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Case Number 273,2016

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.; ENBRIDGE, INC., ENBRIDGE ENERGY MANAGEMENT, L.L.C.; JERREY A. CONNELLY, REBECCA B. ROBERTS, DAN A. WESTBROOK, J. RICHARD BIRD, J. HERBERT ENGLAND, C. GREGORY HARPER, D. GUY JARVIS, MARK A. MAKI, JOHN K. WHELEN, ENBRIDGE PIPELINES (ALBERTA CLIPPER) L.L.C. AND ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

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

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APPELLANT'S OPENING BRIEF

(caption cont'd.)

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NATURE AND STAGE OF PROCEEDINGS

Plaintiff appeals from the Court of Chancery's Memorandum Opinion[1] dismissing the Complaint[2] in its entirety. This appeal is the latest in a line of cases requiring the Court to interpret the rights of the parties to a Delaware limited partnership agreement ("LPA") in the context of a publicly traded master limited partnership ("MLP"). This case also requires the Court to resolve a conflict between two Court of Chancery decisions concerning the scope of relief available for breaches of the same LPA. The disagreement concerns whether, absent allegations that the "agreement" to be reformed was the product of "fraud, mutual mistake or . . . knowing silence," the Court of Chancery can enforce the terms of an LPA and set aside an amendment and/or reform a transaction the general partner adopted in breach of the LPA.[3] The Court of Chancery does have that authority.

Four years ago, the same parties litigated the terms of the same LPA. Brinckerhoff challenged the sale by Enbridge Energy Partners, L.P. ("EEP" or the "Partnership") to Enbridge Inc. ("Enbridge") of 66.67% of the Alberta Clipper Pipeline (the "2009 Sale"),[4] and sought both monetary damages and equitable relief.

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[1] Attached as Exhibit A hereto ("Opinion" or "Op.").
[2] A15-74.
[3] *Compare* Op. 50 *with Brinckerhoff v. Enbridge Energy Co., Inc.*, 2012 Del. Ch. LEXIS 291, at *7, 17 (May 25, 2012) ("*Brinckerhoff II*").
[4] That litigation spawned three reported decisions: *Brinckerhoff v. Enbridge Energy Co.*, 2011 Del. Ch. LEXIS 149 (Sept. 30, 2011) ("*Brinckerhoff I*"); *Brinckerhoff II*; and *Brinckerhoff v. Enbridge Energy Co.*, 67 A.3d 369 (Del. 2013) ("*Brinckerhoff III*.")

After the Court of Chancery dismissed the complaint, this Court remanded for resolution the question of the sufficiency of plaintiff's alternative claims for reformation and rescission.[5]

On remand, the Court of Chancery held that the LPA's provision exculpating the general partner and its affiliates from liability for money damages ***did not*** preclude the remedy of reformation. The Court of Chancery also held that the complaint stated a claim that the 2009 Sale was not fair and reasonable to the Partnership in breach of the LPA, and that the claim could be remedied by reforming the parties' agreement.[6] The court rejected the argument that plaintiff could not obtain reformation absent allegations of "fraud, mutual mistake or . . . knowing silence." The court, however, held that plaintiff had not fairly preserved his reformation claim, and so it was waived.[7] On appeal, this Court affirmed on that basis.[8]

Late in December 2014, Enbridge Energy Company, Inc. ("EEP GP" or "General Partner")[9] caused the Partnership to repurchase from Enbridge (the

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[5] *Brinckerhoff v. Enbridge Energy Co.*, C.A. No. 574, 2011 (Del. Mar. 27, 2012) (ORDER).
[6] *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *7, 14-15, 17.
[7] *Id.* at *7, 17.
[8] *Brinckerhoff III*, 67 A.3d at 373.
[9] EEP GP delegated to defendant Enbridge Energy Management, L.L.C. ("Enbridge Management") its authority to manage and control the business of EEP (Compl. ¶ 23 (A27), LPA 6.15 (A282)) and the Complaint alleges that both EEP GP and Enbridge Management are liable for breach of the 6the LPA. Compl. Counts I, II and VII and VIII (A49-58, 68-73). Unless otherwise necessary, this brief refers to EEP GP and Enbridge Management collectively as EEP GP.

"Transaction") the same 66.67% interest in the Alberta Clipper Pipeline (the "AC Interest").[10] While the reported purchase price was $1.0 billion,[11] Enbridge was given additional compensation. On January 2, 2015, EEP GP amended EEP's 6th LPA to add Section 5.2(i), to provide for a "special allocation" of hundreds of millions of dollars of EEP's gross income from Enbridge's units to units owned by plaintiff and EEP's unaffiliated unitholders (the "Special Tax Allocation").[12] The Special Tax Allocation would reduce Enbridge's tax obligations by hundreds of millions of dollars and increase the taxable income (and accompanying tax obligations) of public unitholders. As such, the amendment creating the Special Tax Allocation breached Section 15.3(b) of the 6th LPA, which prohibited amendments that increased a limited partner's obligations without the consent of each affected limited partner.[13] The amendment also breached Section 5.2(c) of the LPA, which allowed for special allocations only in certain specific circumstances, not presented here, and only if such allocation would not have a materially adverse effect on the partners.[14] Brinckerhoff seeks, *inter alia*, to *enforce* the parties' agreement in the 6th

[10] Compl. ¶ 65 (A42-43).
[11] *Id.*; Enbridge Inc., Press Release, December 23, 2014 ("Press Release") (A75-78).
[12] Compl. ¶ 2 (A19); A474.
[13] LPA 15.3(b) (A295). At all relevant times, the Partnership's operative LPA was the "Sixth Amended and Restated Agreement of Limited Partnership of Enbridge Energy Partners, L.P.," (the "6th LPA"). In connection with the transaction at issue, EEP GP amended the 6th LPA to adopt the "Seventh Amended and Restated Agreement of Limited Partnership of Enbridge Energy Partners, L.P." (the "7th LPA"). Brinckerhoff refers to each agreement, generally, as the "LPA." Where relevant, Brinckerhoff distinguishes between the "6th LPA" and the "7th LPA."
[14] LPA 5.2(c) (A270).

LPA, by reforming the 7th LPA.

Plaintiff's arguments below were guided by the Court of Chancery's decision in *Brinckerhoff II* that, even though plaintiff did not allege fraud or mistake, plaintiff's complaint stated a claim that could be remedied through reformation.[15] Plaintiff, in his complaint and at oral argument, focused on the allegations that: (i) reformation was not barred by Section 6.8 of the LPA; (ii) reformation was well suited in the MLP context and in this case; and (iii) the remedy could be implemented by reforming the 7th LPA to eliminate Section 5.2(i) (Special Tax Allocation), which was adopted in violation of the 6th LPA, and/or by adjusting the amount of consideration EEP paid in the Transaction.[16]

On April 29, 2016, the Court of Chancery rendered the Opinion. The court agreed that Section 6.8(a) "does not preclude an award of equitable relief against any person, including EEP GP, Enbridge Management, or Enbridge."[17] The court also suggested that EEP GP's adoption of the Special Tax Allocation breached the 6th LPA: "When viewing the Special Tax Allocation in isolation, apart from the LPA's governance provisions, Brinckerhoff's construction of Sections 4.4(b), 5.2(c) and 15.3(b) provide a platform on which 'reasonably conceivable' claims of breach

[15] *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *14-15; A349-52.
[16] Compl. ¶¶ 94-96 (A52), ¶¶ 121-123 (A60), ¶¶ 169-176, Count VIII (A71-73); Transcript of Argument on Motion to Dismiss ("MTD Tr.") at 30-55 (A632-57), 63-69 (A665-71), 80-84 (A682-86).
[17] Op. 49.

might be constructed."[18] The court, however, found that it was without the power to reform the 7th LPA to eliminate the unauthorized amendment because plaintiff did not allege that the Special Tax Allocation was "the product of either fraud, mutual mistake or unilateral mistake with knowing silence."[19] The Court of Chancery noted, but declined to follow, the court's ruling in *Brinckerhoff II*.[20]

The Court of Chancery erred. As in *Brinckerhoff II*, plaintiff seeks to invoke the court's equitable power to enforce the parties' agreement.[21] Plaintiff presented his argument that EEP GP's adoption of the 7th LPA breached the 6th LPA, and, therefore, the 7th LPA can and should be reformed and/or the transaction rescinded.[22] The Court of Chancery could readily reform the LPA and/or the Transaction[23] to remedy the breach. Given the MLP structure and the relationship with Enbridge, neither remedy would be difficult to implement. Further, given that the Special Tax Allocation is an annual reallocation in perpetuity, and effects each

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[18] *Id.* at 40-43.
[19] *Id.* at 49-50 (quoting *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *14-15).
[20] *Id.* The court also stated that with respect to plaintiff's claim for rescission, the claim failed because the Complaint did not explain how money damages "would be 'inadequate to do justice.'" Op. 51. As explained below, this too was error.
[21] *See, e.g.*, *In re Loral Space & Commc'ns Inc. Consol. Litig.*, 2008 Del. Ch. LEXIS 136, at *120 and n.161 (Sept. 19, 2008) (rejecting the argument that reformation was not available to remedy a breach of duty absent allegations of fraud or mistake as a "category error"), *aff'd sub nom*, *Loral Space & Commc'ns Inc. v Highland Crusader Offshore Partners, L.P.*, 977 A.2d 867, 868 (Del. 2009).
[22] *E.g.*, A336-56; MTD Tr. at 30-55 (A632-57), 63-69 (A665-71).
[23] Specifically, the Contribution Agreement by and among EEP GP, Enbridge Pipelines (Alberta Clipper) L.L.C. ("Pipelines AC") and the Partnership, dated as of December 23, 2014 (the "Contribution Agreement") (A319, A329).

unitholder differently, money damages would not be ascertainable or adequate.[24]

The Special Tax Allocation breached EEP GP's affirmative, *non-discretionary* obligations under the 6th LPA.[25] Section 15.3(b) prohibited EEP GP from amending the 6th LPA in a manner that increased *any* limited partner's obligations unless that limited partner consented. Section 5.2(c) prohibited EEP GP from adopting an allocation that would have a material adverse effect on the partners, which the Special Tax Allocation plainly does. No other provision of the allowed EEP GP to circumvent these affirmative obligations.

The fact that the Special Tax Allocation was adopted in connection with a related-party transaction in which new units were issued does not change the analysis.[26] The LPA could have, but did not, allow for an amendment that increased the limited partners' obligations if the amendment was adopted in connection with a conflicted transaction. Even if EEP GP had been afforded some discretion as to contracts with affiliates, and it was not, that discretion would not have applied to other expressly *non-discretionary* contractual provisions, such as Section 15.3(b)

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[24] A351.

[25] *See, e.g.*, *Norton v. K-Sea Transp. Partners, L.P.*, 67 A.3d 354, 364 (Del. 2013) (LPA does not permit GP to act with discretion where it "creates an affirmative obligation"); *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 386-87 (Del. Ch. 2010) ("*TEPPCO*") (requirement that transactions between partnership and general partner be "fair and reasonable" created non-discretionary standard).

[26] Indeed, it would be an absurd result if the provisions that expressly and unconditionally protected the limited partners against EEP GP's over-reaching could be circumvented when EEP GP engaged in a conflict transaction – the scenario in which the limited partners are most in need of protection.

and 5.2(c). Section 15.3(b) also restricts any authority under Section 4.4(d) to amend the LPA in connection with the issuance of new units.[27] Delaware law allows for broad freedom of contract, but those contracts will be enforced as written.

Section 6.10(d)'s good faith standard is not relevant to whether the Special Tax Allocation breached the affirmative obligations of the 6th LPA.[28] As this Court has explained, Section 6.10(d) *limited* the LPA's otherwise broad grants of discretion.[29] That broad grant of discretion does not apply where the agreement specifies an affirmative contractual obligation.[30]

Finally, contrary to the court's ruling, Section 6.8(a) does not establish a "free-standing enigmatic standard" modifying Section 15.3(b) and Section 5.2(c) to allow EEP GP to do anything it wants regardless of the adverse effect on limited partners as long as it acts in "good faith."[31] Section 6.8(a) establishes a standard of "good faith" solely as to the availability of monetary relief, and that standard is the same as the objective "best interests of the Partnership" standard set out in 6.10(d).[32]

Turning to the court's holding with respect to bad faith and failure to

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[27] *Compare* Section 15.3(b) *with* Section 15.1(f) (A295).
[28] A280.
[29] *Norton*, 67 A.3d at 361.
[30] *Id.* at 362 ("*unless another provision supplants [Section 6.10(d)'s] standard, . . .*") (emphasis added); *TEPPCO*, 986 A.2d at 387. *See* LPA 6.9(b) (certain provisions expressly permit EEP GP to act with discretion; if another standard is specified, EEP GP must meet that other standard) (A279-80); LPA 6.10(d) (A280). *Norton* did not involve a claim for equitable relief and, therefore, did not expressly address the availability of equitable remedies.
[31] A279; Op. 45 n.123.
[32] *Norton*, 67 A.3d at 362.

overcome Section 6.8(a) in connection with the Special Tax Allocation, contrary to the Court's holding, the Complaint alleges "facts supporting an inference that [EEP GP] had reason to believe that it acted inconsistently with the Partnership's best interests when" it amended the 6th LPA to adopt the Special Tax Allocation.[33] The Court of Chancery failed to give proper weight to, among other factors, the Complaint's allegations that defendants adopted the Special Tax Allocation to "tunnel" hundreds of millions of dollars of additional consideration to Enbridge.[34]

The Court of Chancery attempted to avoid these allegations by finding that the Special Tax Allocation was adopted in connection with the overall transaction and, thus, holding that the Fairness Opinion from the Special Committee's financial advisor, Simmons & Company International ("Simmons"), insulated EEP GP from monetary liability.[35] But, the Special Tax Allocation was not part of Simmons's *valuation* of the $1 billion purchase price, and none of the twenty-seven comparable transactions referenced by the court included any allocation of income such as provided by the Special Tax Allocation.[36] Simmons opined as to the Transaction as

[33] *Id.* (setting forth the pleading standard for bad faith under Section 6.10(d) and 6.8(a)).
[34] *See In re EZcorp Inc.*, 2016 Del. Ch. LEXIS 14, at *5 (Jan. 25, 2016) ("As control rights diverge from equity ownership, the controller has heightened incentives to engage in related-party transactions and cause the corporation to make other forms of non-*pro rata* transfers. Economists call this 'tunneling.'").
[35] Op. 44-45; December 23, 2014, Fairness Opinion (A306-07).
[36] December 23, 2014, Presentation Prepared for the Special Committee ("Simmons Presentation") (A54, 105-12, 118-20).

a whole, not as to (a) the Special Tax Allocation's fairness,[37] (b) whether including the Special Tax Allocation as part of the deal was in the best interests of the Partnership, or (c) whether it breached the LPA.[38]

The factual allegations concerning bad faith in this case are more compelling than those in *Brinckerhoff I* and *III*. Here, the Partnership agreed to pay $200 million more to repurchase the same asset it sold in 2009, despite declining EBITDA, slumping oil prices, the absence of expansion rights sold in 2009, and other objective factors.[39] And, on top of that, EEP GP added hundreds of millions of dollars more in benefits for itself, taken from the public unitholders. That substantial benefit to EEP GP was not valued in determining whether the Transaction's terms were fair and reasonable to the Partnership. This self-serving conduct evidences the sort of behavior that cannot be reasonably considered in the Partnership's best interest and is inexplicable on any ground other than bad faith.

[37] Fairness Opinion (A303-07). *See Gerber v. Enterprise Prods. Holdings, LLC.*, 67 A.3d 400, 421 (Del. 2013) (advisor opinion that did not value all consideration paid in a transaction was insufficient and breached implied covenant).
[38] A322-23.
[39] *E.g.*, Compl. ¶¶ 5-6 (A20-21).

SUMMARY OF ARGUMENT

1. The Court of Chancery erred by dismissing Brinckerhoff's claims to reform or rescind the 7th LPA to eliminate the Special Tax Allocation. The Special Tax Allocation breached Section 15.3(b) by increasing each public unitholder's obligations without their consent. The Special Tax Allocation also breached Section 5.2(c) because it was not done for the proper administration of the Partnership or to preserve uniformity of units, and because it had a material adverse effect on the public unitholders. "Good faith" is irrelevant to the Section 15.3(b) or 5.2(c) reformation and rescission analysis. Contrary to the court's decision, reformation or rescission of the 7th LPA to eliminate Section 5.2(i), is available to remedy EEP GP's breach of contract.

2. The Court of Chancery erred by dismissing Brinckerhoff's claims for reformation or rescission of the Transaction, which breached Section 6.6(e) because it was not "fair and reasonable" to the Partnership. The Special Tax Allocation increased the consideration paid to Enbridge far above the amount EEP GP (or Simmons) purportedly found to be fair. EEP GP's "good faith" is irrelevant to whether the Transaction breached Section 6.6(e) (as opposed to the availability of money damages for such breach). Reformation or rescission is available.

3. The Court of Chancery erred by dismissing Brinckerhoff's claims against EEP GP for monetary damages. The Transaction price was unfair and the Special Committee acted in bad faith by agreeing to the Special Tax Allocation at all, much

less without valuing the additional consideration. The Special Committee also failed to consider the price Enbridge paid in 2009,[40] and that conditions had worsened materially since then. EEP GP is not entitled to a conclusive presumption of good faith pursuant because, among other reasons, Simmons failed to value the Special Tax Allocation. For these same reasons, the Court of Chancery erred when it held that Brinckerhoff failed to plead a breach of the implied covenant.

4. The Court of Chancery erred by dismissing the claims against Remaining Defendants.[41] The LPA did not eliminate or modify the fiduciary duties owed by the Remaining Defendants and they are liable as controllers.

5. The Complaint alleges facts that raise an inference that the Remaining Defendants aided and abetted EEP GP's breach or tortuously interfered with the 6th LPA. Finally, having acted in bad faith, none of the Remaining Defendants are entitled to exculpation for monetary damages under Section 6.8(a).

[40] As required by LPA 6.9(c) (A280).

[41] Collectively, the Director Defendants and Enbridge are the "Remaining Defendants." Pipeline AC and Enbridge Energy, Limited Partnership ("OLP") are each under Enbridge's control (Compl. ¶¶ 37, 38, 39 (A34)) and are named in the Complaint as parties to the Contribution Agreement, solely for equitable relief.

STATEMENT OF FACTS

A. The Parties

Plaintiff owns 73,080 Class A EEP Common Units and has owned those units continuously since December 26, 2008.[42] EEP is a publicly traded Delaware MLP. Enbridge controls EEP GP and Enbridge Management. The Alberta Clipper Pipeline was operated through a separate operating limited partnership, OLP, by employees of Enbridge, and EEP's interest in the pipeline was represented by a percentage ownership interest in OLP. [43]

B. EEP's Repurchase of the AC Interest

Prior to the 2009 Sale, EEP owned 100% of Alberta Clipper (US). In the 2009 Sale, EEP sold a 66.67% interest in the pipeline (the "AC Interest") to EEP GP for $800 million, essentially "at cost."[44] The $800 million price represented a 7x multiple of the approximately $114 million projected EBITDA.[45] During the period from the 2009 Sale to the end of 2014, the market for oil worsened significantly. Crude oil prices dropped by almost 50%. The AC Pipeline's tariffs faced increased

[42] Compl. ¶ 19 (A26); A328.
[43] Compl. ¶ 25 (A28-29); A329. OLP is the operating limited partnership through which the EEP and EEP GP owned their respective interest in the AC Interest. Compl. ¶ 25 (A28-29); A329.
[44] A329.
[45] Compl. ¶¶ 63, 105 (A42, 54-55); A329.

risk that they would be rebased with long-term negative effect on revenue. The AC Interest's projected EBITDA dropped from 2009 by 20% to $93 million.[46]

Nonetheless, on December 23, 2014, Enbridge announced that EEP agreed to purchase the AC Interest for an "aggregate consideration of $1 billion, a multiple of 10.7x EBITDA." The reported purchase price consisted of $694 million in newly issued Class E Units and approximately $306 million in repaid debt. The press release announced that the Class E Units would be "entitled to the same distributions as Class A common units held by the public."[47] The Press Release, however, did not tell the entire story. Because of the Special Tax Allocation, EEP GP agreed to pay Enbridge much more than $1 billion for the AC Interest.[48]

The Special Tax Allocation provide two benefits to Enbridge. First, EEP GP expected to realize a $410 million taxable gain on the sale of the AC Interest back to EEP.[49] The Special Tax Allocation lowered the amount of Partnership income allocated to EEP GP's Class E Units, each year, sufficient to offset the taxable

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[46] *Id.* The Court of Chancery seemed to attribute weight to the recovery of the financial markets and that the pipeline had been constructed and was operational, as motives for Enbridge and EEP to explore whether EEP should reacquire the AC Interest. Op. 10-11. The pleaded facts suggest a different reason: Enbridge was motivated by the opportunity to sell a depressed pipeline asset, whose projected EBITDA declined by 20% over five years, for a 25% profit, *plus* hundreds of millions of dollars in tax benefits tunneled from the public unitholders.

[47] Press Release (A75-78).

[48] The Press Release did not mention the Special Tax Allocation. *Id.* The Special Tax Allocation was disclosed in a Form 8-K filed on December 30, 2014. The Transaction closed on January 2, 2015. (A136; A206).

[49] Compl. ¶¶ 55-58 (A39-41), Simmons Presentation EEPLP 317-19 (A113-15).

income EEP GP would recognize on the sale.[50] Second, EEP GP would receive less revenue (cash distributions) from EEP on the Class E Units than EEP GP would have received from the AC Interest. The Special Tax Allocation artificially lowered EEP GP's allocation of Partnership income by an additional amount to lower EEP GP's tax burden.[51]

For public unitholders (*i.e.*, excluding the General Partner's units), the Special Tax Allocation allocates 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, materially increasing their tax obligations.[52] As a result, the Special Tax Allocation tunnels hundreds of millions of dollars from the public unitholders to EEP GP. Although the Special Committee knew that the Special Tax Allocation represented additional consideration paid to EEP GP for the AC Interest, it never learned how much that consideration was worth.[53]

The Simmons presentations did explain the negative burden that the Special Tax Allocation placed on the public unitholders. The Special Tax Allocation would

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[50] Under MLP accounting rules, partnership allocations of gross income to unitholders are mere book entries – no monies are transferred. However, those amounts of gross income are immediately taxable to the unitholder. Partnership distributions of cash to unitholders are not immediately taxable, but the distributions lower the unitholder's cost basis in the units. National Assoc. of Publicly Traded Partnerships, BASIC TAX PRINCIPLES FOR MLP INVESTORS, available at http://tinyurl.com/q6z77re (A690-91).

[51] Simmons Presentation EEPLP (A113-15).

[52] Op. 11-12 n.26; Simmons Presentation EEPLP 317-19 (A113-15); 7th LPA Section 5.2(i) (A474).

[53] Compl. ¶ 68 (A43-44).

increase each limited partner's taxable income by $.06 per annum for 2015-2018 (the period covered by the projections), an amount that was about the same as the amount of additional income per unit from the Alberta Clipper project.[54] Simmons informed the Special Committee that the Special Tax Allocation would "*negate most of the accretion the Public Unitholders*" would otherwise have obtained from the Transaction.[55] Nothing in the Simmons presentations explains *why* the public unitholders should bear Enbridge's tax burden or repay to EEP GP a portion of the revenue stream EEP had just purchased for the purportedly "fair" price of $1 billion.

C. The Partnership Agreement

1. Allocation of Income and Loss and Amendments

The 6th LPA provided that income and loss shall be allocated for federal income tax purposes on a pro-rata basis to all of the limited partner units, regardless of class.[56] It provided, in Section 5.2(c), that EEP GP could adopt "special allocations" of income for federal income tax purposes *only* for the purpose of "proper administration of the Partnership" or to preserve the uniformity of the Units.[57] Even in such circumstances, the 6th LPA restricted EEP GP's discretion,

[54] Simmons Presentation EEPLP 317 (A113); *see also* Compl. ¶¶ 58-59 (A40-41). Simmons suggested that the Special Tax Allocation "will be partially offset by additional allocated depreciation to the A, B, and D units." A113. However, the 7th LPA does not obligate EEP GP to make any additional depreciation allocations to the Limited Partners. A332 n.11.
[55] Compl. ¶ 59 (A41).
[56] 6th LPA 5.1, 5.2 (A264-69); Compl. ¶ 43 (A35).
[57] LPA 5.2(c) (A270).

providing that such an allocation could not "have a material adverse effect on the Partners, [or] the holders of any class."[58]

Article XV addressed amendments. Section 15.1 identified the specific categories of amendments EEP GP could make without the approval of the limited partners, including an amendment in connection with the issuance of a new class or series of Units pursuant to Section 4.4.[59] Section 15.3(b), however, expressly limited that authority:

> *Notwithstanding the provisions of Section 15.1 and 15.2*, no amendment to this Agreement may (i) enlarge the obligations of any Limited Partner without such Limited Partner's consent, which may be given or withheld in its sole discretion.[60]

Section 4.4(b) of the 6th LPA allowed the General Partner to establish the rights of newly issued units, including the allocation of income among those new units.[61] Section 4.4(b) did **not** provide that, in connection with issuing a new class of units, EEP GP could modify the rights or obligations of existing classes of units, or allocate income that should be allocated to the new units to the existing unitholders, thereby increasing existing unitholders' tax obligations. Section 4.4's grant of authority to amend the LPA in connection with the issuance of new units is expressly limited by Section 15.3(b).

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[58] *Id.*
[59] LPA 15.1 (A294-95).
[60] LPA 15.3(b) (emphasis added) (A295).
[61] LPA 4.4(b) & (d) (A250).

2. Contracts with Affiliates and Resolution of "Potential" Conflicts

Section 6.6 provided express standards applicable to specific types of conflict transactions.[62] Section 6.6(e) provided that neither EEP GP nor its Affiliates[63] could purchase property from, or sell property to, EEP "except pursuant to transactions that are fair and reasonable to the Partnership."[64] Section 6.6(e) does not permit EEP GP to exercise discretion.[65] Nor does it provide that EEP GP could, itself, determine whether the Transaction was fair or reasonable to EEP – whether or not EEP GP did so in good faith.

Section 6.9(a) addressed EEP GP's standards of care when resolving "potential conflicts of interest," not otherwise addressed.[66] Section 6.9(a) applies to conflicted transactions "unless otherwise expressly provided in this Agreement." Section 6.6(e) is the express standard that was applicable to EEP's purchase of property from EEP GP. Further, under Section 6.9(b) where there is an express standard, "the General Partner shall act under such express standard and shall not be subject to any other or different standards imposed by th[e] agreement . . . ."[67]

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[62] A277-78.
[63] Section 6.6(e) expressly binds Enbridge, as an "Affiliate." Enbridge is not entitled to the protections in Sections 6.9(a), 6.10(b) or 6.10(d) (A278-80).
[64] A278. The LPA also provides that "the fair and reasonable nature of such transaction . . . shall be considered in the context of all similar or related transactions." LPA 6.9(c) (A280).
[65] Section 6.6(e)'s objective standard is akin to "entire fairness." *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *8-9.
[66] A279.
[67] LPA 6.9(b) (A279-80).

3. The LPA's Limitation of Liability for Money Damages

Section 6.8(a) provided that EEP GP and "Indemnitees" may not be liable *for monetary damages* to the Partnership or limited partners for losses on behalf of any act done in "good faith."[68] Section 6.8(a) did not provide that such acts, even done in good faith, do not breach the LPA, nor did it preclude the award of equitable relief or otherwise limit available remedies.[69]

4. Other Provisions Relating to the General Partner

Section 6.10(b) provided that where EEP GP acted in reliance upon an opinion of a qualified advisor, it would be conclusively presumed to have acted in "good faith."[70] Section 6.10(b) did not apply to any other person, such as Enbridge or Enbridge's controlled entities.[71] Under Section 6.10(d), any standard of care of duty (*i.e.*, fiduciary or other discretionary duty), shall be modified, waived or limited, to permit EEP GP to act under the LPA, so long as such action is reasonably believed to be in the best interest of the Partnership. Section 6.10(d) does not eliminate or modify the fiduciary duties that Enbridge, as controller, owes to the Partnership or the minority unitholders.

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[68] A279.
[69] Op. 49; *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *16.
[70] A280. *Norton*, 67 A.3d at 362 (Section 6.10(d) defines the LPA's "good faith" standard).
[71] *See Brinckerhoff III*, 67 A.3d at 372 ("The other appellees do not have the benefit of a conclusive presumption, . . .").

ARGUMENT

I. THE COURT BELOW ERRED BY DISMISSING PLAINTIFF'S CLAIMS AGAINST EEP GP FOR REFORMATION OR RESCISSION OF THE SPECIAL TAX ALLOCATION

A. Question Presented

Did the Court of Chancery err by holding that it did not have the equitable power to reform the 7th LPA to set aside amendments enacted in breach of the 6th LPA because the Complaint did not plead the amendments were the product of "fraud, mutual mistake or unilateral mistake with knowing silence"?[72]

B. Scope of Review

A Court of Chancery's ruling on a motion to dismiss is subject to *de novo* review.[73]

C. Merits of Argument

1. The Court of Chancery Has the Discretion to Reform the 7th LPA to Eliminate the Special Tax Allocation

The Court of Chancery is vested with broad discretion to fashion equitable relief for breaches of duty – common law or contractual.[74] The *Brinckerhoff II* court rejected defendants' argument that reformation was available only for fraud and mistake, noting that this was only a "general" rule.[75] It held that, but for plaintiff's

[72] This issue was raised below at A349-352.
[73] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011).
[74] *E.g.*, *Loral*, 2008 Del. Ch. LEXIS 136, at *120.
[75] *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *13-14.

waiver, plaintiff stated a claim for breach of the 6th LPA that could potentially be remedied by reforming the parties' sale agreement.[76]

In this action, the Court of Chancery held otherwise. The Court of Chancery noted the court's decision in *Brinckerhoff II,* but the court failed to distinguish the court's decision in that case that the power to reform the parties' agreement was not contingent upon allegations of fraud or mistake.[77] The Court of Chancery held, incorrectly, that even where plaintiff seeks to remedy a general partner's breach of duties under an LPA, a plaintiff must still plead that "the contract the parties agreed to does not reflect the parties' actual intent."[78]

In *Loral*, the Court rejected this same argument as a "glaring problem" and a "category error."[79] The *Loral* plaintiff, like Brinckerhoff, was not attempting to conform the agreement to the parties' intent. Under such circumstances, the Court of Chancery's "broad remedial powers" include reformation.[80]

Other courts have recognized that, although reformation typically is used to

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[76] *Id.* at *17. Vice Chancellor Noble and the Court of Chancery below were in agreement that Section 6.8(a) did not preclude the availability of equitable relief to remedy breaches of the LPA. *Id*. at *5 ("it is clear from the face of Article 6.8 that it provides exculpation from money damages"); Op. 49.

[77] *Id.* at 50 (citing *Brinckerhoff II*, 2012 Del. Ch. LEXIS 291, at *7).

[78] *Id.* The Court of Chancery relied upon *Universal Compression, Inc. v. Tidewater, Inc.*, 2000 Del. Ch. LEXIS 151, at *23 (Oct. 19, 2000), and *Carey v. Brittingham*, 1992 Del. Ch. LEXIS 74, at *4 (Apr. 6, 1992), for the same general proposition. *Universal Compression* and *Carey* each involved a claim to reform a specific contract that was allegedly breached. Neither involved a claim where plaintiff sought to reform a second contract that was created in breach of the first.

[79] *Loral*, 2008 Del. Ch. LEXIS 136, at *120 n.161; *see also Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002).

[80] *Loral*, 2008 Del. Ch. LEXIS 136, at *120 n.161 (citations therein).

conform contracts to the parties' intent, "[i]t also can be used to remedy a breach of fiduciary duty, in which case the court has broad authority to fashion an appropriate remedy."[81] In *Allen v. El Paso Pipeline GP Co., L.L.C.*, the Court of Chancery recognized that it could remedy a general partner's breach of an LPA "through changes to the partnership agreement" or invalidating the general partner units.[82] Those remedies would necessarily involve reforming one or more contracts, despite the absence of allegations that the contracts did not reflect the parties' agreement.[83] Likewise, DRULPA specifies that fiduciary remedies are still available for partnership wrongs unless they are specifically eliminated.[84]

In *Gotham Partners,* this Court noted the availability of such a remedy:

> 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 it contractually created fiduciary duty to meet the entire fairness standard and the partnership agreement is silent regarding damages.[85]

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[81] *Zimmerman v. Crothall*, 62 A.3d 676, 613 (Del. Ch. 2013).
[82] 90 A.3d 1097, 1111 (Del. Ch. 2014).
[83] *See also In re El Paso Pipeline, L.P. Deriv. Litig.*, 132 A.3d 67, 111 (Del. Ch. 2015) ("Delaware cases have recognized the availability of alternative remedies when dealing with insider transfers involving stock."); *Carsanaro v. Bloodhound Techs, Inc.*, 65 A.3d 618, 657 (Del. Ch. 2013) (to remedy breach of fiduciary duty, court could adjust rights of stock); *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1054 (Del. Ch. 2015) (to remedy a breach of duty, court could "adjust the relative rights of the stock or invalidate a portion of the shares").
[84] *See* 6 *Del. C.* § 17-1101(f).
[85] *Gotham Partners*, 817 A.2d at 175 (emphasis added).

Thus, whether styled as a breach of fiduciary duty or a breach of contract, the same remedies are available, including reformation.

Reformation can be accomplished here readily. The court can direct EEP GP to eliminate from the 7th LPA Section 5.2(i),[86] which effectuated the Special Tax Allocation. In the alternative, the court can direct that the Transaction be reformed to reduce the amount of Class E Units issued to EEP GP.[87]

The Court of Chancery also erred by dismissing Brinckerhoff's claims for rescission. The Court of Chancery held that Brinckerhoff failed to "plead" facts to explain how the court could restore the parties and that Brinckerhoff pleaded only that monetary damages "*may be* insufficient."[88] The AC Interest is a series of partnership units issued by OLP.[89] The Court of Chancery could simply order that EEP return those units to EEP GP, cancel the Class E Units, and reinstate the prior $306 million debt.

The court below also erred when it found Brinckerhoff failed to plead money damages were inadequate.[90] Plaintiff's allegations make clear that the computation of monetary damages arising from the Special Tax Allocation might well require the Court of Chancery to examine every public unitholders' finances to determine how

[86] A474.
[87] MTD Tr. 30-55, 63-69 (A632-57, A665-71).
[88] Op. 51 (emphasis added).
[89] Compl. ¶¶ 25, 175 (A28-29, A72).
[90] Op. 50-51.

the increased income allocation affected his or her tax burden and to do so every year for decades to come.[91] The Complaint also alleges that the continued existence of Section 5.2(i) in the 7th LPA constitutes a continuing breach of the LPA. To remedy it, the court would have to retain jurisdiction and address damages each year. Injunctive relief is far more appropriate for this continuing harm.[92] Finally, where, as here, an exculpation provision renders monetary damages unavailable, reformation is appropriate.[93]

2. EEP GP Breached the 6th LPA By Amending the LPA to Effectuate the Special Tax Allocation

Section 15.3(b) assured each public unitholder that EEP GP could not amend the LPA to increase a public unitholder's obligations thereunder, unless the public unitholder consented in writing. The Special Tax Allocation breached that provision.[94]

The Special Tax Allocation also breached Section 5.2(c), which provided that EEP GP may adopt special allocations for federal income tax purposes in only two

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[91] *See In re IBP Inc. S'holders Litig.*, 789 A.2d 14, 53 (Del. Ch. 2001) (specific performance appropriate where remedy would eliminate need for complex and speculative damages determination).

[92] *See, e.g.*, Compl. ¶ 94 (A52). *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN DELAWARE COURT OF CHANCERY § 12.03[b][2] (2015) (noting that where there exists a threat of multiplicity of suits, the legal remedy may be inadequate).

[93] *In re El Paso S'holder Litig.*, 41 A.3d 432, 448-50 (Del. Ch. 2012); *see also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 838 (Del. Ch. 2011) ("Exculpation under Section 102(b)(7) can render empty the promise of post-closing damages.").

[94] A336-42; Op. 42, 45 n.125.

circumstances: "For the proper administration of the Partnership or for the preservation of the uniformity of the Units (or any class or classes thereof)."[95] Section 5.2(c) also limits EEP GP's discretion as to adopt special allocations. Special allocations may not "have a material adverse effect on . . . the holders of any class or classes of Units."[96] The Special Tax Allocation was neither necessary "for the proper administration of the Partnership" nor necessary to preserve uniformity among the classes. And, it had a material adverse impact on the public unitholders.

3. The 6th LPA Did Not Allow EEP GP to Increase the Obligations of Existing Limited Partners in Breach of 15.3(b) When it Issued New Units

Section 4.4 gave EEP GP authority to issue new classes of units, such as the Class E Units, and to establish the rights and obligations for such new units, including the "designations, preferences and relative, participating, optional or other special rights, powers and duties" in EEP GP's discretion, "subject to Delaware law," including "the allocation of items of Partnership income, gain, loss, deduction and credit . . . ."[97] Section 4.4(d) authorized EEP GP to amend the LPA to provide for such new units. However, these provisions *did not* authorize EEP GP to alter existing unitholders' rights.

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[95] A343-45.

[96] The LPA does not permit EEP GP any discretion in determining whether the Special Tax Allocation will have a "material adverse effect." *Compare* Section 5.2(c) *with* Section 15.1(d) (EEP GP has "sole discretion" to determine whether an amendment will have a material adverse effect on the Limited Partners). (A270, A294).

[97] LPA 4.4(b) (A250).

The 6th LPA expressly limited EEP GP's discretion when issuing new units. Section 15.1 enumerated the amendments EEP GP could enact *sua sponte*, including "an amendment that the General Partner determines in its sole discretion to be necessary or appropriate in connection with the authorization for issuance of any class or series of Units pursuant to Section 4.4."[98] Section 15.3(b) overrode Section 15.1, including EEP GP's authority under Section 4.4. If the drafters intended for Section 4.4 alone to allow EEP GP to amend the LPA, they would not have included Section 15.1(f). Reading the 6th LPA as a whole, it evidences the parties' intent that EEP GP could never amend the LPA to increase a limited partner's obligations without consent, even when acting under the authority of Section 4.4.

The court below erred when it appeared to conclude that Brinckerhoff's claims were subject to a general "good faith standard" under Sections 6.8(a) and 6.10(d).[99] Most fundamentally, the Court of Chancery's interpretation ignores the requirement that courts should "construe [contracts] as a whole and give effect to every provision if it is reasonably possible."[100] Such an interpretation would render Sections 15.3(b) and 5.2(c) (as well as Section 6.6(e)) a nullity. Nothing in text of Section 6.8(a) or 6.10(d) purports to affect the express standards set forth in Section 15.3(b) or Section 5.2(c). Section 6.8(a) does not define the *standard of care* to

[98] LPA 15.1(f) (A295).
[99] *See, e.g.*, Op. 29, 43-44.
[100] *Norton*, 67 A.3d at 360.

which Indemnitees are held.[101] It is an exculpatory provision that limits the remedies available to plaintiff. Section 6.10(d) does not imbue every provision of the LPA with a "good faith" standard so as to allow EEP GP to breach the LPA's affirmative obligations if it acts in good faith. At most, Section 6.10(d) *limits* the LPA's otherwise broad grants of discretion.[102] It does not apply where the agreement does not authorize EEP GP to exercise its discretion.[103]

In analyzing a similar provision, the court in *KMI* noted that the plain language of Section 6.10(d) merely established a condition precedent to the elimination of fiduciary duties.[104] Section 6.10(d) stated that only "*so long as*" EEP GP reasonably believes its actions are in the best interests of the Partnership, will EEP GP be entitled to a modification of duties.[105] Section 6.10(d) did not "itself impose any contractual obligations."[106]

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[101] Op. 15.

[102] *E.g.*, *Norton*, 67 A.3d at 361 (analogous provision limited that LPA's express grants of discretion). As noted above, *Norton* did not involve claims for equitable relief. The Court's statement that Section 6.10(d) defined the "free-standing" good faith standard found in Section 6.8(a) is, of course, limited to claims for monetary relief.

[103] *Id.* at 362 ("*unless another provision supplants this standard, . . .* [plaintiff] must allege facts supporting an inference that [General Partner] had reason to believe that it acted inconsistently with the Partnership's best interests") (emphasis added); *TEPPCO*, 986 A.2d at 387.

[104] *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 Del. Ch. LEXIS 221, at *21 n.1 (Aug. 20, 2015) ("*KMI*"), *aff'd*, 135 A.3d 76 (Del. 2016). *See infra*, n.126.

[105] LPA 6.10(d) (A280).

[106] *KMI*, 2015 Del. Ch. LEXIS 221, at *21, n.1.

II. THE COURT BELOW ERRED BY DISMISSING PLAINTIFF'S CLAIMS AGAINST EEP GP FOR REFORMATION OR RESCISSION OF THE TRANSACTION

A. Question Presented

Did the Court of Chancery err by dismissing Brinckerhoff's claim for reformation and rescission of the Transaction because the Transaction was not fair and reasonable to the Partnership, as required by Section 6.6(e)?[107]

B. Standard of Review

See supra, Section I.B.

C. Merits of the Argument

Section 6.6(e) establishes an objective standard – "fair and reasonable to the Partnership" for sale transactions between EEP and its controller. The Complaint alleges facts sufficient to raise an inference that the Transaction breached this standard. The Complaint alleges that since 2009 (when EEP received only $800 million for the AC Interest), the AC Interest's projected EBITDA dropped by 20% to $93 million, crude oil prices dropped by almost 50%, and the AC Pipeline's tariffs faced increased risk that they would be rebased with long-term negative effect on revenue, and the repurchase did not include valuable expansion rights sold in 2009.[108] In addition, the Special Tax Allocation increased the Partnership's cost by

[107] This issue was raised below at A356-363.
[108] Compl. ¶¶ 5-6, 66-67, 97-114 (A20-21, 43, 52-58).

burdening the limited partners with additional tax obligations.[109] The Special Committee knew about the additional consideration[110] but did not value it and did not ask Simmons to value it. Enbridge also chose not to disclose the Special Tax Allocation in Enbridge's Press Release announcing the $1.0 billion purchase price.

Because Section 6.6(e) neither permits EEP GP to exercise any discretion nor provides that EEP GP could, itself, determine whether a transaction was "fair and reasonable," neither Section 6.9(b)'s clarification of the discretionary standard nor Section 6.10(d)'s definition of good faith are relevant. Further, because Section 6.6(e) provides the express standard for the Transaction, Section 6.9(b) mandates that EEP GP meet that standard and none other – Section 6.9(a)'s "general" standard for "potential conflicts of interest" does not apply.[111]

In *Brinckerhoff II*, the court found that plaintiff's complaint – challenging the unfairness of the 2009 Sale – stated a claim for breach of Section 6.6(e) that could be remedied by reformation, had the claim not been waived, regardless of defendants' bad faith. In so holding, the court suggested that the last sentence of 6.9(a) might apply despite the more specific language in Section 6.6(e), but the court

[109] There is no suggestion that EEP GP could meet Section 6.6(e)'s "safe harbor" that the Transaction was on terms no less favorable than those available to third-parties," since none of the other comparable transactions identified by Simmons included a "special tax allocation." A278.
[110] Compl. ¶ 68 (A43-44).
[111] *Norton*, 67 A.3d at 363-64 (distinguishing between "potential" conflicts of interest and transactions covered by 6.6(e) that "necessarily involve a conflict"); *TEPPCO*, 986 A.2d at 387.

noted defendants' concession and the "unless otherwise provided" prefatory language in Section 6.9(a), as a basis to hold that it did not.

Although the court here recognized that "Brinckerhoff's claims are rich in allegations of wrongdoing that likely would gain traction if Defendant's conduct was measured under traditional corporate governance standards,"[112] the court found that the failure to plead bad faith was "fatal to all claims asserted therein."[113] The Court of Chancery relied principally upon Section 6.8(a) although it later endorsed a contrary reading of Section 6.9(a), stating, incorrectly, that the last sentence of Section 6.9(a) seemed to apply to a transaction governed by Section 6.6(e).[114] This construction is contrary to the holding in *Brinckerhoff II*, the prefatory language "unless otherwise provided" in Section 6.9(a), and also Section 6.9(b).[115]

Section 6.8(a)'s good faith standard for money damages is also not applicable to plaintiff's claims for equitable relief. For the reasons stated above, the Court can and should reform or rescind the Transaction.

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[112] Op. 28.
[113] *Id*. at 29.
[114] *Id*. at 35.
[115] *Accord Norton*, 67 A.3d at 364-65; *KMI*, 2015 Del. Ch. LEXIS 221, at *21 n.2 (Section 6.9(a)'s standard does not apply where transaction implicates "an even more specific provision"); *TEPPCO*, 986 A.2d at 387; *see also In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 Del. Ch. LEXIS 101, at *34-35 (June 12, 2014) (provisions governing specific sorts of conflict-of-interest transactions control over more generalized conflict-of-interest transaction provision).

III. THE COURT BELOW ERRED BY DISMISSING PLAINTIFF'S CLAIMS FOR MONETARY DAMAGES AGAINST EEP GP

A. Question Presented

Did Brinckerhoff plead facts to support an inference that EEP GP reasonably believed that it acted inconsistently with the Partnership's best interests when approving the Special Tax Allocation and the Transaction? Did the Court of Chancery err when it held that EEP GP was entitled to a conclusive presumption of good faith due to its purported reliance upon the Fairness Opinion? Did the Court err by dismissing Brinckerhoff's claims under the Implied Covenant?[116]

B. Standard of Review

See supra, Section I.B.

C. Merits of the Argument

To plead a claim for breach of the 6th LPA's "good faith" standard, Brinckerhoff need only plead facts to support an inference that EEP GP did not "reasonably believe that its action [was] in the best interest of" the Partnership.[117] As set forth above, the Complaint's allegations meet this standard. Among other things, through the Special Tax Allocation, EEP GP caused the Partnership and the limited partners to transfer to EEP GP hundreds of millions of dollars more than $1 billion purchase price, at a time when the assets value suffered from declining

[116] The issue was raised below at A322-25, A326, A352-55, 359-62, 363-66.

[117] *Norton*, 67 A.3d at 362. The LPA's use of the term "reasonably" interjects a subjective element and makes this case distinguishable from LPAs that Delaware courts have interpreted as purely subjective. *Id.* at n.34; *see also KMI*, 2015 Del. Ch. LEXIS 221, at *16 and n.1

projected EBITDA and depressed oil prices. EEP GP did this, and amended the 6th LPA to effectuate the Special Tax Allocation, in violation of the unambiguous terms of Sections 15.3(b) and 5.2(c). EEP GP and its advisor failed to consider the Transaction in the context of the similar and related 2009 Transaction.[118] No reasonable person acting in good faith could believe breaching the Partnership's LPA and ignoring the most similar transaction in order to divert funds from minority investors to the controller, could be in the Partnership's best interest.

EEP GP is not entitled to a conclusive presumption of good faith. Simmons failed to value the total consideration that would be paid to Enbridge for the AC Interest because it failed to value the Special Tax Allocation. The opinion failed to "fulfill its basic function,"[119] and was unreliable.[120]

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[118] LPA 6.9(c) (A280).

[119] *Gerber*, 67 A.3d at 422, 424 (a fairness opinion that did not value the total consideration LP unitholders would receive in a transaction is insufficient to give rise to a conclusive presumption of good faith).

[120] The Court of Chancery, ignoring *Gerber*, held incorrectly that Simmons was not obligated to "consider the Special Tax Allocation separate and apart from the other consideration being offered to EEP [sic] in the Transaction." Op. 42 n.115. This ruling confuses the issue. In order to opine that the Transaction was fair to the Partnership, Simmons was obligated to value all of the consideration being paid for AC Interest. *Gerber*, 67 A.3d at 424. The Court of Chancery instead relied upon *Norton*'s holding that where the total consideration being received by a partnership is fair, the financial advisor was not obligated to consider how that consideration was allocated between the public unitholders and the controller's IDR units. 67 A.3d at 367. That holding is inapposite. The issue is whether the total consideration paid was in the best interests of the Partnership. The Court of Chancery also misread the opinion in *KMI*. Op. 42 n.115. *KMI* held that where the board determined that the consideration received by the partnership in a merger was "in the best interests of the partnership," it did not matter that a related partnership received more tax-beneficial consideration in the same transaction. *KMI* also noted allegations that the partnership "faced a looming crisis," further supporting the decision that the merger was in the partnership's best interests. *Id.* at *28-29. There are no such allegations here. The Transaction

Further, the fairness opinion did not opine that EEP GP had the contractual authority to effectuate the Special Tax Allocation. Indeed, EEP GP could not have reasonably believed that Simmons was qualified to render an opinion as to whether the Special Tax Allocation would breach those provisions.[121]

For these same reasons, any purported reliance on the fairness opinion breached the implied covenant.[122] Brinckerhoff "could hardly have expected that [EEP GP] would rely upon" a financial advisor's opinion (a) as to the legal requirements for amending the LPA; and (b) that did not value the total consideration paid in the Transaction. The Court of Chancery incorrectly found that the LPA "addressed the challenged conduct and expressly eliminates fiduciary duties," and therefore there was "no reasonable basis to allow the implied covenant to stand."[123]

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was proposed by Enbridge and structured by Enbridge. One can reasonably presume that Enbridge believed the Transaction would be in its own best interests, not the Partnership's.

[121] *Compare* LPA 6.10(d) ("best interests of the Partnership") with 6.6(e) ("fair and reasonable to the Partnership").

[122] *Gerber*, 67 A.3d at 420 (a fairness opinion that did not value the consideration LP unitholders would receive in a transaction is insufficient to give rise to a conclusive presumption of good faith).

[123] Op. 47; *see also infra*, Section IV.

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

A. Questions Presented

Did the Court of Chancery err by holding that the Remaining Defendants are entitled to "avail themselves of the contractually established good faith standard" to evade liability?[124]

B. Standard of Review

See supra, Section I.B.

C. Merits of the Argument

The court below wrongfully suggested that the LPA totally eliminated fiduciary duties.[125] Section 6.10(d) only established a *condition precedent* to the modification of fiduciary duties.[126] Moreover, Section 6.10(d) by its plain language is limited in its applicability to the General Partner. Thus, the LPA makes clear that none of the Remaining Defendants have eliminated their common law fiduciary

[124] The issue was raised below at A366-74.

[125] *Compare* Op. at 45 n.123 *with* 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) (noting that EEP's LPA did not eliminate all fiduciary duties).

[126] *KMI*, 2015 Del. Ch. LEXIS 221, at *17 n.1. To modify common law duties, EEP GP must 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." *Id.* at 16, 17. Plaintiff recognizes that his interpretation of 6.10(d) in this regard could be viewed as inconsistent with this Court's holding in *Norton*, 67 A.3d at 362. *Norton* does not preclude plaintiff's interpretation under the specific EEP LPA. Other courts have suggested that *Norton* should be revisited and similarly worded provisions construed as plaintiff suggests here. *See, e.g., KMI*, 2015 Del. Ch. LEXIS 221, at *17 n.1. This result is also consistent with the academic literature. Manesh, *supra*.

duties.[127]

The trial court erred when it rejected this interpretation of Section 6.10(d) and found that "Brinckerhoff's argument still fails to account for the various additional provisions of the LPA that allow all Defendants to avail themselves of the contractually established good faith standard."[128] Even if the Remaining Defendants could avail themselves of the LPA's protections, they could rely only on Section 6.8(a)'s exculpation clause. As with the EEP GP, plaintiff has plead the Remaining Defendants lack of good faith and his entitlement to equitable relief.[129]

The Complaint also pleads a distinct claim against Enbridge. Enbridge is prohibited from selling property to the Partnership under Section 6.6(e) except on terms that are fair and reasonable, terms that for the reasons set forth above were

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[127] *In re Atlas Energy Resources, LLC*, 2010 Del. Ch. LEXIS 216, at *29 (Oct. 28, 2010) (noting that LLC Agreement only expressly eliminated directors' and officers' fiduciary duties and did not, by implication, eliminate controlling stockholder's fiduciary duties); 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 Miller v. Am. Real Estate Partners*, 2001 Del. Ch. LEXIS 116, at *25 (Sept. 6, 2001) (restrictions on fiduciary duties must be set forth clearly and unambiguously.). In other MLP cases, such as *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100-01 (Del. 2013) and *Gerber v. EPE Holdings, LLC*, 2013 Del. Ch. LEXIS 8, at *8 (Jan. 18, 2013), the fiduciary modification/elimination provision, unlike here, extended to "Indemnitees."

[128] *Compare* Op. at 48 *with Brinckerhoff I*, 2011 Del. Ch. LEXIS 149, at *22 (finding "[u]nder the facts as alleged in the Complaint," which were in relevant part similar to those alleged here, "EEP GP, EEP GP's Board, Enbridge Management, and Enbridge all, at least potentially, owe fiduciary duties to EEP"). *See also In re USACafes, L.P. Litig.*, 600 A.2d 43, 48 (Del. Ch. 1991); *In re Boston Celtics L.P. S'holder Litig.*, 1999 Del. Ch. LEXIS 166, at *14 (Aug. 6, 1999). The Transaction and the Special Tax Allocation presented a conflict of interest, implicating the entire fairness standard. *See, e.g., Boston Celtics*, 1999 Del. Ch. LEXIS 166, at *8. Even though defendants will have the burden of proof on this claim, Plaintiff has adequately pled that both transactions were not entirely fair. *See* Compl. ¶¶ 5-11, 63-73 (A20-22, 42-45).

[129] *See infra*, Sections I.C. and III.C.

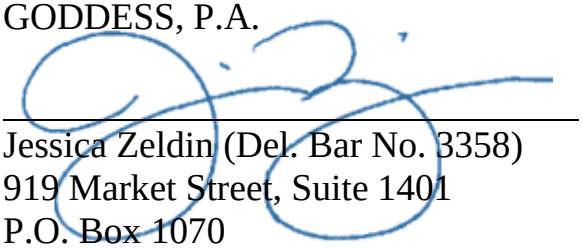
breached. Enbridge exercised complete control over EEP GP. Enbridge orchestrated the Special Tax Allocation to shift benefits to itself. It is also liable as a controller. [130]

Alternatively, Enbridge and the Director Defendants are liable for having aided and abetted the breaches described above,[131] and/or for having tortuously interfered with the LPA and plaintiff's rights under the LPA.[132]

* * *

For all of the reasons provided above, the Opinion of the Court of Chancery should be reversed, and the matter remanded.

ROSENTHAL, MONHAIT & GODDESS, P.A.



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[130] *Gotham Partners*, 817 A.2d at 173.
[131] *In re Del Monte Foods Co. S'holder Litig.*, 2011 Del. Ch. LEXIS 94, at *16 (June 27, 2011)
[132] *Global Recycling Solutions, LLC v. Greenstar New Jersey, LLC*, 2011 U.S. Dist. LEXIS 110477, at *26-28 (Sept. 28, 2011).