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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAUL MORRIS, on behalf of all similarly situated former unitholders of SPECTRA ENERGY PARTNERS, L.P., Plaintiff-Below, Appellant, v. SPECTRA ENERGY PARTNERS (DE) GP, LP, Defendant-Below, Appellee.	:	**PUBLIC VERSION** **Filed on February 21, 2020** No. 489, 2019 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2019-0097-SG

APPELLEE'S ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

Plaintiff appeals from the Court of Chancery's ruling that Plaintiff, a former unitholder of master limited partnership ("MLP") Spectra Energy Partners, LP ("Partners" or the "Partnership"), lost standing to bring his derivative claim when his limited partnership units ("LP Units") were acquired in a roll-up transaction with Partners' sponsor entity, Enbridge, Inc. (the "Roll-Up").

Plaintiff's Complaint below purported to assert a direct claim challenging the Roll-Up based solely on Partners' alleged failure to ascribe value to, and obtain consideration for, the extinguishment of his then-pending derivative suit, *Morris v. Spectra Energy Partners (DE) GP, LP*, C.A. No. 12110-VCG (Del. Ch.) (the "Derivative Litigation"). In the Complaint, Plaintiff argued that the Partners' Conflicts Committee that approved the Roll-Up (the "Roll-Up Committee") should have adopted exactly the same methodology the Court of Chancery applied to value his derivative claim – first, determining the maximum amount of damages, and then discounting that amount to reflect the likelihood of success. On appeal, Plaintiff reverses course and contends that although the Roll-Up Committee had to apply a chance of success adjustment, the trial court's adoption of that same methodology to value the same contingent asset constitutes reversible error.

The Derivative Litigation, filed in 2016, asserted six claims arising from a 2015 reverse drop-down transaction (the "Reverse Drop-Down"). In the Reverse

Drop-Down, Partners' sponsor, Spectra Energy Corp ("Spectra"), acquired certain pipeline assets from Partners in exchange for the redemption of approximately 21 million LP Units held by Spectra and the waiver of certain contractual payments to Spectra. A single claim for breach of the limited partnership agreement survived a motion to dismiss. That claim was premised on Plaintiff's assertion that the 2015 Conflicts Committee that approved the Reverse Drop-Down (the "Reverse Drop-Down Committee"), on the advice of its financial advisor, overvalued the consideration Partners received by $525 million. Plaintiff's Complaint alleged that reduced future cash flow to the general partner, purported to be worth $525 million, was not properly an element of consideration and that the placement of the slide reflecting that $525 million value in the appendix to the advisor's presentation deck demonstrated the Reverse Drop-Down Committee's bad faith.

Plaintiff pursued the Derivative Litigation, completing fact and expert discovery in August 2018. In discovery, every witness involved in the Reverse Drop-Down confirmed that he or she believed the Reverse Drop-Down Committee correctly valued the consideration. Only Plaintiff's expert disagreed. In the interim, Enbridge acquired Spectra, and, in the summer of 2018, Enbridge offered to acquire all of Partners' outstanding LP Units in the Roll-Up. With trial approaching, and with Defendant's Motion for Summary Judgment pending, Plaintiff moved to stay – and ultimately agreed to dismiss – his own claim in anticipation of losing standing

when the Roll-Up closed.

After the Roll-Up closed, Plaintiff sought to revive his standing through the Complaint that is the subject of this appeal, invoking the narrow exception to the continuous ownership rule adopted in *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243 (Del. 1999), and *In re Primedia, Inc. Shareholders Litigation*, 67 A.3d 455 (Del. Ch. 2013). Plaintiff alleged that the Roll-Up Committee breached its duty of subjective good faith under Partners' Limited Partnership Agreement ("LPA")[1] because it failed to correctly value Plaintiff's extinguished derivative suit. The Complaint specifically alleged that the Roll-Up Committee should have determined Plaintiff's chances of success of the claim, applied a discount reflecting that likelihood to Plaintiff's claimed damages, and then extracted the resulting value from Enbridge in the Roll-Up.

To support his claim that the Roll-Up Committee breached the LPA, Plaintiff incorporated into his Complaint and relied on all of the documents he had received in response to a books and records demand he sent before filing suit. The incorporated documents included everything from the Derivative Litigation evidentiary record that either Plaintiff or Defendant had presented to the Roll-Up

[1] The January 2018 Third Amended and Restated LPA was in effect at the time of the Roll-Up. (A153-97) The Second Amended and Restated LPA was in place during the events giving rise to the Derivative Litigation. (*See* B306-62) All relevant provisions were identical in both versions.

Committee during its deliberations, along with the minutes of the Roll-Up Committee's meetings and the analyses of the Roll-Up Committee's financial advisor.

Defendant moved to dismiss, arguing that Plaintiff had not met the prerequisites to claim standing under *Parnes* and *Primedia* because (1) the Complaint did not allege that the Roll-Up consideration as a whole was unfair or inadequate, (2) the alleged value of the Derivative Litigation, however it was calculated, was not material to the $3.3 billion Roll-Up value, and (3) the Derivative Litigation was no longer viable when the Roll-Up Committee evaluated it. In his response, Plaintiff repeated that the Roll-Up Committee erred by failing to risk adjust and then extract from Enbridge the value of the Derivative Litigation.

At oral argument on the motion to dismiss, the Court of Chancery focused on *Primedia*'s materiality prong, including how to calculate the value of the Derivative Litigation. Vice Chancellor Glasscock asked defense counsel, "[H]ow would I determine, first of all, whether I use the full value of the asset or some percentage that reflects the risk that there will never be such a judgment?" Defendant's counsel responded that because the litigation was a contingent asset, the court should apply a discount. Plaintiff's counsel did not respond to the question.[2]

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[2] Defendant also argued that the Derivative Litigation was not material to the Roll-Up, even without any risk adjustment. (A122 n.12; A721:17-A722:19) Plaintiff

In a detailed opinion, the Court of Chancery focused its analysis on materiality. The trial court concluded that, taking into account the information incorporated in the Complaint and Plaintiff's contractual burden to rebut the presumption of good faith that the Reverse Drop-Down Committee is entitled to under the LPA, Plaintiff had, at best, a 25% chance of prevailing in the Derivative Litigation. Comparing the discounted value of the Derivative Litigation with the $3.3 billion value of the Roll-Up, the trial court correctly concluded that the Derivative Litigation was not material in the context of the total Roll-Up value, and Plaintiff, therefore, could not establish standing under *Parnes*, *Primedia*, and their progeny. Plaintiff appealed.

Plaintiff raises only one issue on appeal – whether the Court of Chancery could risk adjust the value of the Derivative Litigation in determining materiality under *Primedia*.

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contends that his claim was worth, at most, $112 million to the Partnership's public unitholders, which is only 3.4% of the $3.3 billion Roll-Up.

SUMMARY OF ARGUMENT

1. Denied. Plaintiff lost standing to pursue the Derivative Litigation when his LP Units converted into Enbridge stock when the Roll-Up closed. (B577-79) As the Court of Chancery found, Plaintiff's Complaint did "not challenge the fairness of the Roll-Up's exchange ratio, other than to allege failure to achieve value for the litigation asset."[3] (Op. 22 (emphasis in original))[4] Because Plaintiff did not allege that the Roll-Up Committee's valuation of the Derivative Litigation resulted in a "materially inadequate, and therefore unfair, price" for the Roll-Up as a whole, Plaintiff's claims cannot be sustained. *In re Massey Energy Co. Derivative & Class Action Litig.*, 2011 WL 2176479, at *17 (Del. Ch. May 31, 2011).

Plaintiff cannot revive his standing because the value of the Derivative Litigation was not material to the value of the Roll-Up. In addressing the motion to dismiss, the trial court reviewed in the Opinion the facts and documents incorporated by Plaintiff into the Complaint and observed that to prevail, Plaintiff had to rebut the presumption of good faith that attached under the LPA to the Reverse Drop-Down

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[3] Plaintiff now asserts in his briefing that Partners' "controller forced the Roll-Up through at an unfair price," but that allegation is not in his Complaint. (*See* Br. 4) Citations to "Br." refer to Appellant's Opening Brief.

[4] Citations to "Op." refer to the Memorandum Opinion issued by the trial court (the "Opinion"), attached as Exhibit A to Appellant's Opening Brief.

Committee's valuation by proving that Committee did not subjectively believe that the Reverse Drop-Down consideration was in the best interests of Partners. (Op. 32-33; A186 §7.9(a)) The incorporated record and Plaintiff's contractual burden to overcome the presumption of good faith led the trial court to conclude "that the chance of success of the Derivative [Litigation] was slim, and certainly less than one-in-four." (Op. 33) Accordingly, and just as Plaintiff's Complaint argued the Roll-Up Committee should have done, the trial court discounted the value Plaintiff had ascribed to the Derivative Litigation in its materiality analysis. (Op. 32-33)

2. Denied. Defendant did not "waive" any argument that the value of the Derivative Claim should be discounted to account for litigation risk, nor was the alleged value of the Derivative Litigation undisputed. (Br. 5) Plaintiff put risk adjustment directly at issue when he asserted in his Complaint and in response to Defendant's motion to dismiss that the Roll-Up Committee should have risk adjusted the value of the Derivative Litigation. (A26-29 ¶¶7-10, A53-60 ¶¶65-72, 75-77; A211-12) And Defendant joined issue in briefing and at oral argument, contending that in assessing the value of the Derivative Litigation for materiality, interest should be excluded and "[t]he value of the Derivative Litigation becomes even more immaterial if, as Plaintiff suggests, it is discounted to reflect the probability of an ultimate recovery." (A122 n.12; A721:17-A722:19 ("[I]n the context of this transaction, given its size, the fact that it's a contingent asset, the fact that [Plaintiff]

acknowledges it would have been good faith … to discount it so, in fact … that top number is really not the right number to look at.”))

3. Denied. The Court of Chancery’s valuation methodology is consistent with Delaware precedent and accepted practices for valuing contingent assets. In *Primedia*, which established materiality as one of three prerequisites for a former shareholder to maintain a direct claim challenging a merger based on an alleged failure to value a derivative claim, the court held that the value of an extinguished claim “must be ‘discounted to reflect the minority stockholders’ beneficial interest in the litigation recovery.’” (Op. 32 (quoting *Primedia*, 67 A.3d at 482)) *Primedia* itself established that the standard of review on a motion to dismiss does not require the trial court to draw the unreasonable inference that Plaintiff’s claim had a 100% chance of success. *Primedia*, 67 A.3d at 476, 483. The trial court relied on *Primedia* in determining that it should consider the “chance of success” and “substantial roadblocks” Plaintiff faced to recover in the Derivative Litigation. (Op. 32)

Plaintiff’s suggestion that the extensive record he incorporated in his Complaint was insufficient to support the court’s analysis is untethered to reality. And the trial court properly considered that record in determining which inferences were “reasonable” to draw in favor of Plaintiff.

4. Denied. The trial court’s ruling is entirely consistent with Delaware law and the policy underlying it. *Parnes*, *Primedia* and their progeny created a

narrow exception to the long-standing continuous ownership rule. Plaintiff does not explain why public policy would require courts assessing the materiality of pending litigation under *Primedia* to eschew the ordinary, commonsense practice of risk-adjusting the value of a contingent asset and instead accept a plaintiff's self-serving pleading of damages as the irrebuttable value of an extinguished derivative claim. This is particularly so in light of the advanced stage of the Derivative Litigation and the record incorporated in the Complaint (and therefore properly considered by the trial court even at the motion to dismiss stage). Adopting Plaintiff's theory that courts must assume a 100% chance of success for any extinguished derivative claim would allow shareholders to simply plead around the materiality requirement, greatly expanding the "limited" exception *Parnes* and *Primedia* were intended to create. *See Primedia*, 67 A.3d at 476.

5. The value of the Derivative Litigation is not material in the context of the Roll-Up, no matter how calculated. Even if the Court were to include prejudgment interest, the unadjusted value of the Derivative Litigation to unaffiliated unitholders as pled by Plaintiff is $112,370,000. (Op. 32; Br. 32) The total value of the Roll-Up was approximately $3.3 billion. (B30; Op. 34 n.148) The maximum potential value is therefore roughly 3.4% of the value of the Roll-Up. No Delaware court has found that a litigation worth less than 5% of the value of a merger met the *Primedia* materiality test.

6. If Plaintiff has standing under *Primedia*, this Court should nevertheless affirm the dismissal because the Complaint did not state a claim for breach of the LPA or the implied covenant. To state a claim, Plaintiff would have to allege facts to rebut the presumption of subjective good faith of not one, but two different Conflicts Committees that approved two different transactions (three years apart), each relying on different legal and financial advisors. The Complaint did not allege such facts and did not attack the Roll-Up Committee's overall process. In the absence of such allegations, Plaintiff cannot meet his burden, even at the pleading stage.

COUNTERSTATEMENT OF FACTS

A. Enbridge proposes the Roll-Up of its master limited partnership.

Partners was a Delaware master limited partnership managed by its general partner, Spectra Energy Partners (DE) GP, LP ("Partners GP" or "Defendant"). (A30 ¶16) On May 17, 2018, Enbridge sent Partners GP a non-binding offer to exchange all of Partners' LP Units not already beneficially owned by Enbridge for Enbridge common stock. (A501; Op. 14) At the time, Enbridge indirectly owned approximately 83% of the LP Units. (A22-23 ¶1; Op. 4) Public unitholders held the remainder of the LP Units. (A50 ¶59)

B. Partners' LPA allows Partners to enter into transactions with its sponsor.

Partners' LPA provided that transactions between "[Partners GP] or any of its Affiliates, on the one hand, and the Partnership," on the other hand, "shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement" if they are approved under one of four safe harbors. (A186 §7.9(a); Op. 8, 14-15) One of these safe harbors was "Special Approval," defined as the "approval by a majority of the members of the Conflicts Committee." (A166 §1.1, A186 §7.9(a)) The LPA also defined the qualifications for "Conflicts Committee" members. (A159 §1.1)

The LPA eliminated all common-law fiduciary duties that Partners GP (acting directly or through a Conflicts Committee) might otherwise owe to Partners and its

unitholders and replaced them with a contractual subjective good faith standard. (Op. 7; A186-87 §§7.9(b), (e) (defining "good faith" as the "belie[f] that [a] determination or other action is in the best interests of the Partnership")) Under the LPA, a Conflicts Committee's Special Approval created a rebuttable presumption that the committee acted in good faith. (A186 §7.9(a); Op. 8) A plaintiff challenging a Special Approval "shall have the burden of overcoming such presumption." (A186 §7.9(a)) A Conflicts Committee was also entitled to a presumption of good faith whenever it acted in reliance on the advice of outside advisors as to matters that it "reasonably believes to be within such Person's professional or expert competence." (A187 §7.10(b); Op. 8) Plaintiff does not challenge on appeal the trial court's reliance on or interpretation of any of these provisions.

C. Partners authorizes a Roll-Up Committee to evaluate and negotiate the Roll-Up in accordance with the LPA.

Pursuant to the LPA, when the Partners GP Board received Enbridge's Roll-Up proposal, it authorized a Conflicts Committee – the Roll-Up Committee – to evaluate and negotiate the Roll-Up. (A48-49 ¶55; Op. 14-15) Three directors served on the Roll-Up Committee:

- JD Woodward, former Senior Vice President at Atmos Energy and Partners GP Board member since 2009;
- Nora Brownell, former FERC Commissioner and Partners GP Board member since 2007; and

- Michael Morris, former director of Spectra Energy, former CEO of American Electric Power Company, Inc., and Partners GP Board member since 2017.

(*See* A501-03; B17-18; Op. 15) Plaintiff does not dispute that the Roll-Up Committee met the independence criteria of a "Conflicts Committee" under §1.1 of the LPA. (*See* A20-80; B40) Each member also owned a significant number of LP Units before the Roll-Up was proposed, and each asked for and received additional LP Units as compensation for serving on the Roll-Up Committee, further aligning their interests with public unitholders. (A514; B2; B42)

The Roll-Up Committee engaged Sidley Austin LLP as its legal advisor and Jefferies LLC as its financial advisor. (A501; A504; Op. 16) Plaintiff does not dispute that Sidley and Jefferies met the qualifications under §7.10(b) of the LPA to serve as advisors, and neither Sidley nor Jefferies had any connection to the 2015 transaction. Between May and August 2018, the Roll-Up Committee and its advisors met fifteen times to discuss and evaluate the Roll-Up. (A501-653)

D. As part of its analysis, the Roll-Up Committee assesses the value of the Partnership's potential assets, including the Derivative Litigation.

The Roll-Up Committee analyzed all of Partners' fixed and contingent assets during its negotiations, including Plaintiff's then-pending Derivative Litigation.

1. In the Derivative Litigation, Plaintiff alleged that the 2015 Conflicts Committee undervalued Pipeline Assets that Partners sold to its sponsor.

In the lone Derivative Litigation claim that survived a motion to dismiss, Plaintiff claimed that Partners GP breached the LPA when the Reverse Drop-Down Committee approved an October 2015 sale of certain assets to Partners' former sponsor, Spectra. (B454-55 ¶¶83-88; Op. 11-12) The Reverse Drop-Down arose from a 2015 agreement by Spectra to contribute a one-third interest in two pipeline companies (the "Pipeline Assets") controlled by Partners to Spectra's joint venture with a third party at an implied valuation of $1.5 billion. (A36-37 ¶35; Op. 5) To do so, Spectra first had to acquire the Pipeline Assets from Partners. (A36-37 ¶35; Op. 6)

Partners GP authorized the Reverse Drop-Down Committee to negotiate the acquisition for the Partnership. (A38 ¶38; Op. 6-7) The Reverse Drop-Down Committee retained Simmons & Company International ("Simmons") as its financial advisor and McGuireWoods LLP as its legal advisor. (A38 ¶39; Op. 9; (B438 ¶38) Spectra and the Reverse Drop-Down Committee agreed that in exchange for the Pipeline Assets, Spectra would redeem approximately 21 million LP Units and waive its right to receive $48 million in incentive distribution rights payments over three years. (A44 ¶47)

Simmons advised the Reverse Drop-Down Committee that the value of the LP Unit redemption included both the market value of the units and the reduction in payments to Spectra that resulted from eliminating the units while increasing distributions per LP Unit in accordance with Partners' prior public guidance. (A495; B363-65) Simmons described this latter element of value as "Reduced GP Cash Flow." (A495) Simmons opined that the total consideration Partners received for the Pipeline Assets was worth approximately $1.5 billion and was in the best interests of the Partnership as a whole. (A495; B364-65)

Plaintiff filed the Derivative Litigation, alleging that the Reverse Drop-Down Committee breached its duty of subjective good faith under Partners' LPA because it accepted consideration worth only $1 billion, but the Pipeline Assets were worth $1.5 billion. (B427-28 ¶1) (B427-28 ¶1, B439-42 ¶¶41-44) Plaintiff's theory was grounded in his belief that the only value attributable to the redemption of Spectra's LP Units was the market value of those units. (A44-45 ¶49, A68 ¶89; Br. 12-13) Plaintiff argued that since "Reduced GP Cash Flow" was of no value to the Partnership, Partners received inadequate consideration. Plaintiff pointed to the placement of the "Reduced GP Cash Flow" slide in the appendix of its presentation as evidence of the Committee's alleged bad faith. (A44-45 ¶49, A68 ¶89; Br. 12-

13) In 2017, one of Plaintiff's six claims survived a motion to dismiss, and the parties proceeded to discovery. (A46 ¶¶50-51; Op. 12-13)[5]

In discovery, no witness other than his own paid expert corroborated Plaintiff's valuation theory. Simmons confirmed that it actually determined and advised the Reverse Drop-Down Committee that "Reduced GP Cash Flow" was worth $525 million to the Partnership (B498) The Reverse Drop-Down Committee members, Defendant's expert, Spectra, and Spectra's joint-venture partner all testified that they believed the total value of consideration to the Partnership was $1.5 billion. (B76-77; B489-90, B503-04) Third-party analysts who reported on the transaction reacted favorably, and several also independently calculated Reduced GP Cash Flow as part of the value flowing to the Partnership. (B403; B422; B415; B367; B382; B371; B390)

Only Plaintiff's expert, James Read, disagreed. Read, who testified that he had no experience valuing MLPs, also admitted that he had no basis to dispute that the Reverse Drop-Down Committee actually believed that Reduced GP Cash Flow constituted $525 million in value to Partners. (B251; B189 at 189:2-9, B191-93 at 197:24-205:23) With no evidence supporting Plaintiff's core theory, Defendant

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[5] That same year Enbridge acquired Spectra. (A32 ¶24)

sought summary judgment. (B464-537) Rather than respond to Defendant's motion, Plaintiff asked the trial court to stay his own case. (A784-96)

2. The Roll-Up Committee conducts its own review of the value of the Derivative Litigation.

The day after Enbridge proposed the Roll-Up, Plaintiff's counsel sent the Roll-Up Committee a letter outlining why Plaintiff believed the Derivative Litigation was a valuable asset of Partners. (B541) The Roll-Up Committee set out a process to analyze Plaintiff's claim. (A507; A516) It discussed the Derivative Litigation in approximately half of its meetings. (A501-509; A515-25; A533-44; A549-52) Some of these meetings were dedicated almost entirely to the Derivative Litigation. (A520-25; A533-37)

At Plaintiff's request, Plaintiff's counsel made a presentation to the Roll-Up Committee's advisors. (A51-52 ¶¶62, 64; A533) In their presentation, Plaintiff's counsel "set forth facts concerning the Reverse Drop-Down, the applicable legal standards under Delaware law, the reasons that there was a significant likelihood that SEP GP [*i.e.* Defendant] would be held liable for breaching the Partnership Agreement by agreeing to the Reverse Drop-Down, and an analysis of the damages in the Underlying Action [*i.e.* the Derivative Litigation]." (A52 ¶64) Plaintiff's counsel urged the Roll-Up Committee's advisors to value the Derivative Litigation at $661 million, which included $554 million in alleged damages and $107 million in prejudgment interest. (A298) Defense counsel also made a presentation to the

Roll-Up Committee, explaining both why Plaintiff's theory was wrong and that there was no evidence to rebut the Reverse Drop-Down Committee's good faith. (A51-52; Op. 16-17)

Both parties provided the Roll-Up Committee with documents from the Derivative Litigation, including Simmons' valuation decks, the trial court's memorandum opinion on the motions to dismiss, and the parties' opening and rebuttal expert reports. (A520-25; A533-37; A543; B49-140; B247-68; B269-305) Plaintiff's Complaint does not identify any document that the Roll-Up Committee should have considered but did not. Nor does Plaintiff identify any documents that he alleges the Roll-Up Committee considered but should not have.

Finally, the Roll-Up Committee asked its financial advisor, Jefferies, to independently analyze the consideration that Partners received in the Reverse Drop-Down and specifically to opine on whether Reduced GP Cash Flow constituted value to the Partnership. (A543) Jefferies agreed with Simmons' analysis from 2015 and advised the Roll-Up Committee that "Reduced GP Cash Flows should be included as a component of the consideration received in the [Reverse Drop-Down] and, as a result, the total value of consideration received by the Partnership in the [Reverse Drop-Down], including the Reduced GP Cash Flows, was approximately $1.5 billion." (A543-44) In other words, Jefferies concluded that the alleged $525

million gap in value that was the lynchpin of the Derivative Litigation simply did not exist.

Based on its review of the evidence and the advice of its financial advisor, the Roll-Up Committee rejected as meritless Plaintiff's central contention in the Derivative Litigation – that Reduced GP Cash Flow resulting from the redemption of LP Units provided no value to the Partnership. (A543; Op. 19) The Roll-Up Committee then risk-adjusted the value of the Derivative Litigation to the cost of defense, approximately $4 million, and instructed Jefferies to reflect that value in an updated valuation. (A543-44; A551; Op. 19) Jefferies did so, but noted that the $4 million in value assigned to the Derivative Litigation was "so small compared to the total value of the Partnership, that it would not have a meaningful impact on the exchange ratio" for the proposed Roll-Up. (A544)

E. The Roll-Up Committee determines that the Roll-Up is in the best interests of the Partnership, and the Roll-Up closes.

For several months, the Roll-Up Committee bargained with Enbridge on many issues, including the consideration that LP unitholders would receive in the Roll-Up. Through five rounds of offers and counteroffers, including one round in which the Roll-Up Committee outright rejected Enbridge's offer, Enbridge ultimately agreed to an exchange ratio of 1.111x – a 9.8% increase over Enbridge's initial proposal and a 21% premium to the publicly traded LP Unit price before the Roll-Up was announced. (A515-653; A557) Jefferies tendered a fairness opinion to the Roll-Up

Committee concluding that the Roll-Up was fair, from a financial point of view, to Partners and unaffiliated unitholders. (A560)

Based on the recommendations of its advisors and its own independent analyses, the Roll-Up Committee concluded that the Roll-Up was in the best interests of the Partnership. (A568-69; Op. 21) The Partners GP Board unanimously approved the Roll-Up, and the parties signed and announced the merger agreement on August 24, 2018. (A49-50 ¶58) LP unitholders voted on the Roll-Up. (B44-45; Op. 22) Approximately 91% of the unaffiliated unitholders who voted supported the Roll-Up.[6] The Roll-Up closed in December 2018. (B48; Op. 22) The total value of the Roll-Up after the Roll-Up Committee's negotiations was approximately $3.3 billion. (B30)

F. Plaintiff loses standing to pursue the Derivative Litigation.

After the Roll-Up closed, Defendant moved to dismiss the Derivative Litigation. (B560-71; Op. 22) Plaintiff acknowledged that he lost standing when the Roll-Up closed and did not oppose the dismissal. (B572-76; Op. 22-23) On

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[6] 484,896,871 LP Units were eligible to be voted in the final proxy vote on the Roll-Up. (B48) Enbridge owned 402,989,862 LP Units and unaffiliated unitholders owned 81,907,009. (A50 ¶59; A594) 46,758,295 LP Units were not voted. (B48) 91% of unaffiliated unitholders who submitted proxies voted in favor of the Roll-Up. (*See* B48; A50 ¶59; A594) Plaintiff does not allege whether or how he voted his LP Units.

March 26, 2019, the trial court dismissed the Derivative Litigation with prejudice. (B577-79; Op. 23)

G. Plaintiff sues again, arguing that the Roll-Up Committee breached the LPA by failing to risk adjust the value of the Derivative Litigation.

On October 8, 2018, Plaintiff made a demand to inspect Partners' books and records regarding the Roll-Up. (B543; Op. 23) Partners produced 2,400 pages of documents, including all of the evidence from the Derivative Litigation considered by the Roll-Up Committee, the Committee meeting minutes, and Jefferies' presentations to the Committee. (B2 ¶4) Plaintiff did not challenge Defendant's production.

On February 8, 2019, Plaintiff filed this lawsuit, asserting claims for breach of the LPA and breach of the implied covenant of good faith and fair dealing. (A77-79 ¶¶102-112; Op. 23-24) Plaintiff incorporated into his Complaint all of the documents produced in response to his books and records demand (B548 ¶10; *see also* Op. 23), and alleged in the Complaint that "a strong likelihood of liability and substantial damages in the Underlying Action" should be inferred from those documents. (A61 ¶79) Defendant moved to dismiss the new claims, arguing that Plaintiff did not have standing to directly challenge the merger because (1) Plaintiff did not challenge the Roll-Up as a whole; (2) the Derivative Litigation was no longer

viable when Plaintiff lost standing; and (3) the value of the Roll-Up was not material to the Roll-Up as a whole. (A119-25)

H. The trial court finds that Plaintiff cannot meet the materiality prong of the *Primedia* exception to the continuous ownership rule and dismisses the case for lack of standing.

In a detailed Opinion, the trial court reviewed the Complaint's allegations about the Derivative Litigation, including the incorporated documents, and the allegations about the Roll-Up Committee's process in determining the value of that claim and approving the Roll-Up. (Op. 3-23) The trial court also walked through the relevant provisions of the LPA and recognized that Plaintiff faced "substantial roadblocks" to succeeding on his extinguished derivative claim. (Op. 7-8, 31-32) Among those roadblocks were Plaintiff's burden to prove (1) "that the work of Defendant's advisor, Simmons, on the Reverse Drop-Down did not fit in the parameters of Section 7.10(b) of the [LPA], or that SEP GP [*i.e.* Defendant] did not 'reasonably believe' that the valuation of the transaction was within Simmons' competence, negating any 'safe harbor' for the Defendant"; *and* (2) "scienter: that SEP GP's Board of Directors and the Reverse Drop-Down Committee acted consciously against the best interests of the Partnership." (Op. 32-33) Plaintiff does not challenge on appeal the trial court's interpretation of the LPA.

In its materiality analysis, the trial court presumed, "without deciding, that prejudgment interest is a part of the value attributable to the Derivative [Litigation],"

and accepted Plaintiff's assertion that a full recovery on his Derivative Litigation would therefore result in up to $112,370,000 in value to the unaffiliated unitholders. (Op. 31-32) Relying on *Primedia*, the trial court then found, based on its analysis of the Complaint and applicable law, "that the chance of success of the Derivative [Litigation] was slim, and certainly less than one-in-four." (Op. 33) That brought the value of the contingent and unliquidated Derivative Litigation to less than $28,092,500. (*Id.*) The trial court concluded that this figure "represents less than one percent of the total value of the [approximately $3.3 billion] Roll-Up," which "is not material in the context of the Roll-Up," and dismissed Plaintiff's claims. (Op. 33-34)

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFF LACKED STANDING TO BRING A DIRECT CLAIM BECAUSE THE VALUE OF THE DERIVATIVE LITIGATION WAS NOT MATERIAL TO THE VALUE OF THE ROLL-UP.

A. Question Presented.

Whether this Court should affirm the trial court's holding that Plaintiff lacks standing to bring a direct claim challenging the Roll-Up Committee's good faith in approving the Roll-Up because Plaintiff does not allege that the Roll-Up consideration as a whole was inadequate and the value of the Derivative Litigation to unitholders is not material to the value of the $3.3 billion Roll-Up as a whole. (A119-25)

B. Scope Of Review.

"Whether a party has standing is a question of law that is subject to *de novo* review." *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1256 (Del. 2016).

C. Merits Of Argument.

Plaintiff concedes that under the continuous ownership doctrine, he lost standing to pursue the Derivative Litigation when the Roll-Up transaction closed. (B577-79); *see Ark. Teacher Ret. Sys. v. Caiafa*, 996 A.2d 321, 322-23 (Del. 2010) He attempted to convert his claim to a direct challenge to the Roll-Up under the limited exception to that doctrine established in *Parnes* and detailed in *Primedia.* (Br. 1; A75 ¶100) But Plaintiff failed to meet the threshold requirement of the

Parnes/Primedia exception because he did not allege that the merger consideration as a whole was unfair to unitholders.

"Delaware Courts have interpreted the *Parnes* exception very narrowly." *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *10 (Del. Ch. Sept. 30, 2009). It does not permit a shareholder to bring a direct claim based only on an alleged failure to adequately value an extinguished derivative claim. Instead, "[*Parnes*] says that if the [ancillary transactions challenged by a plaintiff] were not so costly that they enable the plaintiffs to allege that the consideration offered to the target stockholders was reduced to an unfair level, then a price attack on them must be labeled as derivative and extinguishable by the merger." *Golaine v. Edwards*, 1999 WL 1271882, at *6 (Del. Ch. Dec. 21, 1999).

Accordingly, without factual allegations that "the merger price was unfair or that the merger was obtained through unfair dealing," a former shareholder's claim that "wrongful transactions associated with the merger … reduced the amount paid" to stockholders is insufficient. *Parnes*, 722 A.2d at 1245 (distinguishing *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1988)). But, as the trial court found, Plaintiff "does not challenge the fairness of the Roll-Up's exchange ratio, other than to allege failure to achieve value for the litigation asset." (Op. 24 (emphasis in original)) Plaintiff's sole complaint about the Roll-Up Committee's valuation of a single contingent asset – the Derivative Litigation – is not enough. (A25 ¶6, A53

¶65, A60-61 ¶¶77-78, A77 ¶105) Plaintiff offers no objection to Jefferies' opinion that the transaction was fair or any other aspect of the valuation process. Nor does Plaintiff otherwise contend that the exchange ratio was outside the "range of reasonable values." *Cede & Co. v. Technicolor, Inc.,* 2003 WL 23700218, at *2 (Del. Ch. Dec. 31, 2003, revised July 9, 2004), *aff'd in part*, *rev'd in part on other grounds*, 884 A.2d 26 (Del. 2005). Because the Committee may have undervalued one asset of the Partnership and overvalued other assets, Plaintiff's allegation that the Roll-Up Committee erred in its valuation of a single contingent asset is insufficient to plead that the Roll-Up price was "materially inadequate, and therefore unfair." *See Massey*, 2011 WL 2176479, at *17.

Even if *Parnes* applied, Plaintiff did not satisfy the prerequisites to that limited exception. In *Primedia*, the Court of Chancery established a three-part test to determine when a plaintiff has standing "to challenge a merger directly under *Parnes* because of a board's alleged failure to obtain value for an underlying derivative claim." 67 A.3d at 477. As the trial court succinctly stated, *Primedia* asks: "Was the underlying claim viable? Was its value material in light of the merger consideration? Did the company fail to receive value for the claim in the merger because the buyer would not be willing to pursue it?" (Op. 2) Because the value of the Derivative Litigation – whether it is discounted to account for the likelihood of

success or not – was not material to the value of the Roll-Up, the answer to the second question is "no."

1. Having argued in the Complaint that the Roll-Up Committee was required to risk adjust the value of the Derivative Litigation, Plaintiff cannot fault the trial court for adopting his own methodology.

In his attack on the Roll-Up Committee's valuation of the Derivative Litigation, Plaintiff alleged that the Committee should have performed precisely the type of risk-adjustment that he now contends was error for the Court of Chancery. (*See* A26-29 ¶¶7-10, A53-60 ¶¶65-72, 75-77) Specifically, Plaintiff alleged in his Complaint that "the [Roll-Up] Committee failed to consider the range of possible outcomes had the Underlying Action [*i.e.* the Derivative Litigation] proceeded." (A58-59 ¶75; *see also* A26-29 ¶¶7-10, A53-60 ¶¶65-72, 75-77) According to Plaintiff, the Committee should have followed the same process another Enbridge-sponsored master limited partnership adopted: first, "***identif***[y] ***a range of recoverable damages***," and then "***appl***[y] ***a risk adjustment (stated as a percentage) to the range of recoverable damages***." (A55-56 ¶69 (emphasis in original)) Plaintiff commends this risk-adjustment methodology as "***intended to reflect the Derivative Action Subcommittee's views regarding the likelihood of the Derivative Action Plaintiff recovering the range of recoverable damages***." (*Id.*

(emphases in original))[7] Plaintiff does not explain why discounting the value of pending litigation – a contingent asset – is the preferred methodology for a conflicts committee valuing a contingent asset but reversible error for a court engaged in the same task.

Nor does Plaintiff explain how Defendant waived reliance on the valuation theory that Plaintiff expressly endorsed in his Complaint. Plaintiff's claim that "Defendant never argued that Plaintiff's damages calculation should be reduced to reflect litigation risk" is false. (Br. 36) Defendant did not adopt or accept Plaintiff's valuation – it argued that the value of the litigation was not material "*even* under Plaintiff's calculation." (A122 (emphasis added)) Defendant also stated that "[t]he value of the Derivative Litigation becomes even more immaterial if, as Plaintiff suggests, it is discounted to reflect the probability of an ultimate recovery." (A122 n.12)[8]

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[7] Ironically, Plaintiff looks to the finding by a separate committee considering another roll-up that an 85% discount to the claimed $743.8 million value of pending litigation to reflect the committee's view of the plaintiff's chances of success was a model of governance behavior. (*See* A55-56 ¶69)

[8] Defendant also argued that the Derivative Litigation was not viable based on the fully developed summary judgment record. (A124-25) Defendant maintains that under *Primedia*, the viability of any derivative claim should be measured by the information available when a board (or committee) actually considers the merits of the claim. (*See* A123-25; A703-05) This provides an independent basis to affirm the decision below. While the trial court disagreed with this reading, the court did find that whether "the facts favor a summary judgment" is pertinent to the materiality

The trial court also explicitly addressed this question at oral argument on the motion to dismiss:

> THE COURT: What is the limited materiality, in your view? … But how would I determine, first of all, whether I use the full value of the asset or some percentage that reflects the risk that there will never be such a judgment? And how do I put that in the context of the full value of the transaction?

(A721:17-A722:1) Defense counsel affirmed that the Court should discount the value of the Derivative Litigation:

> I think in the context of this transaction, given its size, the fact that it's a contingent asset, the fact that even Mr. Barry acknowledges it would have been good faith, or could have been very consistent with good faith, to discount it so, in fact, that – that top number is really not the right number to look at.

(A722:10-19) The trial court then directed Plaintiff's counsel to address materiality. (A731:1-3) Plaintiff's counsel never addressed the court's question and never argued that the court should not perform a litigation risk adjustment. (*See* A731:4-11)

2. The trial court's risk adjustment of the value of the Derivative Litigation was grounded in the allegations in Plaintiff's Complaint and the burden of proof set in the LPA.

In performing its risk-based adjustment (consistent with Plaintiff's allegations), the trial court analyzed the procedural and factual history of the

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prong. (Op. 30) Plaintiff's argument that the trial court should not have risk adjusted the value of the Derivative Litigation ignores this finding.

Derivative Litigation and, importantly, the "substantial roadblocks" to Plaintiff recovering in his direct claim under the liability standard set forth in the LPA. (Op. 3-23) Specifically, the court noted that under the LPA, Plaintiff would have to clear the twin hurdles of the presumption of good faith that attached to the Reverse Drop-Down Committee's decision in 2015 and the separate presumption of good faith attached to the Reverse Drop-Down Committee's decision. (Op. 33) The Vice Chancellor, with a wealth of practical experience evaluating challenged transactions, concluded after reviewing the new Complaint and Plaintiff's burden under the LPA that the chance of success of the Derivative Litigation was "slim" and "certainly less than one-in-four." (*Id.*)

Plaintiff misstates the record when he contends the trial court erred in this analysis because it had only a "limited, skewed record available." (Br. 37) As previously noted, Plaintiff's Complaint incorporated the documents that Plaintiff (and Defendant) presented to the Roll-Up Committee or its advisors and the Roll-Up Committee minutes and financial advisor presentations. (*See* B548 ¶10; B2 ¶4; A21-22, A61) Nothing prevented Plaintiff's counsel from giving the Roll-Up Committee any documents produced during discovery in the Derivative Litigation in support of his claims. (B554-59) Because Plaintiff decided what information to present to the Roll-Up Committee, he cannot now complain that the trial court

somehow erred by not considering information that he did not think was sufficiently important to present to the Committee.

3. *Primedia* and *Massey* specifically contemplate risk adjustment of the value of an extinguished litigation claim.

The trial court's materiality analysis was entirely consistent with both Delaware precedent and accepted litigation valuation methodology. In evaluating the materiality of a derivative claim, the *Primedia* court explicitly considered the "prospects for recovery" and observed that "[c]learly there is risk in the litigation, and to succeed, plaintiffs will have to prove materiality and *scienter*." *Primedia*, 67 A.3d at 483 (emphasis in original). The *Primedia* court reasoned:

> If I assume prevailing on the [derivative] claim was a toss-up, or even a 1–in–5 proposition, the <u>risk-adjusted, pre-interest recoveries</u> for the minority of $40 million and $16 million, respectively, remain material when compared to their $133 million share of the proceeds from the Merger.

Id. at 482-83 (emphasis added). Plaintiff mischaracterizes this sentence as "merely not[ing] that ***if*** one were to take the same approach as in *Massey* and adjust the claims at issue on the basis of risk, the value of the damages would still be material." (Br. 40 n.62 (emphasis in original)) As the full quote demonstrates, the "if" does not refer to whether to perform a risk-adjustment; it refers to the amount of the adjustment. And the *Primedia* court performed that adjustment in the context of deciding a Rule 12(b)(6) motion to dismiss. *See Primedia*, 67 A.3d at 476.

Plaintiff concedes that *Massey*, too, calls for a risk adjustment when valuing derivative claims. (Br. 38-40) Yet Plaintiff blithely dismisses *Massey*'s valuation as irrelevant because the "factual circumstances were categorically different." (Br. 39) But the legal principle of whether a court should adjust for risk when valuing a derivative claim does not turn on the nature and degree of that risk. It is either appropriate to risk adjust or it is not.

Plaintiff's theory that courts should ignore contingencies (*i.e.*, litigation risks) when valuing a litigation finds no support elsewhere in the law. Delaware courts routinely apply discounts when valuing claims in other contexts. For instance, in the appraisal action *Onti, Inc. v. Integra Bank*, the court addressed whether the value of a derivative suit should include discounts for the likelihood of success and costs of attorneys' fees and indemnification. *See* 751 A.2d 904, 906, 929 (Del. Ch. 1999). The *Onti* court found "strong case law and even stronger intuitive support" for the "view that *all* litigation must be factored in, and all defenses against it must be considered, in determining the value of contingent claims." *Id.* at 932 (emphasis in original). Applying this view, the *Onti* court found that the "contingent litigation amount that should be added to the valuation is $0." *Id.*

In another consolidated appraisal and breach of fiduciary action challenging a merger, the court applied a three-step process to value underlying claims:

> I value the claim by multiplying (a) my assessment of the probability of success on the merits by (b) the likely amount of a favorable recovery, and subtracting from that result (c) the reasonable costs [the merged company] would have incurred in prosecuting the claim.

Bomarko, Inc. v. Int'l Telecharge Inc., 794 A.2d 1161, 1189 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000). The *Bomarko* court discounted claims by 20% for "the inevitable uncertainty of litigation and the chance that the forebearance agreement might be upheld," and applied another 15% discount for fees and expenses. *Id.* The approach taken in *Primedia* and adopted by the trial court was entirely consistent with these cases.

4. Plaintiff's position contravenes the public policy behind *Parnes* and *Primedia*.

Plaintiff contends that the trial court's (and *Primedia's*) use of a risk adjustment to value his extinguished claim would "largely eradicate the availability of direct standing under *Parnes*."[9] (Br. 41) But *Parnes* was never intended to create a broad exception to the continuous ownership rule – it was meant to apply only where the value of an extinguished claim "'reduced the consideration offered to the target stockholders to a level that is unfair.'" *NYMEX*, 2009 WL 3206051, at *10 (quoting *Golaine*, 1999 WL 1271882, at *6).

[9] Plaintiff's argument is based in part on his characterization of the record below as "in a stage of litigation infancy." (Br. 41) For the reasons detailed above, that characterization is not credible.

Under Plaintiff's approach, the *Primedia* materiality requirement would essentially disappear, particularly if viability is established by surviving a motion to dismiss. A plaintiff whose derivative claim was extinguished through a merger would simply have to plead a damages theory large enough to generate a "material" damages figure, and the Court would be required to accept that figure and ascribe to plaintiff a 100% chance of success on the merits without regard for the actual facts, legal standards or other "roadblocks" that would govern the claim. That result would extend *Parnes* far beyond its rationale and "raise overall transaction costs and barriers to mergers, with obvious costs to public investors, with no gain substantial enough to compensate them." *El Paso Pipeline*, 152 A.3d at 1252 (discussing impact of setting aside the continuous ownership requirement).

Plaintiff conflates the court's evaluation of the likelihood of success on the merits in assessing materiality with the liberal standard applied on a motion to dismiss. The trial court accepted all of Plaintiff's factual allegations as true and drew all reasonable inferences in Plaintiff's favor. But Plaintiff's conclusion that he had a 100% chance of success defies logic and is not a reasonable inference to be drawn from those facts. The motion to dismiss standard does not require the court to accept Plaintiff's conclusion that he was certain to win.

Finally, Plaintiff mistakenly claims that *Parnes* was intended to prevent fiduciaries from "insulat[ing] themselves from derivative liability by squeezing

stockholders out of their investment." (Br. 6) But that is the function of the fraud exception to the continuous ownership rule – not the *Parnes*/*Primedia* doctrine. Under the fraud exception, a derivative plaintiff may retain standing after a merger if the merger "was fraudulent and done merely to eliminate derivative claims." *Lewis v. Ward*, 852 A.2d 896, 905 (Del. 2004). Plaintiff here agreed to dismiss his Derivative Litigation with prejudice, and he has never invoked the fraud exception. (B572-76; B577-79)

5. The value of the Derivative Litigation was not material to the value of the Roll-Up even if the trial court had assumed Plaintiff had a 100% chance of success.

In the Complaint, Plaintiff alleged that a damages award in the Derivative Litigation would not have exceeded $94.18 million, or 2.85% of the $3.3 billion total Roll-Up value. (*See* A22 ¶1; A121-22; Br. 5 n.6) Plaintiff then added prejudgment interest to that figure to claim that the Derivative Litigation represented a value of approximately $112 million – or just 3.4% of the $3.3 billion Roll-Up value – to the unaffiliated LP unitholders. (*See* A22 ¶1, A23 n.3; A122; Op. 31-32)

Plaintiff cites no authority for either the inclusion of prejudgment interest in the total value of the Derivative Litigation or the proposition that a contingent asset valued at approximately $112 million is material to the $3.3 billion Roll-Up. As to the former, the *Primedia* court based its materiality assessment on "pre-interest recoveries." 67 A.3d at 483. And the trial court acknowledged, that caselaw did not

clearly answer the question, but gave Plaintiff the benefit of the doubt by including prejudgment interest. (Op. 31-32)[10] But with or without interest, the undiscounted value of the Derivative Litigation is not material.

The few cases applying the *Primedia* materiality prong support the conclusion that 3.4% is not material. As Plaintiff readily concedes, no court has found that an extinguished derivative claim worth less than 5% of the total value of the transaction that extinguished it was material. *Compare Primedia*, 67 A.3d at 482 (holding that a derivative claim representing approximately 60% of the transaction was material and that the risk-adjusted value of the derivative claim, representing approximately 12-30% of the total merger consideration, remained material); *and In re Riverstone Nat'l, Inc. Stockholder Litig.*, 2016 WL 4045411, at *15 (Del. Ch. July 28, 2016) (concluding that derivative claims representing approximately 5-10% of the total consideration were material), *with Massey*, 2011 WL 2176479, at *27-28 (holding that a derivative claim representing approximately 1% of the value of a merger transaction was not material).[11]

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[10] Plaintiff's brief implies that this Court should add another $19 million to reflect interest that purportedly accrued after the Roll-Up Committee made its decision. (Br. 32 n.47) This demonstrates precisely why prejudgment interest should be excluded. Including prejudgment interest would mean that an immaterial claim could become material based on the mere passage of time.

[11] In a footnote, Plaintiff cites a Court of Chancery decision that was reversed, noting that the court in dicta hypothesized that a $171 million liability award representing approximately 2.8% of the merger value may be material. (Br. 32 n.45 (citing *In re*

A finding that 3.4% is not material also comports with how regulators have analyzed materiality for public companies. For example, the Securities and Exchange Commission has found matters that impact less than 5% of a company's assets or liabilities presumptively "unlikely to be material." SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150-01, 45151 & 52 n.14 (Aug. 19, 1999). In addition, the SEC has recognized that where the question of materiality involves "contingent liabilities arising from litigation," "[t]he amount of deviation that is considered immaterial may *increase* as the attainable degree of precision decreases." *Id.* at 45152 n.14 (emphasis added).

Plaintiff turns to termination fee cases arguing that the "fact that values at or around this level [*i.e.* 3.4%] affect parties' behaviors demonstrates their materiality." (Br. 33 (citing as an example *McMillan v. Intercargo Corp.*, 768 A.2d 492, 506, n.62 (Del. Ch. 2000))) But *McMillan* found the termination fee challenged there acceptable precisely because it was *not* material. *McMillan*, 768 A.2d at 505 ("[I]t is difficult to see how a 3.5% fee would have deterred a rival bidder who wished to pay materially more for [the defendant corporation]."). In other words, courts approve termination fees of 3.5% precisely because they are not preclusive (*i.e.*, they

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El Paso Pipeline Partners, L.P. Derivative Litig., 132 A.3d 67, 117 (Del. Ch. 2015)). In reversing, this Court did not address materiality but held that the merger extinguished plaintiff's standing. *El Paso Pipeline*, 152 A.3d at 1252.

do not deter other bidders) or coercive (*i.e.*, they would not induce stockholders to vote for the transaction).

Plaintiff also cites transcripts from settlement hearings for the proposition that "litigation recoveries for stockholders of far less than 3% of the value of a merger—including recoveries of just 0.5%—have been heralded by the Court of Chancery." (Br. 33 & n.51) At a settlement hearing, the court must "consider the nature of the claims, possible defenses, the legal and factual circumstances of the case, and then apply [its] own business judgment in deciding whether the settlement is reasonable." *Brinckerhoff v. Texas E. Prods. Pipeline Co.*, 986 A.2d 370, 384 (Del. Ch. 2010). Consideration of these settlement factors supports the trial court's analysis and conclusion that the risk-adjusted value of the Derivative Litigation is not material. (*See* Op. 33-34)

Likewise, Plaintiff's argument that the Roll-Up Committee's proposal to increase the exchange ratio by .001x somehow sets the standard for materiality to the transaction is a non sequitur. (Br. 33-34) Nothing links the Roll-Up Committee's negotiation offers to any materiality test, and Plaintiff's position would vitiate any meaningful materiality analysis.

II. EVEN IF THE COURT HOLDS THAT PLAINTIFF HAS STANDING, THE COURT SHOULD AFFIRM THE RULING BELOW BECAUSE PLAINTIFF IS NOT ENTITLED TO RECOVER UNDER ANY REASONABLY CONCEIVABLE SET OF CIRCUMSTANCES SUSCEPTIBLE OF PROOF.

A. Question Presented.

Whether the trial court's dismissal of Plaintiff's claims for breach of the LPA and breach of an implied covenant is otherwise proper where Plaintiff fails to allege sufficient facts that, taken alone or in combination, overcome the presumptions that the Roll-Up Committee and Reverse Drop-Down Committee members acted in subjective good faith. (A125-49)

B. Scope Of Review.

Although the trial court did not reach Defendant's arguments under Rule 12(b)(6), this Court may "'affirm on the basis of a different rationale than that which was articulated by the trial court[ ] if the issue was fairly presented to the trial court.'" *Tiger v. Boast Apparel, Inc.*, 214 A.3d 933, 937 (Del. 2019) (alteration in original; citation omitted), *reargument denied* (Aug. 26, 2019) (ORDER). Defendant's Rule 12(b)(6) motion should be granted if "'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'" *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002) (citation omitted).

C. Merits Of Argument.

Plaintiff has not stated a claim for breach of the LPA. Under §7.9 of the LPA, Partners GP is entitled to a presumption that the Roll-Up Committee acted in subjective good faith when it approved the Roll-Up and valued the Derivative Litigation. (A186 §7.9(a)) Embedded in whether the Roll-Up Committee acted in subjective good faith is whether Plaintiff can also overcome the presumption that the Reverse Drop-Down Committee acted in subjective good faith by approving the Reverse Drop-Down. (*See* Op. 32-33) Under §7.10 of the LPA, Partners GP is entitled to a presumption of good faith when it takes action in reliance on an advisor's opinion as to matters that Partners GP reasonably believes to be within such advisor's professional or expert competence. (A187 §7.10(b))[12] Plaintiff does

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[12] The Committee's reliance on qualified financial and legal advisors is relevant to its subjective good faith, and Plaintiff fails to allege sufficient facts to overcome any potentially applicable presumption. The trial court held in the Derivative Litigation that the conclusive presumption in §7.10 for relying on outside advisors does not override the conflicted transaction provision in §7.9 of the LPA. *Morris v. Spectra Energy Partners (DE) GP, LP*, 2017 WL 2774559, at *10-14 (Del. Ch. June 27, 2017). Defendant argued in the Motion to Dismiss that the conclusive presumption should apply, and the trial court acknowledged that the LPA "provides a conclusive presumption of good faith to SEP GP when it acts in reliance on professional advisors." (Op. 8) If the conclusive presumption applies, that is dispositive and provides an alternative basis to affirm dismissal. But, even if the presumption does not apply, it is nevertheless relevant to the facts that evince Defendant's good faith.

not challenge that ruling on appeal, and the Complaint does not come close to alleging sufficient facts to overcome any of these presumptions.

1. Plaintiff failed to identify any defects in the Roll-Up Committee's process.

To survive a motion to dismiss, Plaintiff must rebut the LPA's presumption of good faith by alleging that the Roll-Up Committee did not subjectively believe the Roll-Up, including its valuation of the Derivative Litigation, was in the Partnership's best interests. (A186 §7.9(a)-(b)) It is not enough even to claim that the Roll-Up Committee's decision-making "fell below an objective standard of reasonableness," *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. 2013), or that the Roll-Up Committee negotiated poorly or failed to obtain the best deal possible, *In re Atlas Energy Res., LLC Unitholder Litig.*, 2010 WL 4273122, at *14 (Del. Ch. Oct. 28, 2010). "Quibbles with a valuation methodology" with respect to a single asset are likewise insufficient. *Morris*, 2017 WL 2774559, at *14.

Plaintiff concedes that the Roll-Up Committee was qualified as independent and disinterested under both the LPA and general corporate law principles. (A127-31; A258-59) While the Complaint speculates that the Roll-Up Committee was "conflicted" because two members served on the Reverse Drop-Down Committee (A25 ¶6), there is no basis in fact, law or logic for Plaintiff's theory. (*See* A127-31; A679-82) Plaintiff also points to a different limited partnership committee process in a different transaction under a different governing agreement, but does not allege

how that transaction could have affected the Roll-Up Committee's subjective belief that the Roll-Up was in the best interests of the Partnership. The Roll-Up Committee was not obligated to follow any particular process in deciding how to value the Derivative Litigation or the Roll-Up. *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) ("[D]irectors' failure to take any specific steps during the sale process could not have demonstrated [bad faith].").

For all of his quibbling with the duration or audience of his presentation to the Roll-Up Committee (A51-52 ¶¶61, 64), Plaintiff's Complaint concedes that his own counsel provided documents of their choosing and presented their best arguments directly to the Roll-Up Committee's financial and legal advisors. (A52 ¶64) Plaintiff does not allege that the Roll-Up Committee's financial and legal advisors did not meet the qualifications under the LPA to advise the Committee. (*See* A187 §7.10(b)) The Complaint also does not allege that Plaintiff or his counsel were precluded from putting before the Roll-Up Committee's advisors whatever information or evidence from the Derivative Litigation that they deemed appropriate. Nor does the Complaint identify a single document the Roll-Up Committee should have considered but did not. Accordingly, the Complaint's allegations as to the Roll-Up Committee's process fail to state a claim for breach of the LPA.

2. Plaintiff cites no evidence of bad faith and cannot credibly allege that the Roll-Up Committee's conclusion was so obviously wrong that it could not have been made in good faith.

To survive a motion to dismiss, Plaintiff had to allege facts from which the Court could reasonably infer that the Roll-Up Committee could not subjectively believe in good faith that the Reverse Drop-Down Committee acted in subjective good faith when it approved the Reverse Drop-Down. The Complaint alleged no facts that could overcome this double good faith hurdle. Nothing in the Complaint suggests that the Roll-Up Committee's belief that the Reverse Drop-Down Committee acted in subjective good faith was (1) "so egregiously unreasonable" that it "seem[s] essentially inexplicable on any ground other than [subjective] bad faith," or (2) obviously not in the best interests of the Partnership based on objective facts known to the Roll-Up Committee. *See Allen*, 72 A.3d at 107 (second alteration in original).

Plaintiff claimed in the Derivative Litigation that the Reverse Drop-Down Committee did not act in subjective good faith because there was an obvious gap of roughly $525 million between the consideration that Partners received in the Reverse Drop-Down and the value of the Pipeline Assets. But the Roll-Up Committee concluded, after a thorough process, that the alleged gap did not exist because Reduced GP Cash Flow – which the Reverse Drop-Down Committee's financial advisor, Simmons, valued at $525 million – provided value to the Partnership. To

reach this conclusion, the Roll-Up Committee relied on independent analyses from multiple financial institutions, Defendant's expert report, and a new, independent analysis by its financial advisor, Jefferies. All of these analyses were consistent with Simmons' advice that Partners received $1.5 billion in value in the Reverse Drop-Down. Only Plaintiff (through his expert, and his counsel) contended otherwise. And even Plaintiff's expert conceded that he had no basis to suggest that the Reverse Drop-Down Committee did not believe Reduced GP Cash Flow constituted value to the Partnership in the amount of $525 million.

The most generous reading of Plaintiff's allegations is that he and his expert disagree with everyone else about whether Reduced GP Cash Flow provided value to the Partnership. "But a disagreement, however vehement, with the *conclusion* of an independent and adequately represented committee is not the same as pleading particularized facts that create a reasonable doubt that the Board acted in what it perceived as the best interests of the [Partnership]." *Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *32 (Del. Ch. May 8, 2015), *aff'd*, 132 A.3d 748 (Del. 2016) (TABLE). Thus, Plaintiff is left with nothing in the Complaint to suggest that the Roll-Up Committee did not act in good faith in its evaluation of the Derivative Litigation.

3. The implied covenant of good faith and fair dealing is inapplicable.

The trial court dismissed Plaintiff's implied covenant claim in the Derivative Litigation because Plaintiff cannot allege a Conflicts Committee breached the implied duty of good faith and fair dealing if those same actions are subject to review under the LPA's contractual good faith standard. *Morris*, 2017 WL 2774559, at *17. Similarly here, Plaintiff's implied covenant claim is foreclosed by his claim that the Roll-Up Committee breached the LPA, and thus should be dismissed.

CONCLUSION

For all of the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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