EFiled: Feb 28 2018 09:15PM EST
Filing ID 61743182
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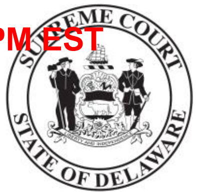

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PETER R. BRINCKERHOFF, TRUSTEE OF THE PETER R. BRINCKERHOFF REV. TR. U/A DTD 10/17/97, on behalf of all others similarly situated, Plaintiff-Below/Appellant, v. KINDER MORGAN, INC., KINDER MORGAN ENERGY PARTNERS, L.P., RICHARD KINDER, STEVEN J. KEAN, RONALD L. KUEHN, JR, ARTHUR C. REICHSTETTER, and WILLIAM A. SMITH, Defendants-Below/Appellees.	)	No. 534, 2017 CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. No. 2017-0313-JTL

APPELLEES' ANSWERING BRIEF

ROSS ARONSTAM & MORITZ LLP

Bradley R. Aronstam (Bar No. 5129)
S. Michael Sirkin (Bar No. 5389)
100 South West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants-Below/Appellees Kinder Morgan, Inc., Kinder Morgan Energy Partners, L.P., Richard Kinder, Steven J. Kean, Ronald L. Kuehn, Jr., Arthur C. Reichstetter, and William A. Smith

Of Counsel:

Joseph S. Allerhand
Seth Goodchild
Amanda K. Pooler
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

February 28, 2018

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NATURE AND STAGE OF PROCEEDINGS

This is a post-closing action brought by a former limited partner of El Paso Pipeline Partners, L.P. (the "Partnership") challenging the Partnership's November 26, 2014 merger with its parent company, Kinder Morgan, Inc. ("KMI") (the "Merger"). Plaintiff's claims are premised entirely on his contention that the $9.2 billion Merger did not sufficiently compensate limited partners for the value of derivative lawsuits he had filed between 2011 and 2013 challenging "dropdown" transactions between the Partnership and its sponsor, El Paso Corporation (the "Derivative Actions").

The chain of events leading to this appeal began on August 10, 2014, when KMI announced a proposed $70 billion reorganization by which it would acquire full ownership of the Partnership and two other publicly traded entities. Under the terms of the proposed transaction, limited partners unaffiliated with KMI would receive cash and/or shares of KMI common stock in exchange for their units. At the time, Brinckerhoff had not succeeded in any of his Derivative Actions: one had been dismissed, two remained dormant since the complaints had been filed, and no trial date had been set in the fourth.

Following announcement of the Merger, Brinckerhoff did not amend any of his complaints in the Derivative Actions to challenge the Merger. He did not allege that it was designed to defeat his standing to prosecute his claims. Nor did

he assert that the Proxy disseminated in connection with the Merger contained false or misleading statements. Instead, in the face of Defendants' argument that he would soon lose standing when the Merger closed, Brinckerhoff insisted on trying his lone active case (which the parties refer to as the "Fall Dropdown" claim) before the transaction closed. A three-day trial ensued, concluding on November 17, 2014. The Merger closed just nine days later following unitholder approval, including approval by a majority of the units unaffiliated with KMI.

On April 20, 2015, the Court of Chancery issued a post-trial opinion finding that the Partnership had overpaid for certain assets it had purchased in the Fall Dropdown.[1] Following the trial court's decision with respect to Brinckerhoff's post-Merger standing,[2] the court entered judgment in the Fall Dropdown action, awarding damages to the Partnership's former unitholders.

The General Partner appealed, and this Court reversed the judgment in its entirety on December 20, 2016, holding that Brinckerhoff had lost standing to sue derivatively because of the Merger.[3] Specifically, this Court held that any causes

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[1] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2015 WL 1815846 (Del. Ch. Apr. 20, 2015), *rev'd sub nom. on other grounds, El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016).

[2] *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 132 A.3d 67 (Del. Ch. 2015), *rev'd sub nom. El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016).

[3] *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1252 (Del. 2016).

of action owned by the Partnership passed by operation of law to KMI in the Merger, and therefore Brinckerhoff's "recourse was to file a money damages challenge to the merger."[4] While Plaintiff treats this language as an invitation to commence this action, he ignores this Court's immediately following language stating that Brinckerhoff's burden in any such challenge would be to "prove that the failure to accord value to the limited partnership in the merger *was somehow violative of his rights*."[5] This Court also observed "it might be difficult to allege that *the value they are receiving in the merger is unfair simply as a result of the failure to consider value associated with their derivative suit. But that reality may also suggest that, even according full value to the potential recovery in the derivative suit (rarely a guarantee), the plaintiffs still received fair value in the merger*."[6]

Following this Court's issuance of the Mandate reversing the judgment in the Fall Dropdown action, all of Brinckerhoff's remaining Derivative Actions were dismissed.

In March 2017, two-and-a-half years after the Merger closed, Brinckerhoff filed this action, alleging for the first time that the General Partner had breached

[4] *Id.*

[5] *Id.* (emphasis added).

[6] *Id.* (emphasis added).

the limited partnership agreement (the "LPA") in approving the Merger by failing to obtain "additional consideration" for his Derivative Actions. Defendants moved to dismiss, arguing that the General Partner had satisfied two independent contractual safe harbors immunizing the Merger from judicial review and that Plaintiff had failed to plead a breach of the implied covenant. The Court of Chancery dismissed Brinckerhoff's Complaint because the General Partner had satisfied the contractual "Unitholder Approval Safe Harbor" and did not reach Defendants' remaining arguments.[7] This appeal followed.

Brinckerhoff now contends that the Court of Chancery erred in dismissing his Complaint. As set forth below, however, he has not demonstrated that the General Partner's failure to obtain additional consideration for the Derivative Actions in the Merger was "violative of his rights" under the governing LPA or that the implied covenant of good faith should be invoked to override the contractual safe harbors.

[7] Eleven days later, Brinckerhoff's counsel commenced yet another action, this time on their own behalf, seeking to require KMI to pay their legal fees based on the supposed benefit they provided to the Partnership in prosecuting the Fall Dropdown action even without any recovery. *Bragar Eagel & Squire, P.C., et al. v. Kinder Morgan Energy Partners, L.P., et al.*, C.A. No. 2017-0841-VCL (Del. Ch. Nov. 22, 2017). Defendants have moved to dismiss that action, and argument is scheduled for March 27, 2018.

STATEMENT OF FACTS[8]

I. THE PARTIES

Until the Merger, the Partnership's limited partnership units traded on the New York Stock Exchange under the ticker symbol "EPB."[9] Like many other MLPs, the Partnership was created, or "sponsored," by its then-parent corporation (El Paso) to maximize the market valuation of assets through a tax-efficient environment for investors. Sponsored MLPs typically grow not through open-market purchases from third parties, but rather through the "dropdown" of income-producing assets from the parent company.[10] Plaintiff purports to have been, until the Merger closed, the owner of 4,150 Partnership common units.[11]

El Paso Pipeline GP Company, L.L.C. (the "General Partner") served as the general partner of the Partnership.[12] Before the Merger, defendant KMI, a Delaware corporation headquartered in Houston, Texas, indirectly owned the

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[8] The Statement of Facts is drawn from the Complaint and documents referenced (and relied upon) therein, in particular, the October 22, 2014 Proxy Statement (the "Proxy") (A168-437), as well as other publicly filed documents subject to judicial notice. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169-70 (Del. 2006); *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 96 n.2 (Del. 2013).

[9] Proxy at 119 (A295).

[10] *See In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 WL 2768782, at *1 (Del. Ch. June 12, 2014).

[11] Compl. ¶ 9 (A11-12).

[12] *Id.* ¶ 3 (A8); Proxy at 1 (A177).

General Partner and approximately 40 percent of the Partnership's outstanding common units.[13] Defendant Kinder Morgan Energy Partners, L.P. ("KMP") traded on the NYSE until the Merger.[14] Following the Merger, the Partnership and the General Partner merged into KMP, leaving KMP as a wholly owned KMI subsidiary.[15]

Defendants Richard Kinder, Steven J. Kean, Ronald L. Kuehn, Jr., Arthur C. Reichstetter, and William A. Smith constituted the General Partner's board of directors before the Merger.[16] Mr. Kinder and Mr. Kean were KMI executives and directors.[17]

Messrs. Kuehn, Reichstetter, and Smith were outside, non-management directors and the sole members of the Conflicts Committee that considered and approved the Merger as well as the dropdown transactions at issue in Brinckerhoff's Derivative Actions (the "Committee").[18] Each owned Partnership common units, but none is alleged to have owned any KMI shares or to have held any position with KMI or its affiliates before the Merger.

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[13] Compl. ¶ 13 (A13); Proxy at 49 (A225).

[14] Compl. ¶ 12 (A12-13).

[15] *Id.* ¶ 12 (A12-13).

[16] *Id.* ¶¶ 10-11, 14-16 (A12-14).

[17] *Id.* ¶¶ 10-11 (A12).

[18] *Id.* ¶¶ 14-16 (A13-14).

II. THE PROPOSED MERGER

On July 17, 2014, KMI advised the General Partner that it was interested in acquiring all of the Partnership units it did not already own at a 10% premium to its then-current trading price.[19] The Merger was to be part of a $70 billion reorganization consolidating the Partnership, KMI, KMP, and another publicly traded entity under a single corporate umbrella, with each transaction cross-conditioned on the others.[20]

The General Partner's board delegated to the Committee the authority to "determine whether or not to approve and recommend [the Merger] for approval" to the General Partner's board.[21] The Committee engaged Vinson & Elkins, LLP and Richards, Layton & Finger P.A. as its counsel, and Tudor, Pickering, Holt & Co. Securities, Inc. as its financial advisor.[22] Tudor had also advised the Committee on the dropdown transactions that were at issue in the Derivative Actions.[23]

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[19] Proxy at 29-30 (A205-06).

[20] *Id.* at 28-30 (A204-06).

[21] *Id.* at 30 (A206).

[22] *Id.* at 31, 51 (A207, A227).

[23] Compl. ¶ 22(c) (A18).

III. BRINCKERHOFF'S DERIVATIVE ACTIONS

At the time the Committee considered the Merger in the summer of 2014, Brinckerhoff had filed four Derivative Actions challenging dropdown transactions, each of which had been announced before KMI acquired its interests in the General Partner and the Partnership. All of the Derivative Actions had been publicly disclosed and described in the Partnership's SEC filings.[24]

The Spring Dropdown Claim. Filed in December 2011, this lawsuit arose from the March 2010 sale of a 51% interest in a liquid natural gas facility and an associated pipeline in Elba Island, Georgia ("Elba").[25] Plaintiff alleges that this litigation "had a value, without prejudgment interest, of as much as $141 million" to the Partnership.[26] However, when the Committee considered the Merger and the Partnership issued the Proxy, *all claims asserted in the action had already been dismissed.*[27] Plaintiff nevertheless alleges that the Court of Chancery's decision

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[24] *See, e.g.*, EPB Form 10-K at 91-92 (filed Feb. 19, 2014) (A444-45); EPB Form 10-Q at 11-12 (filed Apr. 25, 2014) (A449-50); EPB Form 10-Q at 17 (filed July 29, 2014) (A454). The Proxy filed in connection with the Merger vote specifically referenced and incorporated the July 2014 Form 10-Q in its discussion of the Committee's determination regarding the Derivative Actions. *See* Proxy at 54 (A230). *See also* Order ¶ 5(e).

[25] Compl. ¶ 6 (A9-10); *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, C.A. No. 7141-VCL, Dkt. 1 (B88-126).

[26] Compl. ¶ 18 (A15-16).

[27] *Id.* ¶ 20 (A16); *see also El Paso Pipeline Partners*, 2014 WL 2768782, at *23 (granting summary judgment for defendants).

(which he had not yet appealed) constituted "clear legal error," that his claims "would have been reinstated on appeal" (had the Merger not extinguished his standing), and that he would have recovered the full $141 million.[28]

The Fall Dropdown Claim. Filed in March 2012, this lawsuit arose from the November 2010 sale of the remaining 49% interest in Elba.[29] When the Committee considered the Merger, the parties had completed discovery, and while the Court had denied dueling summary judgment motions, no trial date had been set. The sole remaining issue to be tried, and upon which Plaintiff would bear the burden of proof, was "the state of mind of the members" of the Committee under the LPA's subjective good faith standard.[30] Based on his own expert reports and damages theory, Plaintiff alleges that this claim "had a value, without prejudgment interest, of $171 million to [the Partnership], and as much as $285 million."[31]

Shortly before closing, the Court of Chancery held a three-day trial, but it did not issue its post-trial decision finding a breach of the LPA and damages of $171 million until April 2015, eight months *after* the Committee had made its

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[28] Compl. ¶¶ 18-20, 27 (A15-17, A21-22).

[29] Compl. ¶ 21 (A17); *Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 7306-CS, Dkt. 1 (B127-60).

[30] *See In re El Paso Pipeline Partners, L.P. Deriv. Litig.,* 2014 WL 2641304, at *2 (Del. Ch. June 12, 2014) (Order).

[31] Compl. ¶ 18 (A15).

decision to approve the Merger.[32] The court issued its standing opinion later on December 2, 2015, which this Court reversed on December 20, 2016.[33]

The 2012 Dropdown Claim. Filed in May 2013, this lawsuit arose from the May 2012 sale of a 14% interest in Colorado Interstate Gas and a 100% interest in Cheyenne Plains Investment Company.[34] When the Committee was considering the Merger, the case had gone nowhere and "had been stayed."[35] Plaintiff thus had a long road ahead of him—overcoming a motion to dismiss the amended complaint, discovery, defeating summary judgment, trial, and, if successful, defending a possible appeal—before obtaining any recovery. Yet Plaintiff alleges that this nascent claim was worth "approximately $400 million,"[36] based solely on "the decline in the value of the Partnership common units" immediately following announcement of the challenged transaction.[37]

The 2011 Dropdown Claim. Filed just six weeks before announcement of the proposed Merger and not mentioned by Plaintiff in his Complaint, this lawsuit

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[32] *El Paso Pipeline Partners*, 2015 WL 1815846.

[33] *El Paso Pipeline Partners*, 132 A.3d at 80.

[34] Compl. ¶ 23 (A18-19); *Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 8597-VCL, Dkt. 1 (B161-90).

[35] Compl. ¶ 18 (A15-16).

[36] *Id.*

[37] *See id.* ¶ 23 (A18-19); *Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 8597-VCL, Dkt. 1 ¶ 4 (B163).

arose from the June 2011 sale of a 28% interest in Colorado Interstate Gas and a 15% interest in Southern Natural Gas Company.[38] As of August 2014, little substantive activity had occurred, and Plaintiff thus had the same arduous path ahead of him as he did in the 2012 Dropdown Claim.[39]

IV. COMMITTEE APPROVAL OF THE MERGER, THE PROXY, AND THE UNITHOLDER VOTE

On August 9, 2014, following extensive negotiations and consultation with its advisors, the Committee determined that the Merger was "fair and reasonable to, and in the best interests of, [the Partnership], after determining that the [Merger was] fair and reasonable to, and in the best interests of, the unaffiliated EPB unitholders."[40]

In making this determination, the Committee specifically considered Brinckerhoff's pending Derivative Actions. As described in the Proxy, the Committee "ultimately determined that the value of the claims to [the Partnership] that might be extinguished as a result of the [Merger] was not sufficiently material such that they would merit adjustments to the [Merger] consideration or otherwise

[38] *Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. No. 9822-VCL, Dkt. 1 (B191-224).

[39] Defendants filed a motion to dismiss on August 25, 2014. C.A. No. 9822-VCL, Dkt. 10. No briefing followed.

[40] Proxy at 46 (A222).

affect the determinations made" with respect to the Merger.[41] The Proxy disclosed the Committee's reasoning and conclusion, including that:

> (i) the members of the EPGP conflicts committee, given their positions on the EPGP board and the EPGP conflicts committee, had extensive prior familiarity with the nature of the derivative claims and the underlying asset drop-down transactions and factual assertions on which the claims are based; (ii) favorable decisions had been rendered by the trial court in connection with two of the pending derivative actions (although it was noted that such decisions may be subject to appeal); (iii) the advisors to the EPGP conflicts committee had discussions with KMI management and in-house legal counsel for KMI with respect to the status of and merits of the derivative lawsuits in connection with its review of the Transactions; and (iv) in light of the foregoing, the limited utility of any further third party analysis and/or valuation of the derivative claims was outweighed by the delay that such analysis would entail which could threaten the viability of the Transactions, and ultimately determined that the value of the claims to EPB that might be extinguished as a result of the EPB merger was not sufficiently material such that they would merit adjustments to the EPB merger consideration or otherwise affect the determinations made by the EPGP conflicts committee with respect to the EPB merger.[42]

Of particular relevance to the disclosure arguments advanced by Plaintiff below, the Proxy also disclosed:

(i) the per-unit consideration to be paid to unitholders;[43]

(ii) the Committee's membership;[44]

(iii) that each Committee member served on the General Partner's board;[45]

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[41] *Id.* at 45-46 (A221-22).

[42] *Id.*

[43] *Id.* at Cover Letter, 3 (A169, A179).

[44] *Id.* at 30, 50 (A206, A226).

(iv) that the General Partner's directors, along with the General Partner, were defendants in the Derivative Actions;[46]

(v) that the Derivative Actions alleged that the dropdown transactions "were effected on unfavorable terms to [the Partnership] and/or the unitholders" and sought "equitable and monetary relief";[47]

(vi) that the Committee considered that "as a result of" the Merger, these derivative claims "may be extinguished";[48]

(vii) that the unitholders could obtain additional information about the Derivative Actions, specifically referring to and incorporating the June 30, 2014 Form 10-Q filed by the Partnership;[49] and

(viii) that the Committee members "ha[d] been offered the opportunity to become members of the KMI board after the [M]erger" and would receive the "same compensation" granted to KMI's other non-employee board members, which was higher than the annual retainer received by members of the General Partner's board.[50]

The Limited Partners approved the Merger at the November 20, 2014 special meeting.[51] A majority of the outstanding units unaffiliated with KMI or its affiliates voted in favor.[52] The Merger closed on November 26, 2014.[53]

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[45] *Id.* at 29-30, 50 (A205-06, A226).

[46] *Id.* at 54 (A230).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 98 (A274).

[51] Compl. ¶ 35 (A25).

[52] 78% of the approximately 233 million total outstanding units were voted in favor of the Merger. *See* Press Release, Kinder Morgan Announces Shareholder and Unitholder Approval of the Merger Transactions; Transactions Expected to Close

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly held the General Partner satisfied the contractual "Unitholder Approval Safe Harbor" for conflict-of-interest transactions because a majority of the outstanding unaffiliated units voted to approve the Merger. As a result, the Merger is "permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement . . . or of any duty stated or implied by law or equity."[54] Plaintiff concedes that the General Partner met each of the express contractual requirements for application of this safe harbor, and that concession is dispositive of his breach of contract claim. Each of the arguments he now makes would require an impermissible re-write of the LPA and the incorporation of fiduciary-duty concepts that are inapplicable where, as here, the LPA eliminates fiduciary duties.

2. Denied. The Court of Chancery correctly held that the General Partner did not breach the implied covenant of good faith and fair dealing in connection with the Unitholder Approval Safe Harbor because Plaintiff has not

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Nov. 26 (Nov. 20, 2014) (A456-59); Proxy at 120 (A296). Parent and its affiliates owned approximately 40% of the outstanding units. Compl. ¶ 13 (A13). As such, assuming that all the units held by Parent and its affiliates were voted in favor, over 60% of the outstanding units held by unaffiliated holders were voted in favor of the Merger.

[53] Compl. ¶ 9 (A11-12).

[54] LPA § 7.9(a) (A123).

alleged sufficient facts that would make it reasonably conceivable that the General Partner engaged in any misleading or deceptive conduct. The Proxy accurately disclosed not only the Committee's determination with respect to the Derivative Actions, but also the underlying facts of each of the supposed "conflicts" that Plaintiff now claims infected the process.

3. Denied. This Court can affirm the Court of Chancery on the independent ground that the General Partner satisfied the "Special Approval" safe harbor because a properly constituted Committee approved the Merger. Plaintiff has failed to plead objective facts rebutting the contractual presumption that the Committee acted in good faith. Nor has Plaintiff pled facts sufficient to invoke the implied covenant, as he has neither identified a gap in the relevant contractual provisions nor shown that the General Partner engaged in deceptive conduct in obtaining Special Approval.

4. Denied. This Court can affirm the Court of Chancery on the independent ground that Plaintiff has failed to meet his threshold burden of alleging that the risk-adjusted value of the Derivative Actions was material in the context of the Merger.

5. Denied. The Court of Chancery correctly dismissed Plaintiff's secondary liability claims because the Complaint fails to allege an underlying wrong.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT SATISFACTION OF THE UNITHOLDER APPROVAL SAFE HARBOR IN THE LPA REQUIRED DISMISSAL OF PLAINTIFF'S CLAIMS.

A. Question Presented

Did the Court of Chancery correctly conclude that the approval of the Merger by a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates) satisfied a contractual safe harbor, thus requiring dismissal of the Complaint?[55]

B. Standard of Review

This Court reviews *de novo* "the Vice Chancellor's decision to grant a motion to dismiss under Court of Chancery Rule 12(b)(6)."[56]

C. Merits of the Argument

Consistent with the Delaware Revised Uniform Limited Partnership Act, the LPA eliminates all fiduciary duties and imposes a purely contractual scheme governing the rights and obligations of the General Partner and the limited partners.[57] Because of the conflicts inherent in the MLP structure, the LPA contains detailed provisions intended to facilitate conflict transactions and limit litigation, granting the General Partner the option of satisfying any of four

[55] This question was presented below at A561-73, B27-33, B61-67.

[56] *Allen v. Encore*, 72 A.3d at 100.

[57] *See El Paso Pipeline Partners*, 2014 WL 2768782, at *9.

permissive safe harbors.[58] If the General Partner complies with any safe harbor, the transaction "shall be permitted and deemed approved by all Partners, and shall not constitute a breach of [the LP] Agreement . . . or of any duty stated or implied by law or equity."[59]

As the Court of Chancery correctly held, Plaintiff's challenge to the Merger is barred by Section 7.9(a)(ii), the Unitholder Approval Safe Harbor, which applies where "a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates)" vote in favor of the transaction. Plaintiff concedes that a majority of outstanding unaffiliated units voted in favor of the Merger and does not dispute that the General Partner complied with the LPA's express terms in connection with the Merger vote.[60] These concessions are dispositive.

1. The Plain Text of the Unitholder Approval Safe Harbor Does Not Require a Separate Vote.

Plaintiff lacks any textual support for his position that the safe harbor requires a separate class vote of the unaffiliated unitholders called for the specific purpose of determining whether the Unitholder Approval Safe Harbor applies, as

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[58] *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 356 (Del. 2013) ("[T]he limited partnership agreement's conflict of interest provision created a contractual safe harbor, not an affirmative obligation.").

[59] LPA § 7.9(a) (A123).

[60] Order ¶ 4(c).

opposed to a single unitholder vote on the Merger.[61] As the Court of Chancery correctly held, Section 7.9(a)(ii), by its terms, applies whenever there is a class-wide unitholder vote in which a majority of the outstanding unaffiliated common units vote in favor of a conflict transaction.[62] There is nothing in the LPA suggesting that the safe harbor should apply only if the General Partner puts "the issue of the conflict to the unaffiliated unitholders for a vote called for that purpose."[63] Nor does (or can) Plaintiff cite any LPA provision precluding the General Partner from relying on the Merger vote required under Section 14.3(b) to also satisfy the Unitholder Approval Safe Harbor.

Indeed, the LPA's drafters knew how to require a separate class vote when they intended to do so. During the contractually defined "Subordination Period" (which had ended by the time of the Merger), the "Unit Majority" vote required for a merger and certain other events was a vote of "at least a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates), *voting as a class*, and at least a majority of the

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[61] Under Section 14.3(b), a Merger "shall be approved upon receiving the affirmative vote or consent of the holders of a Unit Majority." LPA § 14.3(b) (A150). A "Unit Majority" at the time of the Merger means "at least a majority of the Outstanding Common Units and Class B units, if any, voting as a single class." *Id.* § 1.1 (A72).

[62] *Id.* § 14.3(b) (A150); Order ¶ 4.

[63] Op. Br. at 19.

Outstanding Subordinated Units, *voting as a class*."[64] The absence of similar language in Section 7.9(a)(ii) fatally undermines Plaintiff's reading.[65]

Finally, Plaintiff argues that the Unitholder Approval Safe Harbor is unavailable because the General Partner "never requested, sought or explained to the unaffiliated unitholders the effect of the conflict waiver."[66] Plaintiff cites no LPA provision or authority for such a requirement, because there is none. Unlike Special Approval by a properly constituted conflicts committee, which obligates the General Partner to take affirmative steps in advance to satisfy its requirements, the Unitholder Approval Safe Harbor is self-effectuating and does not require the General Partner to take any action in advance, let alone make any special disclosure warning unitholders that the LPA's conflicts section really means what it says (nor, for that matter, is there any such requirement in the corporate context under *Corwin v. KKR Financial Holdings LLC*[67]).

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[64] LPA §§ 1.1, 7.3, 12.1(b) (emphasis added) (A72, A117-18, A138).

[65] *See MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *7 (Del. Ch. Dec. 30, 2010) ("The use of different language in the two sections shows the parties knew how to cover [an issue] . . . when that was their intent."). For the same reason, Plaintiff's attempt to contrast the words "vote of" in Section 7.9(a)(ii) with the word "approval" in Sections 7.3 and 11.1 is a distinction without a difference: the use of "approval" in these other provisions does not somehow transform Section 7.9(a)(ii)'s "vote of" language into a requirement that this approval be accomplished by a separate class vote.

[66] Op. Br. at 21.

[67] 125 A.3d 304 (Del. 2015).

2. The General Partner Satisfied Any Disclosure Obligations Arising Under the Implied Covenant.

The Court of Chancery correctly held that Plaintiff's attempts to invoke the implied covenant of good faith and fair dealing to vitiate this safe harbor are without merit.

a. The Implied Covenant Did Not Require the General Partner to Precondition the Vote on a Separate Vote of Unaffiliated Units.

Plaintiff argues for the first time on appeal that the General Partner had an implied duty to inform the limited partners in advance of the vote that it might rely on the Unitholder Approval Safe Harbor.[68] As a preliminary matter, Plaintiff waived this claim by not alleging it in his Complaint or raising it to the court below.[69]

On the merits, Plaintiff proposes an impermissible use of the implied covenant. As explained above, the LPA does not require the General Partner to proactively "seek" refuge in the Unitholder Approval Safe Harbor. Imposing the condition Plaintiff offers would improperly employ the implied covenant to "rewrite" the agreement.[70] In addition, the LPA's elimination of fiduciary duties contradicts any argument that the limited partners could have expected the General

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[68] Op. Br. at 22-24.

[69] Sup. Ct. R. 8.

[70] *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

Partner to "pre-condition" the Merger on their approval—a proposition Plaintiff borrows straight from corporate law.[71]

There is nothing misleading in the General Partner's reliance on the Unitholder Approval Safe Harbor after tallying the results of the Merger vote. No reasonable investor could have expected the condition Plaintiff seeks. Delaware courts have long warned investors in limited partnerships to "be careful to read those agreements and to understand the limitations on their rights" as the agreement represents the exclusive source of those rights.[72] Moreover, the Proxy not only reminded unitholders that "[o]wnership interests in a limited partnership are . . . fundamentally different from ownership interests in a corporation,"[73] but also referred unitholders to a comparison of the different rights and limitations between the Partnership and KMI, including a description of the permissive safe harbors available to the General Partner.[74]

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[71] *See, e.g.*, *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[72] *Haynes Family Tr. v. Kinder Morgan G.P., Inc.*, 135 A.3d 76, 2016 WL 912184, at *1 (Del. Mar. 10, 2016) (Order) (holding that unitholders are "restrict[ed] . . . to relying upon the agreement's terms for protection").

[73] Proxy at 10 (A186).

[74] *Id.* at 10, 161, 178-79 (A186, A337, A354-55).

b. The General Partner Did Not Engage in Any Misleading or Deceptive Conduct in Breach of the Implied Covenant.

Plaintiff next argues the implied covenant should override the Unitholder Approval Safe Harbor because the Proxy "was misleading and so rendered it impossible for investors to make an informed and intelligent decision" about whether to vote for the Merger.[75] The Court of Chancery correctly rejected this argument.

Because the LPA eliminates the General Partner's fiduciary duties, the "implied covenant cannot support a generalized duty to disclose all material information reasonably available," as required of corporate fiduciaries.[76] Instead, this "limited and extraordinary legal remedy"[77] prevents a general partner from "engag[ing] in misleading or deceptive conduct to obtain safe harbor approvals."[78] Plaintiff has not met that burden here. Nor can Plaintiff allege here that the General Partner, as in *Dieckman*, acted deceptively to subvert the unitholders' reasonable expectations.

To start, the facts alleged here are different from those in this Court's recent *Dieckman* decision. There, the general partner created (and described as

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[75] Op. Br. at 25.

[76] *See Lonergan v. EPE Hldgs., LLC*, 5 A.3d 1008, 1025 (Del. Ch. 2010).

[77] *Nemec*, 991 A.2d at 1125-26.

[78] *Dieckman v. Regency GP LP*, 155 A.3d 358, 361 (Del. 2017).

"independent") a committee which included a director who: (1) began considering the transaction when he was on the acquirer's board (and therefore ineligible to serve under the partnership agreement), (2) resigned temporarily to join the conflicts committee and approve the transaction, and then (3) rejoined the acquirer's board the day the transaction closed—all without disclosing the facts surrounding these shifting allegiances.[79] By contrast, here, as described below, the Committee members satisfied the contractual criteria at all relevant times and the General Partner accurately disclosed "the facts underlying the[] alleged conflicts" of the Committee members as well as their determination with respect to the Derivative Actions.[80]

Nor is there any merit to Plaintiff's argument that the court below misapplied the *Dieckman* standard by requiring Plaintiff to plead "fraud."[81] In fact, the Court of Chancery correctly characterized *Dieckman* as holding that the implied covenant prohibits "fraud *and conduct resembling fraud*" and stated that "[p]roof of fraud . . . violates the implied covenant*, not because breach of the implied covenant requires fraud*, but because 'no fraud' is an implied contractual

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[79] *See id.* at 365, 368-69.

[80] Order ¶ 5(d); Proxy at 45-46 (A221-22).

[81] Op. Br. at 26.

term."[82] Through this lens, the Court of Chancery properly concluded that "none of the allegedly misleading statements or omissions" asserted in the Complaint "rise to the level of misleading or deceptive conduct resembling fraud."[83]

The Legal Effect of the Unitholder's Vote. Plaintiff contends for the first time on appeal that the Proxy was deceptive because it "indicated that the unaffiliated unitholders vote was mostly insignificant because of KMI's agreement to vote in favor of the Merger."[84] This argument was waived for failure to raise it below[85] and, in any event, is meritless. The Proxy never "represented" that the vote was "insignificant." And approval of the Merger was not a given because KMI owned only approximately 40% of the units.[86] Rather, the language Plaintiff attacks accurately describes the details of the vote, KMI's holdings in the Partnership, and how KMI was expected to vote its units.[87]

The Claims Made in the Derivative Actions. Plaintiff faults the General Partner for failing to disclose "how much Plaintiff sought in the Derivative

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[82] Order ¶ 5(b) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 443 (Del. Ch. 2012), *rev'd on other grounds*, 68 A.3d 665 (Del. 2013)) (emphasis added).

[83] *Id.* ¶¶ 5(b), 5(c).

[84] Op. Br. at 27.

[85] Sup. Ct. R. 8.

[86] In fact, the Proxy informed unitholders that their vote was "very important"—including on the first page. Proxy at Cover Letter (A169).

[87] *Id.* at 121 (A297).

[Actions]" and further that he alleged the directors had acted in bad faith.[88] However, there is no legal requirement that an issuer disclose a plaintiff's legal theories or his subjective valuation of his claims.[89]

The Merger's Value. Plaintiff next asserts that the Proxy was misleading and deceptive because it "failed to disclose the Merger consideration."[90] But Plaintiff admits that the Proxy disclosed the per-unit Merger consideration and the number of units outstanding.[91] The absence of a number that a "middle school algebra student" could calculate was neither misleading nor deceptive.[92] Similarly, KMI's public disclosures outside the Proxy that the Merger was part of its $70 billion corporate reorganization were not misleading. The materials Plaintiff cites accurately explained that the reorganization involved four separate publicly traded entities; no unitholder capable of basic arithmetic could reasonably believe that the Merger's value alone was $70 billion.

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[88] Op. Br. at 28-29.

[89] *See Seibert v. Harper & Row, Publishers, Inc.*, 1984 WL 21874, at *6 (Del. Ch. Dec. 5, 1984) (finding that a proxy "need not include opinions or possibilities, legal theories or plaintiff's characterization of the facts"); *Edelman v. Phillips Petroleum Co.*, 1985 WL 11534, at *9 (Del. Ch. Feb. 12, 1985) (holding that Delaware law does not require disclosures that "provide an opponent with a cost-free medium for circulation of differing views").

[90] Op. Br. at 28.

[91] *Id.* at 28-29.

[92] *See Wayne Cty. Emps.' Ret. Sys. v. Corti*, 954 A.2d 319, 334 (Del. Ch. 2008).

The Description of the Derivative Actions. Plaintiff also complains that the Proxy "failed to describe accurately" the Derivative Actions,[93] essentially, because the Proxy failed to describe them as Plaintiff would have. As an initial matter, Brinckerhoff was clearly not misled about anything related to these lawsuits—he was the plaintiff prosecuting them—and thus was well-positioned to seek injunctive relief (or to communicate directly with his fellow unitholders) in advance of the vote if he believed unitholders needed additional facts.

Plaintiff's argument that the Proxy misleadingly omitted that the Committee members were defendants in the derivative cases[94] is false: the Proxy (and the prior SEC filings incorporated by reference) stated that the General Partner's board members were in fact defendants, and it was public knowledge that the Committee members had been directors since May 2008.[95] The Court of Chancery correctly concluded that the General Partner had no implied obligation to engage in self-flagellation by disclosing that the Committee members "were conflicted *because of* their status as defendants in the derivative actions."[96]

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[93] Op. Br. at 29.

[94] *Id.*

[95] *See, e.g.*, Proxy at 54 (A230); EPB Form 10-Q at 17 (filed July 29, 2014) (A454); EPB Form 10-K at 48 (A441).

[96] Order ¶ 5(e) (citing *Brody v. Zaucha*, 697 A.2d 749, 754 (Del. 1997)) (emphasis added).

Finally, Plaintiff argues that the Court of Chancery erred when it held that the Proxy did "not contain an affirmative representation regarding the materiality" of the Derivative Actions, but rather reported only the Committee members' *subjective belief* about their value in the context of the Merger.[97] There was no legal requirement to make any such "affirmative representation," and the Proxy accurately disclosed the Committee's determination that, in its view, the value of the Derivative Actions was not "sufficiently material" to warrant any change to the Merger consideration.[98] The Proxy is not misleading simply because Plaintiff disagrees with the Committee's determination, or contends the directors acted in bad faith, when the Committee's determination was accurately disclosed.[99]

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[97] *Id.* ¶ 5(c); *see* Op. Br. at 30.

[98] Proxy at 45-46 (A221-22).

[99] This case thus stands in contrast to the facts before the Court in *Appel v. Berkman*, --- A.3d ---, 2018 WL 947893, at *7-8 (Del. Feb. 20, 2018), where the highly negative views of the company's founder and Chairman regarding the proposed transaction *to be voted on* were not disclosed in the Schedule 14D-9.

II. THE GENERAL PARTNER'S SATISFACTION OF THE SPECIAL APPROVAL SAFE HARBOR INDEPENDENTLY REQUIRES DISMISSAL.

A. Question Presented

Has Plaintiff pleaded sufficient facts to state a claim for breach of the LPA where a validly constituted Committee granted "Special Approval" of the Merger?[100]

B. Standard of Review

The standard of review is *de novo*.[101]

C. Merits of the Argument

Section 7.9(a)(i) of the LPA provides a separate safe harbor for conflict transactions "approved by Special Approval."[102] Special Approval means "approval by a majority of the members of the Conflicts Committee acting in good faith."[103] As set forth below, the Merger received Special Approval in accordance with the LPA. Accordingly, the Merger is "permitted and deemed approved" by all limited partners and "shall not constitute a breach" of the LPA.[104]

1. The General Partner Properly Constituted the Committee.

Under the LPA, the Committee must include:

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[100] This question was presented below at A573-80, A607-08, B33-47, B67-83.

[101] *See Allen v. Encore*, 72 A.3d at 100.

[102] LPA § 7.9(a)(i) (A123).

[103] *Id.* § 1.1 (definition of "Special Approval") (A70).

[104] *Id.* § 7.9(a) (A123).

> two or more directors, each of whom (a) is not a security holder, officer or employee of the General Partner, (b) is not an officer, director or employee of any Affiliate of the General Partner, [and] (c) is not a holder of any ownership interest in the Partnership Group other than Common Units and awards that may be granted to such director under the Long Term Incentive Plan . . . .[105]

Plaintiff maintains that the General Partner "did not select or carry out the Special Approval process in good faith" under the LPA and further "subvert[ed] the Special Approval process" in violation of the implied covenant because alleged conflicts rendered the directors "ineligible to serve" on the Committee.[106] These arguments fail. First, Plaintiff does not dispute that each of the Committee's members "satisfied the literal terms" of the LPA, thus precluding any contractual challenge to the Committee's composition.[107]

Similarly, his implied covenant claim is without merit as the LPA addresses the requirements for service on the Committee and the types of conflicts that are disabling, leaving no gap to be filled.[108] Even if a gap existed, however, Plaintiff's

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[105] *Id.* § 1.1 (definition of "Conflicts Committee") (A56).

[106] Op. Br. at 7, 36-37.

[107] *Id*. at 37 (quoting LPA § 1.1 (A56)); *see also In re Kinder Morgan, Inc. Corp. Reorganization Litig*., 2015 WL 4975270, at *7-8 (Del. Ch. Aug. 20, 2015) (in absence of allegations showing "that the members of the Committee did not meet the minimal requirements specified in the LP Agreement," plaintiff cannot show committee was not properly constituted under that agreement), *aff'd sub nom. Haynes Family Tr. v. Kinder Morgan G.P., Inc.*, 135 A.3d 76 (Del. 2016).

[108] *See Gerber v. EPE Hldgs., LLC*, 2013 WL 209658, at *5 n.57 (Del. Ch. Jan. 18, 2013) (finding that plaintiff failed to allege that the committee members did not

fact-specific contentions about alleged conflicts cannot vitiate Special Approval because, as set forth below, doing so would undermine the LPA's express terms.

Future KMI Board Membership. Plaintiff argues that the General Partner subverted the Special Approval process, in violation of the implied covenant, because the Committee members were invited to join the KMI board post-closing.[109] The LPA, however, only precludes *current* KMI directors from serving on the Committee; it makes no mention of the possibility of *future* board service as a disqualifying factor. The implied covenant cannot be invoked to alter the contractual requirements.[110]

Plaintiff's reliance on *Dieckman* is unavailing. Unlike in *Dieckman*, the Committee members had never served or begun considering the Merger as members of the KMI board.[111] Furthermore, the Proxy here, in contrast to the proxy in *Dieckman,* accurately disclosed the underlying facts: that the Committee members had been offered directorships on KMI's board as well as the compensation they would receive.[112] In any event, even with respect to a corporate

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meet the contractual standards and refusing to import common law independence requirements that are "of little importance" in the limited partnership context).

[109] Op. Br. at 7.

[110] *Nemec*, 991 A.2d at 1127 ("implied covenant will not infer language that contradicts a clear exercise of an express contractual right").

[111] *See Dieckman*, 155 A.3d at 368-69.

[112] Proxy at 98 (A274).

transaction governed by traditional notions of fiduciary duty, an invitation to sell-side directors to join the post-closing board does not create a disabling conflict; accordingly, unitholders could not have reasonably expected that an invitation would disqualify these directors from service on the Committee.[113]

Status as Defendants in Derivative Actions. Plaintiff next argues that the Committee members were conflicted because they were defendants in the Derivative Actions and had disclosed their belief "that the Derivative [Actions] were without merit."[114] But none of the individual defendants faced even a "mere threat" of personal liability from the Derivative Actions because they were not parties to the LPA.[115]

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[113] *See Krim v. ProNet, Inc.*, 744 A.2d 523, 528 n.16 (Del. Ch. 1999) ("[T]hat several directors would retain board membership in the merged entity does not, standing alone, create a conflict of interest."); *see also Orman v. Cullman*, 794 A.2d 5, 28-29 (Del. Ch. 2002) ("No case has been cited to me, and I have found none, in which a director was found to have a financial interest solely because he will be a director in the surviving corporation. To the contrary, our case law has held that such an interest is not a disqualifying interest.").

[114] Op. Br. at 7, 37.

[115] For this reason, the directors had obtained dismissal of Plaintiff's breach of contract claim against them in the Fall Dropdown case. *See El Paso Pipeline Partners*, 2014 WL 2641304, at *2. "[O]nly a party to a contract may be sued for breach of that contract." *Kinder Morgan*, 2015 WL 4975270, at *5 (dismissing claims against committee members who "did not owe the contractual obligations that the [complaint] seeks to enforce"). Underscoring the difficulty of holding the directors personally liable for breach of contract, the Complaint here did not name the individual directors as defendants in Counts I or II. Similarly, little weight could be accorded to the directors' potential exposure for any secondary liability claims, given the significant legal hurdles those claims generally face. *See El Paso*

Furthermore, even in the corporate context, fiduciaries are not considered "interested" merely because they vote on transactions and matters which implicate their exposure in pending or future litigation, particularly where, as here, the threat of personal exposure for damages is virtually non-existent.[116] Given that the agreement eliminates fiduciary duties, appointing these directors to the Committee cannot have departed from any reasonable expectation of unitholders under the LPA.

2. The Committee Approved the Merger in Good Faith.

Because the General Partner sought Special Approval, the Committee is entitled to a presumption "that, in making its decision, the [Committee] acted in good faith," and Brinckerhoff bears the burden of rebutting that presumption.[117] "Good faith" under the LPA is a subjective standard that requires the Committee to "believe that the determination . . . is in the best interests of the Partnership."[118] The Committee, however, is not required to make "a determination regarding the

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Pipeline Partners, 2015 WL 1815846, at *2 ("plaintiff did not present" its secondary liability theories "in any meaningful way" and deeming them waived).

[116] *See generally Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984) ("[T]he mere threat of personal liability for approving a questioned transaction, standing alone, is insufficient to challenge either the independence or disinterestedness of directors[.]").

[117] LPA § 7.9(a) (A123).

[118] *Id.* § 7.9(b) (A124) (emphasis added); *see also Allen v. Encore*, 72 A.3d at 105 ("[T]he only duty the Conflicts Committee members had was to form a subjective belief that the Merger was in [the Partnership's] best interests.").

best interests of the limited partners as a class."[119] For the reasons set forth below, Plaintiff's myopic focus on the Derivative Actions does not rebut the contractual presumption.

a. Plaintiff Fails To Plead Objective Facts Showing That the Committee Members Did Not Believe the Merger Was in the Partnership's Best Interests.

To rebut the presumption of subjective good faith, Plaintiff must plead "facts that enable a court reasonably to infer that the . . . Committee members did not subjectively believe that the Merger was in [the Partnership's] best interests."[120] Plaintiff can do so by either alleging that the Committee members: (1) "consciously disregarded" their duty to form a subjective belief that the transaction was in the Partnership's best interests, or (2) believed they were acting against the Partnership's best interests when approving the Merger.[121]

Plaintiff's contentions are untethered to this contractual standard. Plaintiff does not challenge that, as disclosed in the Proxy, the Committee members did in fact determine, and hold the belief, that the Merger was "fair and reasonable to, and in the best interests of" the Partnership."[122] Nor, remarkably, is there any

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[119] *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 178-81 (Del. Ch. 2014), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015).

[120] *Allen v. Encore*, 72 A.3d at 106.

[121] *Id.*

[122] Proxy at 46 (A222). *See Allen v. Encore*, 72 A.3d at 96 n.2 ("Having premised his factual allegations squarely on the Proxy Statement, Allen cannot fairly, even at

allegation that the Committee did not subjectively believe that the Merger was in the Partnership's best interests or that they lacked a basis, from the perspective of the Partnership, to approve the Merger. For example, the Complaint is bereft of any factual basis supporting an inference that the Committee members voted for the Merger even though they actually believed that the Partnership would have been better off continuing as a publicly traded MLP. Rather, Plaintiff improperly attacks the Committee's decision as though the directors were tasked solely with assessing whether the potential extinguishment of his standing to pursue the Derivative Actions was fair to the limited partners—as opposed to deciding whether the Merger itself (the actual "conflict of interest" before the Committee) was in the best interests of the Partnership.

Finally, Plaintiff's conclusory allegation that the Committee knew that the value of the Derivative Actions was material[123] does not bring Plaintiff any closer to meeting his burden of pleading facts that undermine the Committee's belief that the Merger, as a whole, was in the Partnership's best interests.[124] This argument is

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the pleading stage, ask a court to draw inferences contradicting the Proxy Statement unless he pleads nonconclusory contradictory facts.").

[123] Op. Br. at 34-35.

[124] Incredibly, Plaintiff asserts in his brief that "[t]he Merger was an attempt by KMI to ensure it would never pay anything for the claims of bad faith overcharges alleged in the Derivative [Actions]." *Id.* at 41. He was unwilling, however, to make that allegation in his Verified Complaint. Accordingly, such argument is waived on appeal. Sup. Ct. R. 8. Still, his reluctance is revealing, and the notion

nothing more than Plaintiff's attempt to substitute his own judgment about the materiality of the Derivative Actions for that of the Committee. Indeed, the litigation facts known at the time hardly support Plaintiff's warped view as to the value of the Derivative Actions in relation to the Merger consideration.[125]

In short, on this record, Plaintiff has not pled the requisite objective facts known to the Committee that could provide "a basis to question the Committee's decision from the standpoint of the Partnership."[126]

b. Plaintiff's Process Arguments Cannot Rebut the Committee's Presumed Good Faith.

In a last-ditch effort to evade Special Approval, Plaintiff improperly asserts classic fiduciary-duty "process" challenges to the Committee's decision.

Timing of Consideration of Derivative Suits. Plaintiff complains that the Committee's consideration of the Derivative Actions took place "the night before"

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that a $70 billion transaction involving four publicly traded entities was "an attempt" to eliminate these Derivative Actions cannot be credited.

[125] *See supra* note 24 and accompanying text and *infra* Argument Part III.C. Plaintiff also ignores that at the time the Committee considered the Merger it was not completely clear whether the Derivative Claims were, in fact, derivative. Shortly before the Merger negotiations began, the trial court had issued an opinion indicating that a suit challenging a dropdown transaction for breach of a partnership agreement could be brought directly or dually. *See Allen v. El Paso Pipeline GP Co.*, 90 A.3d 1097, 1111 (Del. Ch. 2014). While defendants disagreed, it was not until this Court's decision in *El Paso* that it was definitively determined that the claims belonged to the Partnership and thus were assets that passed in the Merger to KMI.

[126] *Kinder Morgan*, 2015 WL 4975270, at *8; *Allen v. Encore*, 72 A.3d at 107.

the grant of Special Approval "after the consideration had been set."[127] But the Committee already knew the status of the Derivative Actions and the factual background of the underlying transactions. The Committee also discussed the issue with counsel, which included a review of counsel's due diligence on the lawsuits.[128] Plaintiff's argument is nothing more than a contention that the Committee negotiated poorly by not obtaining additional consideration for what he believes were valuable claims.[129]

Separate Valuation of the Derivative Actions. Plaintiff argues that the Committee should have received a separate valuation of the Derivative Actions.[130] But the LPA does not require the Committee to obtain any independent valuation of specific assets so as to provide "fair" compensation to the limited partners. And, in any event, the Committee retained Vinson & Elkins, LLP and Richards, Layton & Finger P.A., who conducted legal due diligence that included "the derivative claims that had been filed on behalf of EPB."[131] The two firms discussed with the Committee "the status and merits of various derivative claims that had been filed . . . with respect to challenges to prior asset drop-down

[127] Op. Br. at 14 (quoting *El Paso Pipeline Partners*, 132 A.3d at 80); *id.* at 35.

[128] Proxy at 45, 54 (A221, A230).

[129] *Allen v. Encore*, 72 A.3d at 108 (poor negotiating by a committee does not establish bad faith).

[130] Op. Br. at 35.

[131] Proxy at 31, 38 (A207, A214).

transactions."[132] Plaintiff's gripe is nothing more than disagreement with the Committee's ultimate determination regarding the Derivative Actions and nit-picking the process it followed in considering the Merger.

Choice of Counsel. Plaintiff suggests that the Committee should have chosen different law firms, because, as described in the Proxy and discussed by the Committee, they may have had current and prior relationships with KMI and its affiliates.[133] Yet Plaintiff does not allege that either firm represented the General Partner in any of the dropdown litigations or represented an adverse party in the Merger. Nor does Plaintiff allege that any current or prior relationship had any bearing on the law firms' ability to render independent legal advice.

[132] *Id.* at 45 (A221).

[133] Op. Br. at 11 n.27, 13; Compl. ¶¶ 33-34 (A23-24).

III. The Derivative Claims Were Immaterial to the Value of the Partnership and Plaintiff Therefore May Not Challenge the Merger on That Basis.

A. Question Presented

May Plaintiff challenge the Merger directly on the ground that the Partnership allegedly failed to secure adequate value for the Derivative Actions?[134]

B. Standard of Review

The standard of review is *de novo*.[135]

C. Merits of the Argument

Plaintiff also appeals on the basis that "the value of the Derivative Litigations was material in comparison to the Merger price" and "unitholders should have received compensation for the claims."[136] As a threshold matter, the General Partner had no obligation to provide any specific value to limited partners with respect to derivative claims. The Committee's duty was to act in the best interests of the Partnership, not the limited partners.[137] As a result, even if the litigations were material in the context of the Merger, that would not mean that Plaintiff has stated a claim for breach of the LPA. It would simply establish that Plaintiff has satisfied one of his pleading burdens to challenge the Merger.

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[134] This question was presented below at B43-47.

[135] *See Allen v. Encore*, 72 A.3d at 100.

[136] Op. Br. at 39.

[137] *See supra* Argument Part II.C.2.

On the merits, however, because Plaintiff has not met his pleading burden to show that the risk-adjusted value of the Derivative Actions was material in the context of the Merger,[138] this Court can affirm on the independent ground that Plaintiff has not established that he may challenge the transaction.

In *Massey*, the Court of Chancery adjusted the plaintiffs' damages range of $900 million-$1.4 billion[139] to account for various litigation and collection risks[140] and approximated the value of the claims at $95 million, the amount of insurance coverage.[141] Here, Plaintiff "recognize[s] that, as the Court explained in *Massey*, the valuation of pending Derivative Litigations involves many complex issues."[142] Yet Plaintiff ignores all of those complex issues and makes no effort to engage in the kind of analysis set forth in *Massey.* Instead, Plaintiff pleads that the value of the Derivative Actions is automatically equivalent to the harm he alleges the

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[138] *See In re Massey Energy Co. Deriv. & Class Action Litig.*, 2011 WL 2176479, at *17 (Del. Ch. May 31, 2011) ("[T]he plaintiffs essentially embrace the holding of the Supreme Court's decision in *Parnes v. Bally Entertainment Corp.*, which permits a plaintiff to attack a merger directly if the target board agreed to a materially inadequate, and therefore unfair, price because the price did not reflect the value of certain assets—in this case, the Derivative Claims."); *see also id.* at *21-23 (determining risk-adjusted value of claims).

[139] *See id.* at *22.

[140] *See id.* at *3, 26-28.

[141] *See id.* at *28.

[142] Op. Br. at 41.

Partnership suffered.[143] Adding up his own damages figures from the three claims, Plaintiff argues that the value of the Derivative Actions was "as much as $700 million."[144] Even accepting Plaintiff's "sticker price" as a reasonable estimate of harms to the Partnership, "one can confidently say there is likely a very large gap between those values" and the risk-adjusted value of the Derivative Actions.[145]

Plaintiff primarily relies on the Court of Chancery's $171 million liability award, issued in April 2015, to prove the value of the Fall Dropdown claim when the Committee approved the Merger in August 2014.[146] However, things were far less certain at the time the Committee approved the Merger. The individual defendants had won summary judgment in two other Dropdown cases,[147] and Plaintiff had lost his own summary judgment motion in the Fall Dropdown case on

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[143] Compl. ¶¶ 18, 27 (A15-16, A21); *contra Massey*, 2011 WL 2176479, at *3 ("This record does not support the inference that the Derivative Claims are material in comparison to the overall value of Massey as an entity. The plaintiffs' argument that they are conflates the value of two different things: the potential diminution in value of Massey as a result of the consequences of the Upper Big Branch Disaster and the loss in public confidence in Massey's management (i.e., the 'Disaster Fall-Out') on the one hand, and the value of the Derivative Claims, on the other.").

[144] Op. Br. at 39.

[145] *Massey*, 2011 WL 2176479, at *22.

[146] Op. Br. at 39-40.

[147] *El Paso Pipeline Partners*, 2014 WL 2768782, at *23; *Allen v. El Paso*, 113 A.3d at 194.

liability.[148] Trial loomed. Plaintiff would bear the burden of proving that the Committee acted in subjective bad faith. Even the Court of Chancery expected to rule for defendants "from the bench."[149]

Yet now, with the benefit of knowing how the trial turned out, Plaintiff assumes that his victory was assured and obvious when the Committee approved the Merger. This argument is infected by hindsight bias.[150] Plaintiff fares no better in trying to plead the value of his other pending Derivative Actions at the time of the Merger. Plaintiff alleges that the Spring Dropdown claim was worth $141 million—the full amount he claimed as damages—despite that the Court of Chancery had granted summary judgment in favor of Defendants.[151] Plaintiff thus valued the claim as though each of the following steps was a riskless proposition: (1) reversal on appeal of Defendants' summary judgment; (2) success at trial,

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[148] *El Paso Pipeline Partners*, 2014 WL 2641304, at *3.

[149] Compl. ¶ 26 (A21).

[150] *See* William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 454-55 (2002) ("There is empirical evidence that persons who know the outcome of a decision tend to exaggerate the extent to which that outcome 'could have been correctly predicted beforehand.'") (citation omitted); *see also* Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 587 (1994) ("Hindsight bias is the tendency for people with knowledge of an outcome to exaggerate the extent to which they believe that outcome could have been predicted.").

[151] Compl. ¶¶ 19-20 (A16-17).

bearing the burden of proof on liability and damages; (3) affirmance on appeal; and (4) collection of a $141 million judgment.

Likewise, Plaintiff alleges that the 2012 Dropdown Claim was worth $400 million based solely on an alleged decline in value of Partnership units, despite his not having advanced his claims beyond filing a complaint.[152] Plaintiff thus similarly values the claims as though each of the following steps was a riskless proposition: (1) prevailing on motions to dismiss and for summary judgment; (2) success at trial, bearing the burden of proof on liability and damages; (3) affirmance on appeal; and (4) collection of a $400 million judgment. Plaintiff may be confident in litigation, but this is inconsistent with what *Massey* requires him to plead to establish the value of the Derivative Actions.

For these reasons, the Court can affirm the Court of Chancery's dismissal of the Complaint on the independent ground that Plaintiff has failed to allege sufficient facts to establish that the value of the Derivative Actions was material in the context of the Merger.

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[152] *Id.* ¶¶ 23-24 (A18-19); *In re El Paso Pipeline Partners L.P. Deriv. Litig.*, C.A. No. 7141-VCL, Dkt. 1 (B88-126).

IV. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT THE SECONDARY LIABILITY CLAIMS SHOULD BE DISMISSED.

A. Question Presented

Did the Court of Chancery correctly dismiss the secondary liability claims because Plaintiff failed to allege an underlying wrong?[153]

B. Standard of Review

The standard of review is *de novo*.[154]

C. Merits of the Argument

As explained above, the Complaint fails to state a primary claim against the General Partner for breach of contract or breach of the implied covenant. Accordingly, Plaintiff has not adequately alleged an underlying breach of the LPA's express or implied terms upon which secondary liability claims can be predicated.[155] The Court of Chancery therefore correctly dismissed Counts III and IV, which seek to impose secondary liability on Defendants other than the General Partner for the same alleged harm.[156]

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[153] This question was presented below at B49-52, B84-86.

[154] *See Allen v. Encore*, 72 A.3d at 100.

[155] *See El Paso Pipeline Partners*, 2014 WL 2768782, at *23 (aiding and abetting); *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1036 (Del. Ch. 2006) (tortious interference).

[156] Order ¶ 6.

CONCLUSION

For each of the reasons explained above, this Court should accordingly affirm the decision of the Court of Chancery granting the Defendants' Motion to Dismiss.

ROSS ARONSTAM & MORITZ LLP

/s/ Bradley R. Aronstam
Bradley R. Aronstam (Bar No. 5129)
S. Michael Sirkin (Bar No. 5389)
100 South West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendants-Below/Appellees Kinder Morgan, Inc., Kinder Morgan Energy Partners, L.P., Richard Kinder, Steven J. Kean, Ronald L. Kuehn, Jr., Arthur C. Reichstetter, and William A. Smith

Of Counsel:

Joseph S. Allerhand
Seth Goodchild
Amanda K. Pooler
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Dated: February 28, 2018