IN THE

Supreme Court of the State of Delaware

PETER BRINCKERHOFF, INDIVIDUALLY AND AS TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR U A DTD 10/17/97, and on behalf of all others similarly situated, Plaintiff Below-Appellant, v. ENBRIDGE ENERGY COMPANY, INC., et al., Defendants Below-Appellees, and ENBRIDGE ENERGY PARTNERS, L.P., Nominal Defendant Below-Appellee.	**No. 273, 2016** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 11314-VCS

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This case is about the Special Tax Allocation,[1] which materially increased the consideration paid to EEP GP (far beyond what EEP GP's banker said was fair), wrongfully increased the public unitholders' obligations and was adopted in breach of the Sections 15.3(b), 5.2(c) and 6.6(e) of the LPA. The purpose of the Special Tax Allocation was to tunnel to EEP GP millions more for the AC Interest than the $1 billion announced purchase price by transferring certain of EEP GP's tax obligations to the public unitholders.[2] The Court of Chancery can and should remedy this breach by reforming the Transaction to either eliminate the Special Tax Allocation from EEP's 7th LPA or reduce the number of Class E Units issued to EEP GP in the Transaction.

Defendants' good or bad faith is not part of the analysis for determining whether Sections 15.3(b), 5.2(c) or 6.6(e) were breached. Sections 15.3(b), 5.2(c) and 6.6(e) provide for express, affirmative contractual obligations.[3] The good faith language of Section 6.10(d) (modification of EEP GP's fiduciary duties) is not implicated because EEP GP's state of mind is not relevant to whether there was a

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[1] Defined terms are from Plaintiff's Opening Brief ("OB"). "AB" is defendants' brief.

[2] The portion of the Special Tax Allocation affecting public unitholders (*i.e.*, excluding EEP GP's units) amounts to "approximately $24.8 million of additional gross income, per year, for 22 years (or $545.6 million total) and then approximately $12.4 million per year thereafter in perpetuity." Op. 11 n.26.

[3] *See, e.g.*, *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 363-64 (Del. 2013) (recognizing that an analogous provision creates an affirmative obligation not subject to the "more lenient discretion standard").

breach. Good faith is relevant only insofar as Section 6.8(a) prohibits the recovery of monetary damages absent bad-faith conduct.[4]

Reformation provides a sound remedy in light of the Partnership's annual prospective allocation of income. Reformation avoids the difficult task of determining money damages as to each public unitholder and can be accomplished easily. EEP's operations are conducted by Enbridge, and the quarterly and annual results are pass-through amounts. The fact that reformation will deprive EEP GP of tax savings or result in a reduction of EEP GP's Class E Units is the product of EEP GP's own breach of the LPA.[5]

Defendants devote pages of their brief to those portions of the decision in *Brinckerhoff I*[6] finding in their favor. But as to the central issue raised in this appeal – whether plaintiff can seek reformation absent a pleading of fraud or mutual mistake – defendants dismiss out of hand the holding in *Brinckerhoff II* that, but for waiver, reformation was available.[7] Defendants mistakenly argue that plaintiff "overlooks the fact that the Court of Chancery's musings on the potential

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[4] The Court of Chancery in *Brinckerhoff II* and the court below each held that Section 6.8(a) does not preclude an award of equitable relief where EEP GP breached the LPA. Op. 49; *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2012 Del. Ch. LEXIS 291, at *5, 16 (May 25, 2012) ("*Brinckerhoff II*").

[5] Notably, the Transaction provides for cancelling $50 million of Class E Units in the event the AC Interest's EBITDA falls below projections. A77. Defendants cannot now reasonably assert that this remedy would be impracticable to implement.

[6] *Brinckerhoff v. Enbridge Energy Co.*, 2011 Del. Ch. LEXIS 149 (Sept. 30, 2011) ("*Brinckerhoff I*"), *aff'd*, 67 A.3d 369 (Del. 2013) ("*Brinckerhoff III*").

[7] *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *7, 17.

remedy without a wrong in *Brinckerhoff II* was dicta."[8] The court in *Brinckerhoff II* found that there was a wrong pled – a breach of Section 6.6(e). This Court, after oral argument, remanded the case to address plaintiff's claim for reformation. The Court of Chancery was obligated to address that issue substantively, and its ruling was not dicta.[9]

Defendants are also wrong when they argue that Sections 15.3(b) and 5.2(c) were not breached by the Special Tax Allocation amendment.[10] The LPA did not allow EEP GP to adopt an amendment that increased the public unitholders' obligations without their consent. Nor can EEP GP enact a special allocation for tax purposes that materially adversely affects the limited partners. The fact that the Special Tax Allocation was adopted in connection with the Transaction to provide additional consideration to EEP GP does not change the analysis.

Finally, there was no delay. Enbridge first disclosed the Special Tax Allocation, not in its December 23, 2014 press release announcing the Transaction, but in a Form 8-K filed December 30, 2014. Three days later, on January 2, 2015, EEP GP amended the LPA. Brinckerhoff could not possibly be expected to have brought suit or other expedited proceedings in the one-business day between

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[8] AB 4.

[9] *SIGA Techs., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108 (Del. 2015) ("Where the Supreme Court remands for further proceedings, 'the trial court must proceed in accordance with the appellate court's mandate as well as the law of the case established on appeal.'").

[10] AB 21-27.

December 30 and January 2, 2015, the date the LPA was amended. Thereafter, Brinckerhoff moved quickly to obtain documents and file a thorough complaint. Defendants mouth the words delay, but point to no prejudice and suggest no circumstances would have been different under any other schedule.

As to EEP GP's bad faith – relevant only to whether plaintiff can plead a claim for monetary damages – defendants largely ignore the fact that, because of the Special Tax Allocation, the price EEP GP received for the AC Interest was hundreds of millions of dollars more than the announced $1 billion purchase price.[11] Defendants rely on the fact that the Special Committee and its financial advisor considered the Special Tax Allocation.[12] But, Simmons did not make an apples-to-apples comparison. Instead, it compared the purchase price for allegedly comparable transactions to the $1 billion purchase price, without accounting for the additional consideration.

Defendants argue that the market reacted favorably to the Transaction from the December 23 press release "to year end."[13] But defendants exaggerate.[14] By January 6, EEP's units closed at $38.44 – below the closing price on December 22.

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[11] Not to mention the many other facts alleged suggesting that EEP GP placed its own interests ahead of those of the Partnership and the public unitholders. *See* Compl. ¶105, A55-56.
[12] AB 10.
[13] AB 10-11.
[14] EEP's unit price increased 4.75% from the open on December 23, 2014, the day EEP announced the Transaction, to the close on December 31, 2014. Notably, EEP disclosed the Special Tax Allocation on December 30, 2014, and the next day EEP's unit price declined by 1.3%.

ARGUMENT

I. THE COURT OF CHANCERY IMPROPERLY DISMISSED PLAINTIFF'S CLAIMS FOR REFORMATION AND/OR RECSISSION

A. Plaintiff Does Not Have to Plead Bad Faith to State a Claim for Breach of Sections 6.6(e), 15.3(b) or 5.2(c) of the LPA

Sections 6.6(e), 15.3(b) and 5.2(c) create affirmative contractual obligations for EEP GP, which are not modified by Sections 6.9(a), 6.10(d) or any other provision. Section 6.6(e) states that "[n]either the General Partner nor any of its Affiliates shall sell . . . any property to, or purchase property from, the Partnership . . . except pursuant to transactions that are fair and reasonable to the Partnership . . . ."[15] The General Partner's affirmative obligation in Section 6.6(e) not to engage in certain transactions is an express standard. The LPA provides that where there is such an express standard, that standard controls.[16]

Defendants argue that the last sentence of Section 6.9(a) modifies Section 6.6(e).[17] But because Section 6.9(a) begins "[u]nless otherwise expressly provided in this Agreement,"[18] and Section 6.6(e) otherwise expressly provides, Section 6.9(a) is not applicable. The Court of Chancery in *Brinckerhoff II* held that it could not invoke Section 6.9(a) because defendants had conceded that the last sentence

[15] LPA 6.6(e), A278.
[16] LPA 6.9(b), A279-80.
[17] AB 13.
[18] In *Norton*, this Court held that the analogous Section 6.9(a) applied only to "potential conflict[s] of interest," not to situations which "necessarily involve a conflict of interest," which implicate the analogous Section 6.6(e). 67 A.3d at 363-64.

of Section 6.9(a) did not apply to a transaction governed by Section 6.6(e).[19]

Under defendants' interpretation, the last sentence of Section 6.9(a) would modify the General Partner's affirmative obligation in Section 6.6(e), but not the General Partner's affirmative obligations in other provisions, such as Section 6.3(a). Section 6.3(a) prohibits the General Partner from taking any action in contravention of the LPA without unitholder approval. Under defendants' interpretation, in a conflicted purchase, EEP GP could avoid Section 6.3(a)'s restrictions by acting in "good faith," because of the last sentence of Section 6.9(a). An interpretation of the LPA that provides EEP GP *more discretion* in a conflicted purchase would not make sense. If the last sentence of Section 6.9(a) was intended to apply to transactions governed by Section 6.6(e), the LPA would have clearly said so. It did not.[20]

Defendants also ignore Section 6.9(b), which provides where the LPA requires EEP GP to act in "'good faith' or under another express standard, the General Partner . . . shall not be subject to any other or different standards imposed by this Agreement . . . ." Section 6.6(e) "otherwise" expressly provides that purchase and sale contracts with affiliates are subject to a "fair and reasonable"

[19] *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *13.

[20] The doctrine of *contra proferentem* mandates that such an ambiguity be construed against the General Partner. *See Norton*, 67 A.3d at 360.

standard.[21] Section 6.6(e) provides the other express standard that applies.

This Court in *Norton* held that a Section 6.9(a) analog was not applicable to a transaction governed by a Section 6.6(e) analog:

> Section 7.6(d) [analogous to Section 6.6(e)] governs transactions between K-Sea GP and the Partnership, . . . involv[ing] a conflict of interest. That Section begins by stating that "[n]either [K-Sea GP] nor any of its Affiliates shall sell . . . any property to, or purchase property from, the Partnership . . . except pursuant to transactions that are fair and reasonable to the Partnership." This language creates an affirmative obligation – K-Sea GP may not engage in a transaction with the Partnership unless the transaction is "fair and reasonable." Section 7.9(d) indicates that the LPA's drafters knew how to impose an affirmative obligation when they so intended, and that Section 7.9(a)'s language does not result from sloppy drafting.[22]

Contrary to defendants' argument,[23] this Court in *Norton* did not hold that the Section 6.10(d) analog modified the general partner's affirmative obligations under the LPA. *Norton* held that Section 6.10(d) limited the LPA's otherwise broad grants of specific discretion, such as the LPA's grant of discretion as to approving a merger.[24] The Court distinguished such discretionary powers from provisions, such as Section 6.6(e), which provided a non-discretionary "affirmative obligation."[25]

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[21] *See Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at 7-8.
[22] *Norton*, 76 A.3d at 364 (citations omitted).
[23] AB 14-15.
[24] *Norton*, 67 A.3d at 361 (referring to that LPA's Section 14.2, which provided that the general partner could approve a merger "in the exercise of its discretion").
[25] For the same reason, defendants' attempt to distinguish the Court of Chancery's decision in *In re Kinder Morgan, Inc. Corp. Reorg, Litig.*, 2015 Del. Ch. LEXIS 221 (Aug. 20, 2015) ("*KMI*"), fails. AB 35. *KMI* involved approval under the discretionary Special Approval process, not the

The Court of Chancery in *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*[26] also analyzed similar provisions and found:

> Section 6.6(e) is an "express standard" that replaces default fiduciary rules. When engaging in the [transactions], the defendants were required to comply *only* with Section 6.6(e) and were "not . . . subject to any other or different standard imposed by this Agreement, the Operating Partnership Agreements, any other agreement contemplated hereby or under the Delaware Act or any other law, rule or regulation."[27]

Defendants' argument that Section 6.10(d) renders every one of the EEP GP's affirmative contractual obligations subject to a discretionary "bad faith" standard goes against reading the LPA as a whole.[28] That is not the basis for the Court of Chancery's decision below (where dismissal of plaintiff's equitable claim was based only upon Section 6.8(a) and the failure to plead fraud or mistake),[29] is contrary to this Court's decision in *Norton*,[30] and is contrary to the Court of

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non-discretionary Section 6.6(e) standard. The Court of Chancery noted that: "[t]here are other sections in Article VI that address still more specific types of conflict transactions. . . . *If the General Partner engaged in one of those more specific types of conflicted transactions, then Section 6.9(a) would yield to the pertinent section.*" 2015 Del. Ch. LEXIS 221, at *22 n.2 (emphasis added).

[26] 986 A.2d 370, 388-89 (Del. Ch. 2010) ("*Teppco*").

[27] *Id.* at 389 (emphasis added) (citation omitted).

[28] AB 18-19.

[29] Op. 40, 49-50.

[30] *Norton*'s reference to a "free-standing enigmatic standard of good faith" referred to [EEP's analogous] Section 6.8(a), which provided, but did not define, a "good faith" standard for *exculpation* that applied to the general partner's and affiliates' actions. The Court concluded that the Section 6.8(a)'s "good faith" standard should be interpreted the same as the good faith standard set forth in Section 7.10(d) [here, Section 6.10(d)]. It did not hold that Section 7.10(d)'s good faith standard substantively modified any provision which did not expressly permit the general partner to act in its discretion or with good faith. To the contrary, it expressly stated that Section 7.10(d)'s "reasonable belief" standard applied only "unless another provision

Chancery's decisions in *Teppco* and *Brinckerhoff II*. Such an interpretation leads to absurd results, in contravention of numerous cannons of construction.[31]

Finally, while Section 5.2(c) allows the General Partner to make Special Allocations for the proper administration of the Partnership and to promote uniformity among the unitholders in its sole discretion, that discretion is limited.[32] Thus, while the LPA gives EEP GP the discretion to make allocations for certain purposes, not present here, the LPA prohibits an allocation that has a material adverse effect on the limited partners. That prohibition is an affirmative obligation that is not modified by Section 6.10(d) of the LPA.

B. The Complaint Pleads That EEP GP Breached the LPA

The court below admittedly failed to parse through the provisions of the LPA to evaluate plaintiff's claims for breach of contract, holding that the failure to sufficiently allege bad faith was fatal to all of his claims, although later in its Opinion, the court declined to consider plaintiff's claim for reformation because plaintiff had not pled fraud or mistake.[33]

Defendants argue erroneously that even if bad faith was not an element to

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supplants this standard." *Norton*, 67 A.3d at 362.

[31] For example, Section 6.6(e) prohibits Enbridge, as an Affiliate, from selling assets to the Partnership on terms that are not fair and reasonable, but Section 6.10(d) does not even purport to apply to Enbridge.

[32] A270.

[33] Op. 28-29, 49-50.

establish breach, adopting the Special Tax Allocation did not breach the LPA.[34] As we explained in our Opening Brief,[35] Section 4.4, which allows the General Partner to issue additional units and to fix the rights of those units, provides the General Partner only with broad discretion to define the rights of the newly issued shares.[36] Or, using the words of Section 4.4(b) (i)-(vii), to fix the rights and duties of "each such class or series of Partnership Securities." It does not give the General Partner the right to reallocate income to existing unitholders, or to a different class or series of Partnership Securities. Moreover, as we explained in our Opening Brief, Section 15.3(b), applies "notwithstanding the provisions of Section 15.1 or 15.2" of the LPA.[37] Therefore, Section 15.1(f), which allows for an amendment in the case of newly issued units under Section 4.4, is trumped by Section 15.3(b).[38] Reading these provisions together, the LPA provides that the General Partner can amend the Partnership Agreement for newly issued units (§15.1(f)), but that amendment cannot enlarge the obligations of the limited partners, unless those partners consent (§15.3(b)).

The fact that Section 4.4(b) allows for the issuance of shares "notwithstanding any provision of this Agreement to the contrary,"[39] does not help

[34] AB 21-26.
[35] OB 24-25.
[36] A250.
[37] OB 16, A295.
[38] OB 24-25, A294-A295.
[39] A250.

defendants and further supports plaintiff's argument that Section 4.4(b) allows EEP GP to fix only the rights, duties and obligations of those newly issued shares. Any other interpretation would render Section 15.3(b) a nullity, and would allow EEP GP to make special allocations that were materially adverse to public unitholders despite the prohibition of such amendments in Section 5.2(c). Only if Section 4.4(b) is properly focused on the rights of the newly issued shares, can these provisions be read consistently. Any ambiguity must be construed against EEP GP.

Defendants' argument that the Special Tax Allocation does not increase the public unitholders obligations is particularly self-serving.[40] The Special Tax Allocation was designed to tunnel tax obligations from EEP GP to the public unitholders and allow EEP GP to save taxes. EEP GP's reduced tax obligations were paid for by an increase in the public unitholders' tax obligations. EEP GP's banker reported that the Special Tax Allocation would increase each limited partners' taxable income by $.06 and would "negate most of the accretion to Public Unitholders."[41] Nor is there any merit to defendants' argument that the word "obligations" in Section 15.3(b) only refers to contractual ones.[42] The LPA could have provided for qualifications to the word "obligations" – such as "contractual obligations," or "obligations herein," but there is no such language in the LPA.

[40] AB 23-24.
[41] Op. 13.
[42] AB 23.

Furthermore, the fact that the Special Tax Allocation was adopted in connection with the purchase and sale of the AC Interest to provide additional consideration to EEP GP does not change the analysis. As explained above, defendants' good faith is not part of the analysis under Section 6.6(e).

Defendants erroneously argue that the Court need not consider plaintiff's claim that the Special Tax Allocation breached Section 5.2(c) because plaintiff's counsel disavowed the claim at oral argument.[43] Plaintiff did not waive the Section 5.2(c) argument, it was considered by the court below, and raised on appeal. Rather, defendants misquote a statement by plaintiff's counsel during oral argument.[44] The omitted words from the quote, "but if [Section 5.2(c)] is applicable, it would have prevented this amendment[]," and the argument that follows, make clear that plaintiff's counsel argued that to the extent Section 5.2(c) applied to the amendment, that Section was breached.[45]

Defendants still appear to be arguing that Section 5.2(c) permitted the General Partner to act in its sole discretion, including its "determination as to whether an allocation would have a material adverse effect" on any unitholder, because they claim the Special Tax Allocation was by definition for the proper

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[43] AB 25.

[44] AB 25 n.94. Defendants' quote of counsel's statements inserts a period at the end of the first part of counsel's statement, without any indication that the quote is a partial quote, and leaves off the balance of counsel's statement. *See* A668.

[45] *See* A639.

administration of the Partnership.[46] That argument would effectively gut the express limitation in Section 5.2(c) and allow the General Partner complete discretion where Section 5.2(c) provides otherwise. To the extent the Court finds that Section 5.2(c) applies, it was breached because the Special Tax Allocation would have a material adverse effect on the public unitholders.

C. The Court of Chancery Erred When It Expanded the LPA's Exculpatory Provision

The court below dismissed Brinckerhoff's claim for reformation holding that Brinckerhoff's claim for reformation "fails as a matter of law" because Brinckerhoff "was required [and failed] to plead either fraud, mutual mistake or unilateral mistake with knowing silence."[47] Contrary to defendants' arguments, this Court reviews such legal determinations *de novo.*[48]

1. Plaintiff's Claim for Reformation Should Not Have Been Dismissed

Defendants first argue that the court in *Brinckerhoff II* erroneously expanded the scope of a reformation claim by adding the word "generally" in front of a quote from *James River-Pennington Inc. v. CRSS Capital, Inc.*,[49] concerning the standard

[46] AB 25-26.
[47] Op. 50.
[48] *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015). Defendants concede that the Court of Chancery is vested with broad discretion to fashion equitable relief, but argue erroneously, that the court below exercised its discretion by dismissing plaintiff's reformation claim. AB 27. As evident from the decision, the Court of Chancery did not consider its equitable powers, holding instead that Brinckerhoff's claim failed as a matter of law.
[49] 1995 Del. Ch. LEXIS 22, at *19 (Mar. 6, 1995); AB 30-31.

claim for reformation.[50] In *Brinckerhoff II*, the court recognized that despite the general rule, there were cases, such as *Loral*, where the Court of Chancery's broad remedial powers allowed it to fashion an appropriate equitable remedy, including one that involves reforming the parties' agreement.[51] Defendants also ignore the Court of Chancery's decision in *Zimmerman v. Crothal*,[52] cited in our Opening Brief, where the court similarly found that the reformation remedy was available in the appropriate circumstances.[53] Furthermore, even in *James River-Pennington Inc.*, the court acknowledged that: "[r]eformation is an equitable right, and when it would be inequitable to enforce a contract, reformation should be available as a remedy."[54]

Defendants next argue plaintiff relied on only cases that involved claims for contractual breaches of fiduciary duty. In *Loral*, the court rejected this argument:

> The defendants have argued that reformation is an inappropriate remedy absent fraud or mistake, and therefore that I lack the power to convert the Preferred Stock into non-voting common stock. The defendants support their argument with contract cases that purport to limit the circumstances in which this court may use the equitable remedy of reformation . . . . The glaring problem with the defendants' argument is again a category error – this is not a contract case

[50] AB 30.
[51] *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *14 (citing *In re Loral Space & Communs. Consol. Litig.*, 2008 Del. Ch. LEXIS 136, *120 (Sept. 19, 2008) ("[T]his court has broad discretion to remedy breaches of fiduciary duty, including reformation when, as here, that is appropriate to remedy a fiduciary violation.")).
[52] 62 A.3d 676, 713 (Del. Ch. 2013); OB 21.
[53] *Zimmerman*, 62 A.3d at 713 (noting that the reformation remedy "typically" is used for mutual mistake but it could also be used to remedy a fiduciary breach).
[54] 1995 Del. Ch. LEXIS 22, at *22.

> involving the reformation of a contract to effectuate the parties' intent; it is a fiduciary duty case, and this court has broad discretion to remedy breaches of fiduciary duty, including reformation when, as here, that is appropriate to remedy a fiduciary violation.[55]

The LPA modifies EEP GP's common law fiduciary duties and replaces those duties with contractual fiduciary duties. Under the circumstances, the Court of Chancery has broad discretion to fashion equitable relief, such as reformation. Defendants next argue that the 2004 amendments to DRULPA, invalidated the reasoning behind *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*[56] This is simply not so. The 2004 amendments did not overrule the holding in *Gotham.* Instead, *Gotham* is yet another case to involve the breach of a contractually defined duty where the Court of Chancery was able to award equitable damages:

> The Partnership Agreement provides for contractual fiduciary duties of entire fairness. Although the contract could have limited the damage remedy for breach of these duties to contract damages, it did not do so. The Court of Chancery is not precluded from awarding equitable relief as provided by the entire fairness standard where, as here, the general partner breached its contractually created fiduciary duty to meet the entire fairness standard and the partnership agreement is silent regarding damages . . . .[57]

Finally, plaintiff is not attempting to repackage his claim for money damages. Reformation will avoid the task of having to estimate each public

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[55] *Loral*, 2008 Del. Ch. LEXIS 136, at *120 n.161.
[56] 817 A.2d 160 (Del. 2002).
[57] *Id.* at 175*; see also Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *17 (finding no basis "to expand the exculpatory rights . . . beyond the protections clearly provided in" the LPA). The fact that plaintiff in *Gotham* sought rescission does not change the analysis. For breaches of contractual fiduciary duties, *equitable relief* is part of the Court of Chancery's powers. Equitable relief clearly includes reformation.

unitholders' future tax obligations, and allow for an adjustment in EEP GP's interest in EEP by reducing the number of its Class E Units. Reforming the related-party transaction, particularly in the context of a controlled MLP with no employees and no operations, is readily possible.

2. Plaintiff's Claim for Rescission Should Not Have Been Dismissed

Defendants argue in error that plaintiff has not explained how the remedy of rescission could be implemented. Defendants do not dispute that the AC Interest is accounted for as a pass through of the percentage interest in a separate operating partnership whose operations were unaffected by the Transaction. Prior to the Transaction, EEP and EEP GP shared profits and distributions from the AC Interest on a 1/3, 2/3 basis. The Court of Chancery can restore that percentage, cancel the Class E Units, restore the affiliated-party indebtedness, and strike the Special Tax Allocation.

II. THE COURT OF CHANCERY IMPROPERLY DISMISSED PLAINTIFF'S CLAIM FOR MONEY DAMAGES

A. The Complaint Pleads Bad Faith Conduct on the Part of the Defendants

While the burden to plead bad faith is admittedly high, it is not insurmountable. Plaintiff pled specific facts, summarized in ¶ 105,[58] that, if proven at trial, would meet his burden. Defendants argue that several of the allegations relating to bad faith, independently, were not enough. However, it is the totality that matters. Plaintiff has pled facts showing that it is reasonably conceivable the Special Committee agreed to a Transaction that provided excessive consideration to EEP GP in order to accommodate Enbridge.

Defendants argue there was no reason to consider the 2009 Sale because the Transaction should be considered in the context of similar or related transactions. It is hard to imagine a more similar transaction than the sale of the same asset four years earlier. Omitting the most comparable transaction cannot so easily be dismissed, especially where including the 2009 Sale in the multiples would have skewed the analysis materially downward. That the Special Committee did not discuss the 2009 Sale or the change in valuation methodology (from relative cost to fair market value) is another indication of an effort to justify a higher price.

Defendants argue that Simmons did value the Special Tax Allocation,[59] but

[58] A54-56.
[59] AB 17.

that contention is not supported by its analysis.[60] No one disputes that Simmons was aware of the Special Tax Allocation and even assessed its impact on accretion. Simmons did not, however, value the Special Tax Allocation when comparing the Transaction to others, or in determining fairness when evaluating the so-called "give and the get." EEP received a $1 billion asset, but paid much more. Plaintiff met his pleading burden.

B. The Court Erred in Dismissing Plaintiff's Implied Covenant Claim

Plaintiff alleged that EEP GP breached the implied covenant by purportedly relying upon the flawed Simmons Fairness Opinion.[61] EEP GP is not entitled to a conclusive presumption because EEP GP did not receive a qualified *legal* opinion that the Special Tax Allocation was permitted under the LPA. EEP GP also breached the implied covenant by relying upon a Fairness Opinion that EEP GP knew did not value the additional consideration paid pursuant to the Special Tax Allocation.[62]

Relying on *Norton*, defendants erroneously argue that Simmons was not obligated to value the Special Tax Allocation separately, only whether the

[60] A79-120.
[61] Section 6.10(b) provides that EEP GP is entitled to a conclusive presumption of good faith only if it reasonably believes that the advice is within the advisor's expertise. A280.
[62] Defendants' assertion that the conclusive presumption precludes an implied covenant claim (AB 20) was expressly rejected by this Court, which stated that this rule would lead to "nonsensical" results. *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 421 (Del. 2013). Defendants rely upon a decision that pre-dates *Gerber*. AB 20 n.74.

Transaction was fair to the Partnership.[63] In *Norton,* plaintiff conceded that the unaffiliated unitholders received a fair price.[64] Not so here. Defendants claimed in its press release,[65] and still in this appeal,[66] that EEP paid $1 billion for the AC Interest. But that claim is clearly erroneous, unless one forgets about the significant additional consideration paid on account of the Special Tax Allocation.

In *Gerber,* this Court sustained a claim for breach of the implied covenant where a financial advisor's opinion failed to value the consideration limited partners received for their units, but only valued the total consideration received by the Partnership in two related transactions.[67] Here, plaintiff alleges the analogous scenario: the Fairness Opinion valued only a portion of the total consideration paid to EEP GP (the Class E Units and debt repayment), but failed to value the material, additional consideration paid through the Special Tax Allocation. EEP GP did not know the total price being paid for the AC Interest. EEP GP, therefore, could not have had a reasonable belief that the Transaction as a whole was in the best interests of the Partnership.

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[63] AB 18-19.
[64] *Norton,* 67 A.3d 366.
[65] A76.
[66] AB 9.
[67] *Gerber,* 67 A.3d at 422. *Norton* does not compel a different result. In *Norton,* plaintiff did not allege that the financial advisor's opinion breached the implied covenant. Further, the financial advisor did value the total consideration received in the transaction. *Norton,* 67 A.3d at 367-68; *see also Gerber,* 67 A.3d at 413 n.29.

III. THE COURT BELOW ERRED BY DISMISSING PLAINTIFF'S CLAIMS AGAINST THE REMAINING DEFENDANTS

The LPA does not eliminate the Remaining Defendants' fiduciary duties. Defendants claim this issue was decided in *Brinckerhoff III*.[68] The Court there did not touch upon, yet alone reach, that question.[69] Defendants next claim that plaintiff's interpretation of LPA Section 6.10(d) is contrary to *Norton*. But there can be no doubt that Section 6.10(d), by its plain language, is limited in its applicability to the General Partner.[70] *Norton* did not hold otherwise.[71] The Remaining Defendants still owe (and breached their) fiduciary duties.[72]

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[68] AB at 1 & 19 (both citing *Brinckerhoff III*, 67 A.3d at 373).

[69] *See id.* (determining that plaintiff waived his claims for reformation/rescission and not reaching the merits of equitable claims). The *Brinckerhoff I* court acknowledged that "EEP GP, EEP GP's Board, Enbridge Management, and Enbridge all, at least potentially, owe fiduciary duties to EEP," a finding that was not disturbed on appeal. 2011 Del. Ch. LEXIS 149, at *22.

[70] *See* Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, at 16 n.20 (Aug. 2014) (noting that there are "agreements, however, that omit particular parties, leaving them exposed to traditional fiduciary" duties); *see also* authorities cited OB at 34 n.127.

[71] *Norton*'s holding was limited to K-Sea GP's fiduciary duties. 67 A.3d at 362. As to EEP GP, to modify fiduciary duties, it must meet the condition precedent that it actually believe its act was "in, or not inconsistent with, the best interests of the Partnership," and EEP GP's belief must be "objectively reasonable." *KMI*, 2015 Del. Ch. LEXIS 221, at *17 n.1. In light of the authorities suggesting the language at issue does not eliminate fiduciary duties, this Court should not rigidly adhere to a contractual construction that does not reflect the LPA's plain language. *Id.*; Mohsen Manesh, *Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs*, 37 JOURNAL OF CORP. LAW 55, 606 (Spring 2012).

[72] The Complaint also states a claim for aiding/abetting and tortious interference. Plaintiff has stated a claim for the underlying breach. Defendants' reliance on *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 194 (Del. Ch. 2014) ignores that *Allen* specifically exempted the situation, present here, where the LPA at issue does not completely eliminate fiduciary duties. The Court's decision in *Gotham* also remains good law. Defendants address plaintiff's argument that Enbridge is directly liable for breach only in their summary of argument, arguing that Enbridge cannot be liable based on a quoted passage from *Brinckerhoff I*. AB 6-7 & n.18. Defendants take the quote out of context (it only dealt with whether EEP GP's Board could rely on the conclusive presumption, which only protected the GP) and they misquote the Court of Chancery opinion (eliminating the court's *may* qualifier). *Brinckerhoff I*, 2011 Del. Ch. LEXIS 149, at *30.