis v. Anderson*, 477 A.2d at 1046 ("The purpose of [the continuous ownership] rule is well established: to eliminate abuses associated with a derivative suit."); *Ala. By-Products*, 657 A.2d at 265 ("The continuous ownership requirement similarly recognizes the power of the board to manage the business and affairs of the corporation. Essentially, a shareholder is permitted to intrude upon the authority of the board by means of a derivative suit only because his status as a shareholder provides an interest and incentive to obtain legal redress for the benefit of the corporation.").

The binary "choice" the Court of Chancery envisioned—to create or invest in a corporation with derivative suits or an alternative entity without derivative suits—is not the choice either the limited partners or the GP envisioned when the Partnership was formed. The court's new regime would impose an after-the-fact wealth transfer for established entities who set up a governance structure with the expectation that contractual rights belonging to the entity would give rise to litigation assets belonging to the entity.[122] Allowing the limited partners to recover for the entity's claims would defeat these expectations and provide a windfall to those limited partners who chose to approve the Merger notwithstanding its effect on this suit.[123] As this Court recently reaffirmed, investors buy into these entities with open eyes.[124] There is no room to "save" them from their own decision to invest in a company with a contract-centric legal framework.

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[122] *Cf. Culverhouse*, 2016 WL 304186, at *4 (declining to formulate a rule in the direct-derivative context that would "upset the contractual expectations of the investors and the managers of each fund" and "call into question the vitality of the same type of foundational agreements").

[123] *See* EPB Proxy at 45-46 (disclosing to unitholders prior to the Merger that "the value of the claims to EPB . . . was not sufficiently material such that they would merit adjustments to the EPB merger consideration"). *See also supra* note 47 and accompanying text.

[124] *See Haynes Family Trust v. Kinder Morgan, G.P., Inc.*, --- A.3d ---, 2016 WL 912184, at *1 (Del. Mar. 10, 2016) ("As we and the Court of Chancery have long noted, investors in these agreements must be careful to read those agreements and to understand the limitations on their rights."); *see also Norton*, 67 A.3d at 368 (a limited partner who "willingly invested in a limited partnership that provided fewer protections to limited partners than those provided under corporate fiduciary duty principles" is "bound by his investment decision"); *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 109 (Del. 2013) ("If [a limited partner] seeks the protections the common law duties of loyalty and care provide, he would be well-advised to invest in a Delaware corporation. He is bound by his decision to forgo these protections.").

For all of these reasons, the trial court committed legal error by holding that Plaintiff stated a direct claim in the absence of allegations of breach of any contract right of the limited partners independent of the rights of the Partnership.

4. Plaintiff's Claim Does Not Fall Within the *Gentile* Paradigm for "Dual" Claims.

The Court of Chancery also erred by invoking the *Gentile v. Rossette* exception to hold that the claim here could be both direct and derivative.[125] As discussed above, "[w]hen a plaintiff asserts a claim against fiduciaries alleging overpayment and subsequent common stock dilution," that claim is typically "'regarded as exclusively derivative, irrespective of whether the currency or form of overpayment is cash or the corporation's stock.'"[126] Under *Tooley*, the "equal 'injury' to the shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually."[127]

"There is, however, at least one transactional paradigm—a species of corporate overpayment claim—that Delaware case law recognizes as being both derivative and direct in character."[128] In addition to a derivative claim, "[a] direct claim results . . . when an overpayment of stock for insufficient consideration

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[125] 906 A.2d 91 (Del. 2006); Standing Op. at 62-71.

[126] *Robotti & Co. v. Liddell*, 2010 WL 157474, at *6 (Del. Ch. Jan. 14, 2010) (quoting *Gentile*, 906 A.2d at 99); *see also Green v. LocatePlus Holdings, Corp.*, 2009 WL 1478553, at *2 (Del. Ch. May 15, 2009) ("Classically, Delaware law has viewed as derivative claims by shareholders alleging that they have been wrongly diluted by a corporation's overpayment of shares.").

[127] *Gentile*, 906 A.2d at 99.

[128] *Id.*

(1) goes to, and is caused by, a controlling shareholder and (2) when such overpayment 'causes an increase in the percentage of shares owned by the controlling shareholder, and a corresponding decrease in the share percentage' owned by the minority."[129] In this specific paradigm, this Court has recognized that "both the corporation and the shareholders [are] harmed by the overpayment: the corporation [is] harmed because it exchange[s] corporate property for something of a lesser value, and the public shareholders [are] harmed insofar as economic value and voting power [are] 'expropriated' by and 'redistributed' to the controlling shareholder out of the minority interest."[130]

Gentile thus establishes a narrow exception to the general rule that overpayment claims are exclusively derivative:

> *Gentile* cannot stand for the proposition that . . . a direct claim arises whenever a controlling stockholder extracts and expropriates economic value from a company to its benefit and the minority stockholders' detriment. Such an exception would largely swallow the rule that claims of corporate overpayment are derivative—stockholders could maintain a suit directly whenever the corporation transacts with a controller on allegedly unfair terms.[131]

The trial court committed legal error by expanding the *Gentile* exception to Plaintiff's claim, holding that it should apply anytime the board approves a

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[129] *Robotti*, 2010 WL 157474, at *7 (quoting *Gentile*, 906 A.2d at 99-100).

[130] *Id.* (quoting *Gentile*, 906 A.2d at 100).

[131] *Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592, at *5 (Del. Ch. Sept. 28, 2015) (footnotes omitted).

transaction with a "significant stockholder" that reallocates value, regardless of whether voting rights were affected or the consideration for the transaction was cash or stock.[132] This holding ignores that every case with a claim of overpayment theoretically involves a reallocation of value, and the *Gentile* test requires dilution of both equity *and* voting power.[133] This dilution of voting power distinguishes the narrow *Gentile* exception from cases involving the traditional, derivative claim for corporate overpayment.[134] This makes sense because there is a harm to the limited partners that is separate and distinct in that it affects the equity holder's voting rights.[135]

Plaintiff here offered no evidence and, indeed, no argument of any dilution of voting power, and certainly no "shift in the corporate power dynamics" at play

[132] Standing Op. at 64-71; *see also id.* at 58-59.

[133] *Gentile*, 906 A.2d at 99-100.

[134] *See Feldman v. Cutaia*, 956 A.2d 644, 657 (Del. Ch. 2007) ("*Gentile* and *Gatz* are predicated on the idea that transactions of this type result in an improper transfer of both economic value and voting power from the minority to the controlling stockholder."), *aff'd*, 951 A.2d 727 (Del. 2008); *Caspian*, 2015 WL 5718592, at *5 ("*Gentile* considered the transfer of voting power as an important factor in finding a direct claim. Here, extending and expanding the loan did not affect Plaintiffs' voting power; Defendants' alleged wrongs had no impact on the relative equity holdings (and any associated rights) of [the company's] stockholders.") (footnotes omitted); *Gaylord*, 747 A.2d at 79 (focusing on "a shift in corporate power dynamics" that "injure[s] those who lose power in the shift" as the feature that distinguishes direct from derivative claims challenging corporate defensive measures).

[135] The trial court's reliance on *Tri-Star* is misplaced. *Tri-Star* does not support the trial court's ruling that a plaintiff need not show an effect on the minority's voting rights. Standing Op. at 66-68. Instead, this Court explained in *Tri-Star* that "*equally relevant*" to any economic dilution was the fact "that plaintiffs, and not Coca–Cola, suffered a proportionate loss of voting power" resulting from the dilutive transaction. *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 332 (Del. 1993) (emphasis added), *as corrected* (Dec. 8, 1993).

in the Fall Drop-Down. Plaintiff never alleged, and offered no proof, that the Partnership's overpayment in the Fall Drop-Down increased the GP's or Parent's control at the expense of the limited partners. Nor could such proof have been proffered. The GP retained the exact same level of contractual control, notwithstanding the Fall Drop-Down. Accordingly, Plaintiff's claim does not fit the limited exception to the rule that overpayment claims are derivative.

Finally, as a policy matter, further expanding the universe of claims that can be brought "dually" could upend the current, well-functioning system that distinguishes between direct and derivative suits, and the effect of that determination under Rules 23, 23.1, and the common law, including regarding who can bring a suit, the form and manner of doing so, the procedures for certifying a class, settlements, and when notice is required to other investors.[136] This Court should not endorse the trial court's expansion of the *Gentile* exception.

5. The Merger Resulted in Plaintiff's Loss of Standing to Pursue His Derivative Claim, and His Remedy Was to Challenge the Merger.

Because Plaintiff's overpayment claim is exclusively derivative, it was owned by the Partnership throughout this litigation, and it passed by operation of law to KMI in the Merger.[137] As a result, Plaintiff lost standing to pursue the claim

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[136] *See* Ct. Ch. R. 23; Ct. Ch. R. 23.1; *see also* Part II.C.2, *infra*.

[137] 6 *Del. C.* § 17-211(h) (without exception, acquirer takes all "rights, privileges and powers . . . as well as all other things and causes of action" belonging to the constituent limited partnerships

that belongs to the Partnership in which he once owned units and is now but a "mere intermeddler" with no rights to pursue the claim or seek redress.[138]

Although Plaintiff's loss of standing may seem harsh at first blush, the simplicity of the rule has long been a benefit of the continuous ownership requirement, and it is partially the product of the former limited partners' decision to accept the Merger's benefits.[139] Ignoring the continuous ownership rule, as the court below did, would introduce new uncertainty as to which claims (assets of the acquired entity) in fact are passed to the buyer in a merger.[140] By statute, mergers transfer ownership of shares and claims, and "the General Assembly's statutory determination leaves no room for judicial improvisation."[141]

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as a result of a merger); *Ala. By-Products*, 657 A.2d at 264 ("Pursuant to 8 *Del. C.* § 259(a), the derivative claim vests in the new shareholder (surviving corporation) upon the transfer of stock through the merger.").

[138] *Stuart Kingston*, 596 A.2d at 1382.

[139] *See Lewis v. Anderson*, 477 A.2d at 1044-46 (rejecting arguments that a merger should not extinguish standing because it would "leave[] former shareholders of [the company] 'without a remedy to redress wrongs'" and would allow "the wrongdoers [to] thereby escape accountability"); *Strategic Asset Mgmt., Inc. v. Nicholson*, 2004 WL 2847875, at *2 (Del. Ch. Nov. 30, 2004) ("One of the benefits of the 'continuous ownership requirement' is that it is straightforward.").

[140] It is well settled that derivative claims pass to a buyer in the merger context because the buyer acquires all of the assets of the entity, including its litigation assets. *Lewis v. Anderson*, 477 A.2d at 1043; *see also* Standing Op. at 14. Indeed, the Vice Chancellor's recent *Activision* ruling, which held that each of direct, derivative, and "dual" claims travelled as "property rights" with the shares to the new holder, suggests that *all* of the potential claims in this case (whether direct, derivative, or "dual") are now owned by KMI. *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1044 (Del. Ch. 2015). At minimum, *Activision* and the Standing Opinion are inconsistent with one another.

[141] *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 159 (Del. Ch. 2013).

Nor did the continuous ownership rule leave Plaintiff without recourse or provide a windfall to the GP.[142] If Plaintiff believed that the Merger did not properly account for the risk-adjusted value of the Partnership's litigation asset—the overpayment claim—he should have challenged the Merger directly on that basis.[143] But that was his only recourse: he lost the ability to assert derivative claims that pre-dated the Merger.[144] As the trial court acknowledged, Plaintiff was not challenging the fairness of the Merger and therefore his claim should have been dismissed under the *Kramer* paradigm.[145]

Yet instead of putting the onus on Plaintiff to challenge the Merger directly, the trial court criticized the GP for not seeking additional merger consideration for the Fall Drop-Down claims and held that applying *Kramer* and *Parnes* to dual claims would be "inefficient."[146] This analysis conflates the continuous ownership

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[142] If anything, there is a potential "windfall" to the plaintiffs "who have accepted the benefits of a corporate transaction extinguishing their ownership of stock and who continue thereafter to challenge the transaction." *Gaylord*, 747 A.2d at 82; *see supra* notes 47, 123.

[143] *See generally Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1245 (Del. 1999).

[144] *Compare Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353-54 (Del. 1988) (dismissing claims under the continuous ownership rule where plaintiff did not challenge merger's fairness), *with Parnes*, 722 A.2d 1243 (stating that a lawsuit challenging the fairness of the merger itself was direct and could survive the merger); *see also Tooley*, 845 A.2d at 1038-39 (stating that *Kramer* and *Parnes* were both correctly decided).

[145] Standing Op. at 83; *see Kramer*, 546 A.2d at 353-54; *Feldman*, 951 A.2d at 735 ("As in *Kramer*, we hold that Feldman's attack on the validity of the Challenged Stock Options is derivative because it does not relate to the fairness of the merger itself and does not allege a harm that is distinct from that suffered by the 'corporation as a whole.' Therefore, Count XIII was also properly dismissed under *Lewis v. Anderson*.").

[146] *See* Standing Op. at 33-37.

analysis with an analysis of whether the Merger was fair. But it is not the province of the trial court to second-guess this Court's framework for addressing this exact situation. And the trial court did not explain how applying the *Kramer-Parnes* doctrine to a dual claim is any less "efficient" than in the derivative context.

In fact, other unitholders did challenge the Merger's fairness, alleging that the Partnership's litigation assets (including the derivative claim here) were not adequately valued.[147] But that lawsuit was voluntarily dismissed after the defendants moved to dismiss on grounds that a majority of the unaffiliated unitholders had approved the transaction.[148] Now, as a former unitholder of the Partnership who no longer owns an interest in the entity, Plaintiff cannot avoid invocation of the *Kramer* doctrine simply because he was unable or unwilling to challenge the fairness of the Merger. Plaintiff has lost standing to proceed and cannot recover for himself or a "quasi-class," regardless of the court's post-trial views of the strength of the underlying derivative claim.

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[147] Verified Class Action Compl., *Arendt v. Kinder Morgan Energy Partners, L.P.*, C.A. No. 10093-VCL (Del. Ch. Sept. 5, 2014).

[148] Stipulation & Order of Dismissal, *In re Kinder Morgan, Inc. Corporate Reorg. Litig.*, C.A. No. 10093-VCL (Del. Ch. Apr. 2, 2015); A922, LPA § 7.9(a)(ii).

II. THE COURT OF CHANCERY ERRED IN AWARDING DIRECT PRO RATA DAMAGES TO FORMER UNITHOLDERS.

A. Question Presented

Did the Court of Chancery err by awarding damages directly to the Partnership's former limited partners where Plaintiff did not assert or prove such damages or seek to certify a class of former unitholders?[149]

B. Scope of Review

This Court reviews questions of law *de novo*; for mixed questions of fact and law, "[t]his Court reviews the entire record and the sufficiency of evidence to test the propriety of those findings, and will review the factual findings of the trial court to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive process."[150]

C. Merits of the Argument

1. The Judgment Should Be Reversed Because Plaintiff Presented No Evidence of Damages to the Limited Partners.

Even if Plaintiff's claim is direct, as the trial court determined, the Judgment should be reversed because Plaintiff failed to assert or prove a required element of his "direct" claim: damages.[151]

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[149] This question was presented below at A1233-34, A1254, A1259-66, A1327-29, A1342-48, and A1380-97.

[150] *Activision*, 106 A.3d at 1033; *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993).

[151] *See Lorenzetti v. Hodges*, 62 A.3d 1224, 2013 WL 592923, at *3 (Del. 2013) ("On a claim of breach of contract, the plaintiff must prove a) the existence of a contract; b) the breach of an obligation imposed by that contract; and c) resulting damages to the plaintiff."); *Towerhill*

A plaintiff cannot rely on the harm an entity suffered to meet its burden to show harm to the investors "individually."[152] Even where a single transaction is susceptible to both derivative and direct challenges, a plaintiff is not relieved of its burden to demonstrate the elements of a direct claim simply because the transaction was also subject to a derivative claim for harm done to the entity.[153] A damages award that reflects harm to the entity does not establish damages for a plaintiff's direct claim because "that damages claim is derivative, not direct."[154] The right to the entity-level recovery remains the entity's property.[155] Given that

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Wealth Mgmt. LLC v. Bander Family P'ship, LP, 2010 WL 2284943, at *11 (Del. Ch. June 4, 2010) ("It is well-established that a party must allege and prove damages to have a successful breach of contract claim.").

[152] *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006) ("Although the $7 billion damage figure would be a logical and reasonable consequence (and measure) of the harm caused to [the entity] for being caused to overpay for [an asset], that $7 billion figure has no logical or reasonable relationship to the harm caused to the shareholders *individually* for being deprived of their right to cast an informed vote.") (emphasis in original); *see also Feldman*, 951 A.2d at 733 (noting that *J.P. Morgan* disapproves of a plaintiff's ability to bring a direct claim by "bootstrap[ping] the harm and damages causatively linked to a derivative claim onto what, according to that plaintiff, was an independently arising direct cause of action").

[153] *J.P. Morgan*, 906 A.2d at 772-73 (rejecting argument that "where a [direct] disclosure violation arises from a corporate transaction in which the shareholders suffer a dilution of the economic and voting power of their shares, the shareholders automatically become entitled to recover the identical damages on their [direct] disclosure claim, that the corporation would be entitled to recover on its underlying (derivative) claim"); *see also In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 375-76 (Del. Ch. 1998) (holding that plaintiffs failed to state a class claim for breach of duty of disclosure because plaintiffs' allegations that bonus plans "wasted company assets" would "result in an award of damages to Disney, not directly to its shareholders" and thus plaintiffs' claim "could not result in a class award"), *aff'd in part, rev'd in part on other grounds and remanded sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[154] *J.P. Morgan*, 906 A.2d at 773.

[155] *Id.* at 772-73 (holding that "any damages recovery would flow *only* to [the entity], not to the shareholder class" and that it "simply cannot be" that "directors of an acquiring corporation

the predicate for a direct claim is separate injury to the investors, it follows that a plaintiff must therefore prove a separate injury.

Yet, as the trial court recognized, Plaintiff here presented no "*evidence at trial regarding specific harm to the unaffiliated limited partners*,"[156] and thus failed to meet his burden to prove damages. Instead, consistent with how he had pled and prosecuted the case from its inception, Plaintiff introduced evidence only of harm to the Partnership. His damages expert, Zachary Nye, focused solely on the alleged injury suffered by the Partnership as a result of paying too much for the assets acquired from Parent, and offered no testimony regarding any harm to any individual limited partner.[157] Plaintiff also failed to introduce any evidence of how the Partnership's overpayment would have translated to any direct harm to the limited partners separate and distinct from the harm to the Partnership. Thus, even if Plaintiff's claim were "direct" or "dual," the Judgment should be reversed due to his failure to prove the damages element of his claim.

Even putting aside that Plaintiff failed to plead, much less prove, an essential element of a direct claim, the manner in which this case proceeded was simply unfair. The Vice Chancellor deferred the defendants' request to decide the

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would be liable to pay both the corporation and its shareholders the same compensatory damages for the same injury.") (emphasis added).

[156] Standing Op. at 13 (emphasis added).

[157] *See supra* note 78 and accompanying text.

threshold question of standing before trial, stating that he wished to avoid a "whole big briefing mess" on the "complex issues of Delaware law" presented by the standing question.[158] As a result, the only claim tried was the claim that in fact had been pled—a derivative one—and the evidence focused exclusively on whether there was any damage to the Partnership.

After trial, the court changed the rules of the game by imposing a different legal framework and constructing a direct claim that had never been pled, much less proved. That is not the way the adversarial system works. Defendants were deprived of the ability to make informed decisions concerning what evidence needed to be developed through discovery and the expert process, and then how that evidence should be introduced at trial to defend against a direct claim that was in fact presented.[159] When the trial court recast Plaintiff's claim as direct long after the trial had been concluded, it deprived the GP of its right to defend itself.[160] This was error of the most fundamental sort.

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[158] A520-23, Hr'g Tr. on Pl.'s Mot. for Prompt Trial, dated Sept. 9, 2014, at 15-18; Liability Op. at 2-3.

[159] For example, the GP could have established that given the unique nature of MLPs, even assuming that the Partnership overpaid for the assets based on their supposed "fair value," the unitholders were not harmed directly because the alternative of no transaction at all would have led to decreased distributions and a lower trading price for the publicly traded units. Additionally, had the claim been asserted and tried as a direct claim, the focus of the expert testimony would have been vastly different, and would have included an assessment of the Fall Drop-Down on the GP's contractual incentive distribution rights.

[160] Although the trial court asked the parties to consider myriad issues in the context of the belated post-trial briefing on standing, including if there was any additional evidence to be submitted, A1213-18, that was simply too little too late, and was no substitute for a trial on the

2. The Court Erred in Supplying an Equitable Remedy Where Plaintiff Failed to Prove Injury and Lacked Standing.

The trial court determined that "[e]ven if [Plaintiff's] claim supporting the Liability Award was *derivative*" and only the Partnership was harmed, it could nonetheless provide a remedy to a "quasi-class" of limited partners under its equitable powers.[161] This too was error.

Although equity provides the Court of Chancery with powerful tools to prevent injustice, because the claim was derivative, Plaintiff lacked standing and there was no justiciable controversy for the court to adjudicate. Accordingly, the court should not have either addressed the merits or considered whether (let alone what) remedy would be appropriate.

But even if the trial court properly decided the merits, and correctly found that the GP breached the LPA in purchasing the assets in the Fall Drop-Down, it erred in ordering that the amount of the "overpayment" be paid on a pro rata basis to the unitholders. As explained above, the derivative claim was an asset of the Partnership which passed to KMI by operation of law in the Merger.[162] Any

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merits, with appropriate cross-examination, regarding claims which Plaintiff had never asserted and bore the burden of proof. Furthermore, at the time the trial court invited the parties to address whether additional evidence was necessary, the trial court had already decided liability. *Id.*

[161] Standing Op. at 3, 94.

[162] 6 *Del. C.* § 17-211(h).

recovery therefore belongs to the purchaser and not the entity's former individual unitholders.[163]

The trial court's remedy is inappropriate for other reasons as well. The use of equity to side-step established legal principles would sow great unpredictability into an area of law that demands, and is currently governed by, bright-line rules.[164] When KMI consummated the Merger, it did so with the reasonable belief under existing law that, having purchased all of the Partnership's units, it now possessed all of the Partnership's rights as well (including its legal claims).[165] But the trial court disregarded both the governing statute and this Court's well-developed jurisprudence to effectively transfer an asset of the Partnership (the derivative claim) to the unaffiliated limited partners who otherwise had no right to it.[166] The market relies on the consistent interpretation of Delaware law, but the award

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163 *Bokat v. Getty Oil Co.*, 262 A.2d 246, 250 (Del. 1970) (dismissing derivative action because derivative claims passed to buyer through merger and declining to award pro rata recovery), *disapproved of on other grounds by Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

164 *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 1.03, at 1-6 (16th rev. 2015) (describing the Court of Chancery and noting that "from an early date, the decisions of these jurists provided clear guidance on a multitude of intracorporate issues and a good measure of predictability with regard to corporate problems yet to be judicially encountered. Consequently, corporate practitioners and decision-makers alike began to draw great comfort from the consistency and principled approach of the Court's decisions . . . .").

165 6 *Del. C.* § 17-211(h).

166 As the Vice Chancellor has explained in another case, "dual-attribute claims"—as the trial court found here—"travel[] with the shares," and the unitholders who sold their units "ha[ve] no right to . . . benefit from [such claims]." *In re Activision*, 124 A.3d at 1056; *see also id.* at 1055 ("Because both direct and derivative claims travel with the shares, claims that have both attributes also logically travel with the shares.").

entered by the trial court here would create great uncertainty for purchasers as to what post-closing rights and liabilities they actually obtain in a merger.

And while the court described a pro rata investor recovery as "the exception, not the rule,"[167] it is unclear when that exception applies or how. For example, it would appear that pro rata recovery would be available whenever there is a *possibility* that an "entity-level remedy would have benefited the 'guilty.'"[168] Such a rule would allow a plaintiff to argue that every derivative claim involving any defendant who was also an equity holder of the company warrants an "exceptional" pro rata recovery. This "exception" is contrary to Supreme Court precedent and would swallow the rule that a derivative recovery goes to the entity.

Equity does, and indeed must, have its limits.[169] And it should not intercede on behalf of a "quasi-class" in these circumstances, where a majority of the unitholders in the "class" voted to approve the Merger. It is undisputed that (i) unitholders received full disclosure regarding whether the Merger consideration included any value for the claims asserted in this action, and (ii) a majority of the unitholders nevertheless voted to approve the Merger and accept its benefits.[170]

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[167] Standing Op. at 3.

[168] *Id.* at 103.

[169] *See Nixon*, 626 A.2d at 1378 n.17 ("We are mindful of the elasticity inherent in equity jurisprudence and the traditional desirability in certain equity cases of measuring conduct by the conscience of the court and disapproving conduct which offends or shocks that conscience. Yet one must be wary of equity jurisprudence which takes on a random or ad hoc quality.").

[170] *See supra* note 47.

Yet the trial court's ruling delivers a windfall to these unitholders by allowing them to receive both the premium consideration from a merger that eliminated their claims (claims which KMI acquired in the transaction) as well as their pro rata share of the damages recovered on that claim.[171]

Moreover, by granting recovery to a "quasi-class" without Plaintiff having first sought class certification, the trial court ignored Court of Chancery Rule 23 and the important procedural safeguards contained therein, which are designed not only to ensure the orderly progression of litigation, but to protect those third parties potentially impacted by the case and the defendants in future litigation.[172]

For all of these reasons, regardless of whether the claim was direct, derivative, or "dual," the court erred in awarding a pro rata damages recovery to the "quasi-class."

[171] *Cf. Kahn v. Household Acquisition Corp.*, 591 A.2d 166, 176-77 (Del. 1991) ("a shareholder who votes in favor of the merger . . . cannot assume a pose of approval in the voting process and then seek to litigate under a contrary position in a Court of Equity"); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *21 (Del. Ch. Aug. 18, 2006) (holding that stockholders who voted in favor of a merger were barred by the "doctrine of acquiescence" from recovering damages with respect to the merger).

[172] *See In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *10 (Del. Ch. Mar. 31, 2009) ("Court of Chancery Rule 23 is designed to protect the due process rights of absent class members. Only through strict compliance with Rule 23 may a court's judgment bind the absent members."); *see also In re Ebix, Inc. Stockholder Litig.*, 2016 WL 208402, at *10 (Del. Ch. Jan. 15, 2016) (absent class certification, a judgment in one action has no bearing on another stockholder's ability to relitigate the same claim).

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

A. Question Presented

Did the Court of Chancery err: (i) by ignoring the "conclusive presumption" of good faith granted under the Partnership Agreement based on the Committee's compliance with the reliance-on-advisor safe harbor; and (ii) in applying the governing "subjective good faith" standard to the Conflicts Committee's determination?[173]

B. Scope of Review

This Court "review[s] questions of contract interpretation *de novo*," and the scope of review of a trial court's decision to grant or deny summary judgment is also *de novo*.[174] Although the review of a conclusion of good faith under a contract typically "involves a mixed question of law and fact," the "ultimate determination that a party acted in good faith is a legal issue" subject to *de novo* review.[175]

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[173] This question was presented below at A210-56, A337-73, A377-79, A384-429, A541, and A1160-85.

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

[175] *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi.*, 75 A.3d 101, 108-09 (Del. 2013).

C. Merits of the Argument

The Judgment below should be reversed for the independent reason that the court misapplied the contractual provisions governing the GP's consideration of the Fall Drop-Down.

1. The Court of Chancery Failed to Apply the "Conclusive Presumption" of Good Faith under Section 7.10(b).

Under Section 7.10(b) of the LPA, any act taken by the GP in reliance upon the opinion of a financial advisor is "conclusively presumed to have been done . . . in good faith" so long as the GP "reasonably believes" that the subject matter of the opinion is within the advisor's "professional or expert competence."[176] Although nominally framed in terms of the GP, this provision also applies to the Committee's reliance on a fairness opinion.[177]

Plaintiff has never disputed that the Committee: (i) believed that rendering a fairness opinion on a drop-down transaction was within Tudor's "professional or expert competence;" or (ii) relied on Tudor's opinion in granting Special

[176] A924, LPA § 7.10(b) ("The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers and other consultants and advisers selected by it, and any act taken or omitted to be taken in reliance upon the opinion (including an Opinion of Counsel) of such Persons as to matters that the General Partner reasonably believes to be within such Person's professional or expert competence shall be conclusively presumed to have been done or omitted in good faith and in accordance with such opinion.").

[177] *Accord Norton*, 67 A.3d at 367 ("Although the Conflicts Committee of the K-Sea Board actually obtained the fairness opinion, it is unreasonable to infer that the entire K-Sea Board did not rely on the opinion that a K-Sea Board subcommittee obtained.").

Approval.[178] Indeed, the trial court noted that Tudor had previously rendered such opinions to the Committee.[179] Accordingly, the GP is conclusively presumed to have acted in good faith in approving the Fall Drop-Down, thereby satisfying any "good faith" obligations under the LPA.

The trial court did not address Section 7.10(b) and its conclusive presumption in its summary judgment or post-trial opinions, although the issue was raised.[180] This was legal error. Because the GP was entitled to judgment in its favor based on the "conclusive" effect of Section 7.10(b), the trial court should not have undertaken any analysis of Tudor's work under Section 7.10(b) beyond confirming that Tudor had rendered an opinion concerning the transaction that was within its professional or expert competence. Whether the trial court agreed with Tudor's analysis is irrelevant.

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

Even putting aside the conclusive effect of Section 7.10(b), the trial court erred in holding that the GP breached the conflicts provision of the LPA, Section

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[178] A260-329, Pl.'s Answering Mot. for Summ. J.; A341-44, El Paso's Reply Br. in Further Support of Summ. J., at 5-8; A967-70, Tudor Fairness Opinion, dated Nov. 12, 2010 (JX 129); A534, Pre-Trial Stip. at 8.

[179] Liability Op. at 7-8.

[180] The issue was raised by Defendants below in connection with their motion for summary judgment. A254-56, El Paso's Opening Br. in Support of Summ. J., at 45-47; A377-79, El Paso's Reply Br. in Further Support of Summ. J., at 41-43.

7.9(a).[181] As discussed above, and as this Court has held in addressing virtually identical language, Section 7.9(a) establishes a "permissive safe harbor," not a mandatory obligation that the GP must fulfill to meet its contractual obligation to act in "good faith" under Section 7.9(b).[182] Indeed, Section 7.9(a) expressly permits the GP to "adopt a resolution or course of action that has not received Special Approval,"[183] thereby making clear that Special Approval is not mandatory and further that it cannot provide the predicate for a breach of contract claim (even if not properly invoked or complied with).

Even assuming that Section 7.9(a) could give rise to a claim, however, the trial court misapplied the subjective good faith standard under the LPA. Under the Special Approval process set forth in Section 7.9(a), the Committee was entitled to a presumption "that, in making its decision," it acted in "good faith."[184] Plaintiff bears "the burden of overcoming such presumption" by showing that the Committee members did not "believe that the determination or other action [was] in the best interests of the Partnership."[185] This standard of subjective good faith

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[181] Liability Op. at 33.

[182] *See Encore*, 72 A.3d at 102 & n.28 (citation omitted); *Gerber II*, 67 A.3d at 410 n.15 (quoting *Norton*, 67 A.3d at 364); *supra* note 104 and accompanying text (discussing permissive safe harbor in Section 7.9(a)).

[183] A922-23, LPA § 7.9(a).

[184] *Id.*

[185] A923, LPA § 7.9(b); *Encore*, 72 A.3d at 102, 104 (interpreting similar provision, holding that the provision is satisfied "if the actor *subjectively believes* that it is in the best interests of [the partnership]") (emphasis added).

requires honesty in fact, and is intended to preclude an "objective" inquiry into whether the Committee's conduct was reasonable.[186]

As this Court has admonished, "[t]rial judges should avoid replacing the actual directors with hypothetical reasonable people when" assessing subjective good faith.[187] A plaintiff can demonstrate subjective bad faith only by showing that the Committee either "believed it was acting *against* [the Partnership's] best interests" or that it "consciously disregarded its duty to form a subjective belief that the [transaction] was in [the Partnership's] best interests."[188] At trial, Plaintiff introduced no evidence that the Committee members were self-interested or believed they were acting *against* the Partnership's interests. To the contrary, the Committee was deemed independent by the lower court and its Chairman had invested $2 million in public units of the Partnership.[189]

Demonstrating a "conscious disregard" takes "an extraordinary set of facts."[190] To meet this heavy burden, a plaintiff must prove that (i) the GP's actions were "so egregiously unreasonable . . . that they seem essentially

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[186] *Encore*, 72 A.3d at 107.

[187] *Id.* Here, "[t]he contractual standard . . . did not contemplate that a court would review the Committee's decision using an objective test, such as reasonableness." Liability Op. at 33; *see Encore*, 72 A.3d at 101-02 & n.26 ("Unlike the contractual duty of good faith in [*Norton*], this LPA," which required only a "belie[f] that the determination or other action is in the best interests of the Partnership," did "not require a reasonable belief.").

[188] *See Encore*, 72 A.3d at 106 (emphasis added).

[189] Liability Op. at 5-6; A592, Trial Tr. at 162:5-163:3.

[190] *Encore*, 72 A.3d at 105-06.

inexplicable on any ground other than subjective bad faith;"[191] or (ii) there were "objective facts indicating that a transaction was not in the best interests of the [P]artnership and that the [Committee] knew of those facts."[192]

Here, the trial court strongly disagreed with the Committee's *criteria* for determining whether the transaction was in the Partnership's best interests, criticizing the directors for "myopically" focusing on "accretion" as the guidepost for their determination.[193] It was undisputed that the Fall Drop-Down would increase future distributions to unitholders, and the lower court even held that the Committee subjectively believed in good faith that all amounts due under the long-term service agreements in place at Elba would be paid over the life of the agreements.[194] Yet the lower court rejected the Committee's criteria for evaluating the benefits of the Fall Drop-Down, and held in its own exercise of business judgment that they got it wrong. In so holding, the Vice Chancellor relied on the economic truism that "[a]n accretion analysis says nothing about whether the buyer is paying a fair price."[195] However reliable this point may be as a matter of

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[191] *Id.* at 107 (internal alterations and quotations omitted); *accord Brinckerhoff v. Enbridge Energy Co.*, 67 A.3d 369, 373 (Del. 2013) ("To state a claim based on bad faith, the decision . . . must be so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.") (citation omitted).

[192] *Encore*, 72 A.3d at 107.

[193] *See, e.g.*, Liability Op. at 39 ("The Committee Members' Preoccupation With Accretion").

[194] *Id.* at 56.

[195] *Id.* at 41.

economics, it fails as a matter of law under the LPA and this Court's settled precedent.

First, the LPA does not require that the terms of any given transaction approved using Special Approval must be "fair" to the Partnership in the sense used by the court below, i.e., a fair price.[196] Under Section 7.9(a), the GP is free to avail itself of any of the four alternative safe harbors, including where the GP concludes—separate and apart from the Special Approval process—that the transaction's terms are "fair and reasonable" to the Partnership.[197] The disjunctive construct of Section 7.9(a) demonstrates that no independent "fair price" requirement applied to conflict transactions considered through Special Approval.[198]

Second, in the context of a "subjective good faith" analysis, this Court has explained that a limited partner "has no contractual basis to argue that the LPA required the Conflicts Committee to bargain to his satisfaction or to achieve a better result."[199] There is no obligation "to negotiate the best deal."[200] As a result,

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[196] *See* A922-23, LPA § 7.9(a).

[197] *Id.*

[198] *See Dieckman*, 2016 WL 1223348, at *6 & n.26, *12 (holding that "[u]sing such a [conflicts] committee is merely one of several optional safe harbor provisions recognized in the LP Agreement, the use of which defendants were free to forgo, even in the face of an admittedly conflicted transaction" and declining to reach the effect of special approval and a reliance-on-advisor conclusive presumption because a different safe harbor had been satisfied).

[199] *Encore*, 72 A.3d at 109 (rejecting allegations that conflicts committee "should have started with a higher counteroffer, . . . negotiated more forcefully, and . . . achieved a better result" as

even if the Partnership "overpaid" for the assets acquired in the Fall Drop-Down as the court below found, that would not establish bad faith.[201] And an asset's "value is not a single number, but a range of fair values[,]"[202] and an "overpayment" could still be a "fair" price within the range of fair values.[203]

No doubt, the court below would have done things differently than the directors on the Committee, but the collective effect of these disagreements does not impugn those directors' "honest belief" as to the Partnership's best interests. Even taken together, these facts do not evidence a "conscious disregard" of the Partnership's interests and certainly do not rise to a level "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than subjective bad faith."[204] While there is, of course, nothing wrong with

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supporting reasonable inference that committee consciously disregarded its duty to form a subjective belief that a transaction was in partnership's best interests).

200 *See id.* at 108 ("While allegations that the Conflicts Committee failed to negotiate the best deal available might suffice to state a colorable claim for breach of the traditional fiduciary duties of care and loyalty, these allegations do not suggest the type of subjective bad faith required to state a claim under the LPA.") (internal alterations and quotation marks omitted).

201 *Cf. id.* at 107-08 (rejecting plaintiff's contention that conflicts committee's "indefensible" counteroffer in a merger negotiation, which represented a *negative* premium, warranted finding of subjective bad faith).

202 *See Norton*, 67 A.3d at 367.

203 As explained above, the sponsored MLP model depends on the sponsor's willingness to drop down assets enabling the partnership to grow (*see supra* notes 31-33 and accompanying text); of course, the parent is not obligated to do so and there is no guarantee that these transactions would continue in the future if negotiations became too contentious. In this context, where the Committee "knew they had limited negotiating leverage vis-à-vis" the GP, there was a limit to the level of negotiating that would be acceptable. *See Encore*, 72 A.3d at 107-08.

204 *Enbridge*, 67 A.3d at 373.

trying to buy the assets for the lowest price possible, that is not the controlling contractual standard. Indeed, "[a] shoddy negotiation that obtains a meager improvement . . . may still be conducted in subjective good faith."[205]

In sum, even accepting the trial court's factual findings as true, the facts upon which it relied do not rise to the "extraordinary" level necessary to demonstrate a "conscious disregard" of the Committee's duties. The trial court accordingly erred in finding a breach of the LPA.

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[205] *Encore*, 72 A.3d at 108-09. In holding that the Committee's conduct evidenced a conscious indifference to their responsibilities to the Partnership, the trial court reasoned that Tudor's work product undermined any possible confidence in the Committee. Liability Op. at 46. Essentially, the court implied that the Committee members should have anticipated that Tudor was manipulating its financial analyses to make the Fall Drop-Down appear fair and should have remembered that the inputs underlying the DCF analyses for the Spring Drop-Down (which was months prior) were slightly favorable in comparison to the Fall Drop-Down. *Id.* at 48, 51-53.

IV. THE COURT OF CHANCERY ERRED IN CALCULATING THE DAMAGES AWARDED TO THE UNAFFILIATED UNITHOLDERS.

A. Question Presented

Did the trial court err in determining the amount of damages even if it correctly found a breach of the LPA?[206]

B. Scope of Review

This Court reviews a lower court's award of damages for abuse of discretion.[207] The Court of Chancery's interpretation of written agreements is reviewed *de novo*.[208] The trial court's findings of fact will be upheld unless clearly erroneous.[209]

C. Merits of the Argument

The trial court concluded that the GP breached the LPA by overpaying in the November 2010 Fall Drop-Down and awarded what it described as "[e]xpectation damages" to the unaffiliated unitholders.[210] As set forth above, the court erred by awarding the unitholders a pro rata recovery, but even assuming the propriety of such relief, the Vice Chancellor erred in his calculation of that award and thereby

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[206] This question was presented below at A1262-63 and A1348-52.

[207] *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 866 (Del. 2015).

[208] *GMG Capital Invs.*, 36 A.3d at 779.

[209] *RBC Capital*, 129 A.3d at 849.

[210] Liability Op. 56 (citing *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000); *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001)).

provided a windfall to the "class" of unitholders in two distinct and independent respects.

First, the trial court determined that, at the time of the Fall Drop-Down, the unaffiliated unitholders owned 46% of the Partnership's units.[211] Thus, they could have expected to recover, at most, 46% of any funds that would have been distributable to them but for the overpayment (assuming that the GP determined to make a distribution from return of the "overpayment"). In fact, the trial court applied this percentage in describing the nature and scope of the harm allegedly suffered by the unaffiliated unitholders.[212] Yet, when the trial court ultimately arrived at a damages figure, it inexplicably ignored these percentages and instead applied the unitholders' percentage of ownership (58.6%) *at the time of the Merger*, four years after the date of the breach.[213] That approach was without logical or legal support.

In allotting the unaffiliated unitholders 58.6% of the total damages suffered by the Partnership, the trial court conflated (i) the "class" of unitholders it determined entitled to a pro rata share of the overpayment with (ii) the percentage of the overpayment to which the class would be collectively entitled. Although it did not certify a class, the court held that unitholders as of the date of the Merger

[211] Standing Op. at 61.

[212] *Id.*

[213] *Id.* at 104.

should receive a pro rata percentage of the damages award.[214] While that group owned 58.6% of the Partnership's limited partnership units as of the date of the Merger, the amount of any damages to which they were entitled became fixed when the harm occurred (the date of the Fall Drop-Down) and should not have changed.[215] This is especially true because the Partnership continued to issue additional units after the purchase closed. The unaffiliated unitholders' "share" of damages is limited to their aggregate ownership interest *as of the date of the overpayment* and no more.

Second, the damages award improperly assumed without analysis or support that the funds representing the "overpayment" would have been distributed by the GP if returned to the Partnership. But even if a distribution was to be made, the trial court erred by not taking into account the LPA provisions entitling the GP to a percentage of distributable funds before determining the limited partner's share. Under Section 6.4, any funds available for distribution would have first been subject to the GP's 2% general partner interest and then to its incentive distribution

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[214] *Id.*

[215] *See Siga Techs., Inc. v. PharmAthene, Inc.*, --- A.3d ---, 2015 WL 9467037, at *18-20 (Del. Dec. 23, 2015), *as corrected* (Dec. 28, 2015) ("[T]he standard remedy for breach of contract is based on the reasonable expectations of the parties that existed before or at the time of the breach.") (internal citation and quotation marks omitted); *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 17 (Del. Ch. 2003) ("damages are to be measured as of the time of the breach").

rights, or IDRs (which as of November 2010 amounted to 48%).[216] The math applying the LPA formula and the unitholders' share at the time of the Fall Drop-Down is straightforward. Assuming the Fall Drop-Down overpayment did not occur, and that the GP would have elected to distribute the proceeds from a debt and equity offering, 50% of any funds distributed would have first been distributed to the GP; only the remaining $85,500,000 ($171,000,000 x 0.50) would have been available for the other unitholders. Of this $85,500,000, the unaffiliated unitholders would have received their 46% proportionate share, or $39,330,000. No more, no less. Accordingly, this $39,330,000, plus interest, represents the total amount of damages to which the unaffiliated unitholders would have been entitled.

CONCLUSION

For all the foregoing reasons, the Court should reverse the judgment below.

[216] A909-11, LPA § 6.4. The trial court recognized the GP's IDR interests in its letter to counsel setting the briefing schedule for Defendant's post-trial motion to dismiss, A1218, Letter to Counsel from Vice Chancellor Laster, but did not address those interests in its Standing Opinion.

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