EFiled: Jun 25 2021 04:52PM EDT
Filing ID 66710544
Case Number 92,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADRIAN DIECKMAN, on behalf of himself and all others similarly situated, Plaintiff-Below/Appellant, v. REGENCY GP LP, REGENCY GP LLC, ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER PARTNERS, L.P., ENERGY TRANSFER PARTNERS GP, L.P., MICHAEL J. BRADLEY, JAMES W. BRYANT, RODNEY L. GRAY, JOHN W. McREYNOLDS, MATTHEW S. RAMSEY and RICHARD BRANNON, Defendants-Below/Appellees.	No. 92, 2021 Court below: Court of Chancery C.A. No. 11130-CB

APPELLANT'S REPLY BRIEF

OF COUNSEL:

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Jeroen van Kwawegen
Edward G. Timlin
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

GRANT & EISENHOFER P.A.
Christine M. Mackintosh (#5085)
Vivek Upadhya (#6241)
Michael D. Bell (#6633)
123 S. Justison Street
Wilmington, DE 19801
(302) 622-7000

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Gregory V. Varallo (#2242)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601

Counsel for Appellant

GARDY & NOTIS, LLP
Mark C. Gardy
James S. Notis
Tower 56
126 East 56th Street, 8th Floor
New York, NY 10022
(212) 905-0509

DATED: June 25, 2021

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES

SUMMARY OF ARGUMENT

Defendants' brief[1] is premised on misinterpretations of this Court's precedents on contract law in the MLP context, including this Court's earlier opinion in this case. Contrary to Defendants' arguments, breaches of the covenant of good faith and fair dealing implied into Special and Unitholder Approval provisions ***are*** breaches of contract. The DRULPA protects MLP unitholders by implying contract terms that prevent general partners from "acting arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected."[2] Those terms cannot be eliminated by contract and required the General Partner here "not act to undermine the protections afforded to unitholders in the safe harbor process."[3]

Here, the court below granted Plaintiff's motion for partial summary judgment, finding that: (i) "the Conflicts Committee was not validly constituted from its inception"[4]; and (ii) the General Partner issued a Proxy that falsely representing that one of the members of the Conflicts Committee (Brannon) was "independent"

---

[1] Appellees' Answering Brief, filed June 10, 2021 ("DB"). Terms used herein have the same meaning as indicated in Appellant's Corrected Opening Brief, filed on May 24, 2021 ("PB"). Emphasis in quoted material has been supplied and internal quotation marks in such material omitted.

[2] *Dieckman v. Regency*, 155 A.3d 358, 367 (Del. 2017).

[3] *Id.* at 368.

[4] A961.

and that the Committee's approval of the self-interested merger "constituted Special Approval."[5] After trial, the lower court held that "the General Partner breached the implied covenant of good faith and fair dealing in the Special Approval and Unitholder Approval safe harbors of Section 7.9(a) of the LP Agreement."[6] Defendants have not cross-appealed these rulings, which are law of the case. However, the lower court erred in holding that "[t]his conclusion does not mean that the General Partner breached an affirmative standard of conduct applicable to its approval of the Merger,"[7] requiring reversal.

Defendants' assertion that Plaintiffs were required to prove "scienter" to avoid LPA §7.8(a) exculpation is wrong.[8] Exculpation is unavailable if Defendants acted in "bad faith," or "engaged in fraud [or] willful misconduct."[9] Nothing in the LPA modifies the exculpation standard to require a showing of "scienter." The LPA does not reference "scienter" anywhere. Nor was Plaintiff required to prove that the General Partner "was aware" that the Proxy contained false statements. Reckless indifference was sufficient.[10]

---

[5] A963.

[6] Op.:53.

[7] *Id.*

[8] DB:37.

[9] A2401.

[10] PB:37-38.

Finally, Defendants recycle the same arguments that caused the lower court to adopt an "entire fairness" damages approach rather than the appropriate "expectation damages" standard.[11] Nothing in the LPA or Delaware law indicates that unitholders consented to receiving anything other than expectation damages for Defendants' breaches of the LPA, calculated as "difference between the transaction price and what [the asset] was worth."[12] The lower court erred in adopting an entirely different, non-contractual analysis.

The decision below should be reversed.

[11] DB:42-47.

[12] PB:45 (quoting *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2015 WL 1815846, at *25 (Del. Ch. April 20, 2015); discussing *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1130 (Del. 2015)).

ARGUMENT

I. THE COURT OF CHANCERY ERRED BY HOLDING THAT THE GENERAL PARTNER'S BREACH OF THE IMPLIED COVENANT DID NOT CONSTITUTE A BREACH OF THE LPA

The Court should reject Defendants' argument that Section 7.9(a)'s "disjunctive framework means there is no LPA breach if ***any*** of §7.9(a)'s four options are satisfied."[13] Nothing in Section 7.9(a), other LPA provisions, or Delaware law indicates that unitholders consented to being lied to, or agreed that the General Partner could procure their votes for a self-interested transaction via a false proxy. Nothing in Section 7.9(a), other LPA provisions, or Delaware law indicates that unitholders agreed that the General Partner could create a Conflicts Committee consisting of:

- one director who ***knew*** that he was disqualified from Conflicts Committee service; and
- one director who was admittedly loyal and grateful to the General Partner's controller, Kelcy Warren, after Warren saved him from financial ruin during their 40-year friendship.

Plaintiff's position rests on contract construction, as explained by this Court in this case. The DRULPA gives maximum effect to the principle of freedom of

[13] DB:25-26.

contract, allowing MLP contracts to eliminate fiduciary duties. But as this Court explained in reversing the Chancery Court's initial dismissal of this action, "investors are not without protections."[14] "[A]mbiguities are resolved ... to give effect to the reading that best fulfills the reasonable expectations an investor would have had from the face of the agreement."[15] Moreover,

> "the DRULPA provides for the implied covenant of good faith and fair dealing, ***which cannot be eliminated by contract***. The implied covenant is inherent in all contracts and is ***used to infer contract terms*** to handle developments or contractual gaps that the asserting party pleads neither party anticipated."[16]

The Court's earlier opinion did not expressly state that the covenant of good faith and fair dealing implied an affirmative standard of conduct into Section 7.9(a) (entitled "Standards of Conduct"). But the Court clearly had affirmative standards of conduct in mind, noting that the implied terms in Section 7.9(a) include "a requirement that the General Partner not act to undermine the protections afforded unitholders in the safe harbor process,"[17] a condition that "the General Partner will

---

[14] *Regency*, 155 A.3d at 366.

[15] *Id.*

[16] *Id.* at 367 (emphasis added).

[17] *Id.* at 368.

not mislead unitholders when seeking Unaffiliated Unitholder Approval,"[18] and a condition that "the General Partner will not subvert the Special Approval Process by appointing conflicted members to the Conflicts Committee."[19]

Following this Court's opinion and discovery, the court below granted Plaintiff's motion for partial summary judgment, finding no genuine dispute that: (i) "the Conflicts Committee was not validly constituted from its inception"[20] and (ii) the General Partner issued a Proxy that falsely represented that Brannon was "independent" and that the Committee's approval of the self-interested merger "constituted Special Approval."[21] After trial, the court below found that "the General Partner breached the implied covenant of good faith and fair dealing in the Special Approval and Unitholder Approval safe harbors of Section 7.9(a) of the LP Agreement."[22] Defendants have not cross-appealed these rulings, which are therefore law of the case. The lower court's holding that "[t]his conclusion does not mean that the General Partner breached an affirmative standard of conduct applicable to its approval of the Merger"[23] was error.

---

[18] *Id.*

[19] *Id.*

[20] A961.

[21] A963.

[22] Op.:53.

[23] *Id.*

None Defendants' cases – *Gerber*,[24] *Norton*,[25] *ETE*,[26] *Kinder Morgan*,[27] *Inter-Marketing*,[28] and *Lonergan*[29] – support a different result. None of these cases addressed whether a breach of the implied covenant in the Special and Unitholder Approval provisions constituted a breach of the LPA, let alone held that such a breach was or could be "mooted" by alleged compliance with the LPA's "fair and reasonable" provision.

Nor does *Gerber* "contradict" Plaintiff's contention that Defendants' breach of the implied covenant in Section 7.9(a) constituted a breach of the LPA.[30] *Gerber*

---

[24] *Gerber v. Enter. Prods. Holdings LLC*, 67 A.3d 400 (Del. 2013).

[25] *Norton v. K-Sea Trans. Partners, L.P.*, 67 A.3d 354, 356 (Del. 2013) ("Importantly, the plaintiffs do not allege that the general partner breached the implied covenant of good faith and fair dealing.").

[26] *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2018 WL 2254706, at *20 (Del. Ch. May 17, 2018) (noting – where general partner was ***not*** alleged to have breached the implied covenant in connection with special approval – that "falling short of reaching [the special approval] harbor does not prevent the Defendants from navigating the straits of fairness").

[27] *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2015 WL 4975270, at *9-10 (Del. Ch. Aug. 20, 2015) (implied covenant claim not adequately pleaded).

[28] *Inter-Marketing Group USA, Inc. v. Armstrong*, 2020 WL 756965, at *6 (Del. Ch. Jan. 31, 2020) (indemnification provision conditioned on indemnitees acting in good faith did not create a "mandatory duty" or "impose affirmative obligations").

[29] *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1022 (Del. Ch. 2010) ("The complaint does not plead a colorable challenge to the Special Approval decision. A colorable claim under the implied covenant would require more particularized facts and a more refined legal theory.").

[30] DB:27.

considered whether Section 7.10(b)'s conclusive good faith presumption barred a claim that the general partner breached the covenant of good faith and fair dealing implied in Section 7.9(a). The Court held that Section 7.10's good faith presumption did ***not*** bar a claim that the general partner breached the implied covenant. As the Court explained, a contractual good faith presumption "cannot operative retroactively to alter the parties' reasonable expectations at the time of contracting, and it cannot be used to fill every gap in the LPA."[31]

Having found that the contractual good faith presumption did not bar a claim for breach of the covenant of good faith and fair dealing implied into Section 7.9(a), the Court analyzed whether the *Gerber* complaint adequately pled such a claim. The Court noted that the Court of Chancery "correctly held that ***the implied covenant independently constrains the Special Approval process***" and that plaintiff had "pled claims that, in its attempt to obtain Special Approval, [the general partner] breached the implied covenant."[32] The Court upheld the lower court's finding that the *Gerber* complaint stated a cognizable claim by alleging that "the general partner selected the Special Approval process in bad faith in breach of its duties under the implied covenant." [33] Nothing in this analysis suggests that plaintiff's breach of the implied

[31] 67 A.3d at 420.

[32] *Id.* at 423.

[33] *Id.* at 424.

covenant could have been "mooted" by alleged compliance with a "fair and reasonable" provision. To the contrary, the Court's analysis makes clear that the general partner's attempt to take advantage of such other provision "may itself by subject to a claim that it was arbitrary and unreasonable and in violation of the implied covenant" and frustrate the fruits of the bargain of the asserting party.[34]

Here, despite Defendants' protestations to the contrary, unitholders would ***not*** expect Section 7.9(a)'s "disjunctive language" to permit Defendants to weaponize the Special and Unitholder Approval provisions and then escape the consequences of these actions by "flipping back into" a different conflict resolution provision.[35] Having ***chosen*** to avail themselves of the Special and Unitholder Approval provisions, Defendants assumed an obligation "not [to] act undermine the protections afforded unitholders in the safe harbor process."[36] Defendants breached the LPA by failing to honor this obligation.

Defendants also argue that Plaintiff asks the Court to turn Section 7.9(a)'s "'or' into an 'and,'" effectively making Special or Unitholder Approval "mandatory."[37] That is not Plaintiff's position. Rather, Plaintiff asserts that because

---

[34] *Id.* at 421.

[35] *Cf. Brinckerhoff v. El Paso*, C.A. No. 7141-CS (Del. Ch. Oct. 26, 2012) (TRANSCRIPT) (A3805-A3867).

[36] *Regency*, 155 A.3d at 368.

[37] DB:30.

Defendants breached the implied covenant, the LPA should not be construed to preclude a breach of contract claim.[38] As in *Gerber*, a contrary finding would lead to nonsensical results and permit arbitrary and unreasonable behavior by the General Partner—*to wit*, creating a conflicted Conflicts Committee and issuing a false Proxy—thereby "frustrating the fruits of the bargain that the asserting party reasonably expected."[39]

Defendants also argue that under Plaintiff's position "any misstep" in invoking Special or Unitholder Approval "establishes liability for a fair transaction that was approved in good faith."[40] Plaintiff is not seeking damages based on a minor oversight or "misstep." Plaintiff is seeking damages for the General Partner's breach of the implied covenant by creating a conflicted Conflicts Committee and issuing a false Proxy, "undermining the protections afforded unitholders" under the LPA.[41]

Defendants next argue that Plaintiff's claims are "foreclosed" by his alleged

---

[38] *See, e.g.*, PB:32-33 (asserting that construing the "LPA to allow the General Partner to 'frustrat[e] the fruits of the bargain' by subverting the LPA's conflicts resolution provisions and find that the General Partner did not breach the LPA, as the court below did here, endorses unreasonable conduct and is an absurd result that could not have been intended").

[39] *Regency*, 155 A.3d at 367; *Gerber*, 67 A.3d at 421 (same).

[40] DB:31.

[41] 155 A.3d at 368.

failure to appeal the determination that the Merger was fair and reasonable.[42] Defendants again misconceive Plaintiff's position. Plaintiff asserts that unitholders reviewing the LPA *ex ante* had a reasonable expectation that if the General Partner undermined Section 7.9(a)'s protections by creating a conflicted Conflicts Committee or issuing a false Proxy to benefit the General Partner's controller, such "resolution or course of action in respect of conflict" would not be "fair and reasonable to the partnership[.]"[43]

Plaintiff also appealed the lower court's conclusion that Plaintiff and the Class suffered no damages because the price was "fair".[44] Under the LPA's terms and Delaware law, Plaintiff and the Class were entitled to expectation damages for breach of contract.[45]

[42] DB:25-27.

[43] PB:33 (quoting LPA Section 7.9(a)(iv)).

[44] PB:44-49.

[45] PB:31-33.

II. THE GENERAL PARTNER'S ISSUANCE OF A FALSE AND MISLEADING PROXY AND CREATION OF A CONFLICTED CONFLICTS COMMITTEE ARE NOT EXCULPATED

The Court should reject Defendants' position that Plaintiff was required to prove "scienter" to avoid Section 7.8(a) exculpation.[46] Section 7.8(a) exculpates Defendants from money damages, unless they acted in "bad faith," or "engaged in fraud [or] willful misconduct."[47] Nothing in the LPA modifies the exculpation standard to require a showing of "scienter." Indeed, there is no reference to "scienter" anywhere in the LPA.

As with the implied covenant claim, Plaintiff's position rests on contract construction, not on an extraneous corporate or fiduciary law principle. Defendants were liable for money damages if they acted in "bad faith" or "engaged in fraud [or] willful misconduct" in creating a Conflicted Conflicts Committee to obtain Special Approval or in issuing a false Proxy in seeking Unitholder Approval.[48] In this regard, Plaintiff asserts that the court below erred by: (i) requiring a showing of "actual knowledge" of wrongdoing for fraud; and (ii) focusing on the General Partner's state of mind when it determined the Merger was fair.[49] The court's

[46] DB:37.

[47] A2401.

[48] PB:10,35.

[49] PB:36-40.

findings and inferences regarding director knowledge were not supported by the record and not the product of logical deductive reasoning.[50]

Defendants contend that the court below did not apply the reckless indifference standard because Plaintiff's post-trial briefing "made numerous assertions about Defendants' knowledge, but none regarding their reckless indifference."[51] Defendants misconceive Plaintiff's position. Plaintiff's post-trial briefs asserted that the General Partner's duly-authorized agent tasked with preparing, executing, and filing the Proxy—Regency director and CEO Bradley—sent the false Proxy to the unitholders while acting as "President and CEO of Regency GP LLC on behalf of Regency" and induced them to vote in favor of the Merger, knowing that Brannon was not qualified to serve on the Conflicts Committee.[52] In its post-trial opinion, the court below *sua sponte* raised the additional requirement that Plaintiff must ***also*** show that Bradley "was aware that

[50] PB:40-43.

[51] DB:34.

[52] A2195-A2206. The court below acknowledged that Bradley knew that Brannon was a Sunoco director as of December 14, 2014, before the Board (including Bradley) added him to the Conflicts Committee on January 17, and understood that Brannon could not simultaneously serve on the Conflicts Committee. The court below ignored that Bradley was only informed about Brannon's possible resignation from the Sunoco Board on January 20, 2015, ***after*** he signed the written consent adding Brannon to the Conflicts Committee. PB:41.

that [the Proxy] contained the two false statements."[53] Contrary to the lower court's analysis, Delaware law does not require Plaintiff to show that the General Partner actually knew that the Proxy contained false statements that its own agents inserted into the Proxy to obtain Unitholder Approval and that went to the heart of the approval of this self-interested transaction: Brannon's purported "independence" and that the Committee's approval of the self-interested merger "constituted Special Approval."[54]

Defendants also argue that the lower court correctly focused on the General Partner's state of mind concerning the Merger's fairness and only needed to look at the GP's state of mind in creating a conflicted Conflicts Committee and issuing a false Proxy ***if*** those actions "were the proximate cause or at least contributed to the unfair exchange ratio."[55] Nothing in Section 7.8(a), other LPA provisions, or Delaware law indicates that unitholders consented to exculpate a General Partner when one of the two members of the Conflicts Committee "***knew*** during the Merger negotiations that he was violating the [Conflicts Committee Qualification] provision and ***made a deliberate choice*** not to reach out to the Sunoco board until after the

[53] Op.:109.

[54] PB:37.

[55] DB:34.

Merger was announced" at the controller's request.[56] Nor did Unitholders consent to exculpate a General Partner that created a Conflicts Committee to approve a self-interested transaction when "everyone on the Board knew" that both members of the Conflicts Committee "ha[d] a long history of personal friendships and business relationships with [the controller]."[57] To the contrary, the LPA was "reasonably read by unitholders to imply a condition that a Committee was established whose members ***genuinely qualified as unaffiliated*** with the General Partner and ***independent at all relevant times***."[58]

Furthermore, nothing in Section 7.8(a), other LPA provisions, or Delaware law limits the bad faith and willful misconduct analysis to conduct that was "the proximate cause of or at least contributed to an unfair exchange ratio."[59] Rather, Plaintiff contends that, by its terms, Section 7.8(a) did not exculpate the General Partner's acts in creating a conflicted Conflicts Committee to provide Special Approval and issuing a false Proxy to obtain Unitholder Approval for a self-interested Merger.[60] The lower court did not find (nor would the record have supported a finding) that Defendants subjectively believed that creating a conflicted

[56] Op.:112 (emphasis added); *see also* PB:39.

[57] PB:40.

[58] 155 A.3d at 369.

[59] Op.:111.

[60] PB:37-38.

Conflicts Committee to provide Special Approval and issuing a false Proxy to obtain Unitholder Approval was "in the best interests of the Partnership."[61] Indeed, the General Partner's conduct was "so egregiously unreasonable" that it is "inexplicable on any ground other than subjective bad faith."[62]

Finally, even if the lower court correctly limited its exculpation analysis to the General Partner's state of mind concerning the Merger's fairness, Plaintiff challenged a number of "acts or omissions" that "proximate[ly] caused" Plaintiff and the Class to be cashed out at "an unfair exchange ratio."[63] A truly independent Conflicts Committee would not have agreed to a Merger designed to benefit Warren/ETE, on Warren/ETE's terms.[64] By misleading Regency's unitholders about the Conflicts Committee's independence and its purported Special Approval, Defendants prevented the unitholders from making an informed decision on the Merger.[65] This Court has already found that the "assurance" that the Merger "was negotiated and approved by a Conflicts Committee composed of persons who were

---

[61] Op.:39,45,103.

[62] *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. 2013).

[63] Op.:111.

[64] *See generally* PB:24-25.

[65] Defendants' observation that "deficiencies in invoking *MFW* can be cured" is puzzling. DB:37. Here, not only were the "defects" in the Special Approval process ***not cured***, Defendants ***doubled down*** on their defective Special Approval by lying about it in the Proxy.

not 'affiliates' of the general partner and who had the independent status dictated by the LP Agreement" "was one a reasonable investor may have considered a material fact weighing in favor of the transaction's fairness."[66]

Defendants' reliance on *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93 (Del. 2013) is misplaced. In *Encore*, the court held that plaintiff could not establish an LPA breach of based on "value-depressing disclosures." *Id.* at 110. Because the plaintiff had asserted "a *single* claim for relief," the court held that "it follows that [plaintiff] has alleged only one LPA breach – the Merger itself – not that the Merger and Vanguard's disclosures constituted independent LPA breaches." *Id*. (emphasis in original). In contrast, Plaintiff here has asserted ***multiple*** claims for relief, including a separate claim relating to Defendants' subversion of Special and Unitholder Approval.[67] *Encore* does not limit the trial court to considering the singular action of approving the Merger in determining whether Section 7.8 exculpation applies, as Defendants suggest.

[66] 155 A.3d at 369.

[67] A154-A156 ¶¶165-166;¶¶167-168.

III. THE COURT OF CHANCERY APPLIED THE WRONG LEGAL STANDARD FOR DETERMINING DAMAGES

A. THE LOWER COURT'S APPLICATION OF TORT DAMAGES PRINCIPLES TO PLAINTIFF'S BREACH OF CONTRACT CLAIM IS REVIEWED *DE NOVO*

Defendants incorrectly argue that the lower court's damages analysis is reviewed for abuse of discretion.[68] Instead of seeking "to give the nonbreaching party the benefit of its bargain by putting that party in the position it would have been but for the breach,"[69] the trial court analyzed damages through the lens of the Merger's purported "fairness".[70] Review of the lower court's formulation and application of legal principles is plenary, requiring no deference.[71]

Nor is Plaintiff is arguing "for the first time" on appeal that he and the Class are entitled to contract damages.[72] In post-trial briefing and at oral argument below, Plaintiff consistently asserted that the lower court should award contract damages

---

[68] PB:44-47.

[69] *Genencor Int'l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000).

[70] Op.:120-24.

[71] PB:44; *Genencor*, 766 A.2d at 13; *Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 84 (Del. 1995) (same).

[72] DB:43.

"based on the parties' reasonable expectations."[73]

Defendants' assertion that *RBC Capital Markets, LLC v. Jervis,* 129 A.3d 816 (Del. 2015) supports abuse of discretion review is wrong. Unlike here, the appellant in *RBC* asked this Court to review whether "the trial court abused its discretion in ***calculating*** damages"—***not*** whether the lower court applied the correct legal standard.[74]

B. DEFENDANTS' BREACHES OF THE LPA HARMED PLAINTIFF AND THE CLASS

1. THE LPA SHOULD NOT BE CONSTRUED TO ALLOW DEFENDANTS TO AVOID PAYING EXPECTATION DAMAGES FOR THEIR BREACH OF CONTRACT

The Court should reject Defendants' argument that Plaintiff and the Class suffered no contract damages because they allegedly received a "fair" price.[75] Under well-established precedents from this Court and the Court of Chancery, Plaintiff and

---

[73] A1699-A1704 (citing *Siga*, 132 A.3d at 1130; *Genencor*, 766 A.2d at 11; *El Paso*, 2015 WL 1815846, at *25 (measuring damages for breach of an MLP agreement); *In re Southern Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 764 (Del Ch. 2011), *aff'd sub nom*, *Am. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012)); A1820 (citing *Town of Cheswold v. Vann*, 9 A.3d 467, 473 (Del. 2010); *Enrique v. State Farm Mu. Auto. Ins. Co.*, 142 A.3d 506, 512 (Del. 2016); *Bandera Master Fund LP v. Boardwalk*, 2019 WL 4927053, at *22 (Del. Ch. Oct. 7, 2019) ("resulting damage to the plaintiff" is element of an implied covenant claim); *In re Southern Peru*, 52 A.3d at 763)).

[74] *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d at 866; *see also Id.* ("We review the ***findings*** as to damages by the Court of Chancery for an abuse of discretion.") (emphasis added).

[75] DB:46-47.

the Class were entitled to a determination of "expectation damages" for breach of the LPA, which are measured as "difference between ***the transaction price*** and what [the asset] was worth."[76] The "transaction price" ($23.83) was undisputed.[77] Furthermore, both damages experts agreed that (1) "what [Regency] was worth" was properly determined based on a Regency DDM[78] and (2) a Regency DDM exceeded the transaction price by at least $2.93 per unit.[79]

Defendants argue this Court should affirm the lower court's application of an entirely different damages framework from cases assessing damages in breach of fiduciary duty actions challenging the "fairness" of corporate transactions.[80] Nothing in the LPA or Delaware law construing MLP agreements indicates that

---

[76] *El Paso*, 2015 WL 1815846, at *25. *See also Siga*, 132 A.3d at 1130 (expectation damages are "measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract").

[77] That *El Paso* involved a cash acquisition is of no moment. DB:45-46. *El Paso* sets the standard for calculating expectation damages for breach of an MLP as the "difference between the transaction price and what [the asset] was worth" – not the difference between the alleged "value of the merger consideration" and what the asset was worth.

[78] A1285:269:22-270:5;A1613:1571:24-1572:4.

[79] A3336;A3790.

[80] DB:42-43 (citing *Sterling v. Mayflower Hotel Corp*. 93 A.2d 107, 110 (Del. 1952) (entire fairness analysis); *Rosenblatt v. Getty Oil Co.*, 1983 WL 8936, at *1 (Del. Ch. Sept. 19, 1983) (same), *aff'd*, 493 A.2d 929 (Del. 1985); *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 498 (Del. Ch. 1990) (same); *Emerald P'rs v. Berlin*, 2003 WL 2103437, at *1 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003) (same).

unitholders consented to receiving anything other than contract damages.

Defendants' insistence on a breach of fiduciary duty damages framework is at odds with their choice to ***eliminate*** all fiduciary duties in the LPA. If Defendants had wanted to impose a different methodology to assess damages, they could have attempted to do so in the LPA. Defendants cannot retroactively deprive unitholders of the fruits of the bargain (*i.e.,* contract damages) ***after*** they breached the LPA. Rather, contract damages are "based on the reasonable expectations of the parties *ex ante*."[81] It was error for the lower court to hold otherwise.

Defendants' claim that Plaintiff "never explains" why the distinction between breach of contract and breach of duty damages principles would affect the outcome here is simply wrong.[82] Plaintiff is entitled to contract damages – not a retroactive, contested determination of a "fair price" – for Defendants' breach of the LPA.[83] The lower court allowed Defendants to avoid any consequences for breaching the implied covenant for the benefit – and at the direction of – the General Partner's controller by "flipping back into" Section 7.9(a)(iv).[84] This was contrary to the

---

[81] *Siga*, 132 A.3d at 1130. *See also* A2084-A2085.

[82] DB:44.

[83] PB:44-55.

[84] Defendants note that LPA Section 7.9(a)(iv) mirrors "entire fairness review." DB:28. Where – as here – Plaintiff has proven that the General Partner breached the implied covenant in securing approval of the Merger, the "fair process" component of a review for entire fairness cannot possibly be met.

unitholders' reasonable expectations.

2. DELAWARE LAW DOES NOT REQUIRE AN "APPLES-TO-APPLES" COMPARISON IN ASSESSING EXPECTATION DAMAGES

Defendants arguments for avoiding the consequences of their breaches of the LPA—like the lower court's opinion—rest on the erroneous view that Delaware law imposes an "apples-to-apples" straightjacket in quantifying expectation damages.[85] Delaware law does not impose such a rigid requirement for either contract ***or*** fiduciary duty claims.[86] To the contrary, this Court's precedents make clear the "established presumption that doubts about the extent of damages are generally resolved against the breaching party" and the court's ability to "take into account the willfulness of the breach in deciding whether to require a lesser degree of certainty."[87] Defendants' cases do not hold differently.[88]

Defendants assert that Plaintiff has not "grapple[d] with" the court's analysis of *Southern Peru*. However, Plaintiff has amply explained in his post-trial briefing and his opening brief in this Court how *Southern Peru* supports his damages methodology.[89] *Southern Peru* establishes that where the acquisition currency in a

---

[85] PB:23.

[86] PB:46,47.

[87] *Siga*, 132 A.3d at 1131.

[88] PB:46.

[89] A1704; A1846-A1847. That *Southern Peru* was "itself a fiduciary duty case" is of no moment. DB:44. The point is that – even if the decades-stale cases Defendants

stock-for-stock merger (there, Southern Peru stock; here, ETP units) has a known cash value, resorting to a "relative valuation" to determine damages is inappropriate.[90] Just as it was "wrong" for the *Southern Peru* special committee to disregard the $3.1 billion market price of the Southern Peru shares that were being used to buy Minera and decide that these shares were "really worth" only $2.1 billion, the lower court was "wrong" here to disregard the $23.83 market price of the ETP units that were being used to buy Regency and decide that these units were "really worth" $30.10.[91]

The lower court's analysis has no support in the LPA or Delaware law quantifying contract damages. Nor did unitholders reasonably expect the lower court to resort to "complicated scenarios pegging the relative valuation of the companies" to "obscure" the "proven cash value" of the ETP units in this stock-for-stock merger.[92] Indeed, the lower court's analysis was not even "apples-to-apples," because an investment in Regency is not equivalent to an investment in a different

---

cite ***had*** accepted an "apples-to-apples" straightjacket in the context of a fiduciary duty claim – this Court has now definitively rejected it.

[90] A1846-A1847.

[91] Plaintiff's inability to sell his Regency units for Canessa's DDM value is of no moment. DB:40-41. Canessa's DDM reveals the present value of the Regency distributions at the Regency IDR split–value Plaintiff could "receive" by ***continuing to hold*** his Regency units. A1325:426:12-20. The Merger deprived him of this choice.

[92] *Southern Peru*, 52 A.3d at 764.

MLP with a different IDR split: combined ETP-Regency.

Defendants also argue that Delaware law required the lower court to compare Regency's unit price with combined Regency-ETP' unit price.[93] Again, Delaware law does not require a rigid approach that will allow general partners to avoid paying damages for creating a conflicted Conflicts Committee to approve a self-interested transaction and issuing a false Proxy. Defendants have cited no authorities requiring a different result.

C. PLAINTIFF'S MATHEMATICAL CALCULATION OF THE PRESENT VALUE THE DIVERTED DISTRIBUTIONS IS NEITHER UNTIMELY NOR UNRELIABLE

The Court should reject Defendants' argument that their diversion of unitholder cash flows for ETE/Warren's benefit was not fairly raised.[94] Plaintiff's expert devoted an entire section in his report and testified extensively about how ETE/Warren siphoned off hundreds of millions of dollars from Regency unitholder distributions for their own benefit through the self-interested Merger:[95] Defendants withdrew their own expert's rebuttal report and Plaintiff's expert's testimony was unrebutted.[96] In post-trial briefing, Plaintiff simply calculated the net present value

[93] DB:40-41.

[94] DB:48.

[95] A3521-A3559 (Cash Flow Impact of The Merger: ETE Extracted Additional to The Detriment of Legacy RGP Unitholders); A1223-A1227:23:19-38:1.

[96] Trans. ID 64579705.

of the diverted distributions using Defendants' own proffered *pro forma* discount rate—a mathematical calculation that the lower court itself found to be appropriate.[97]

Defendants also argue that Plaintiff has tacitly conceded that his damages analysis was unsound by calculating the diverted cash flows. However, this alternative damages methodology is simply another way to measure "the amount of money that would put the promisee in the same position as if the promisor had performed the contract."[98] If Defendants had issued a truthful Proxy, unitholders could have withheld their approval and continued to hold Regency units, entitling them to Regency distributions at Regency's contractually-established IDR splits.[99] The lower court's other reasons for rejecting this calculation were equally erroneous. Although the trial court claimed that the dilution calculation did not "take into account the 15% ($3.14/unit premium)"[100] Regency unitholders allegedly received in the Merger, no such premium was ***actually paid***. Because ETP's unit price declined between signing and closing, the premium actually received was a mere

---

[97] The lower court allowed Defendants to introduce this discount rate over Plaintiff's objection regarding its timeliness because "[i]t is really just a mathematical calculation I could ask for post-trial, if it was something of interest to me, or performed post-trial actually by someone sending me an Excel spreadsheet." A1579:1434:20-23.

[98] *Siga*, 132 A.3d at 1130.

[99] PB:48.

[100] Op.:128.

0.3% to Regency's announcement date trading price.[101] Nor does the calculation assume that Regency's and ETP's distributions were "equally likely to be achieved."[102] By using Defendants' *pro forma* discount rate, Plaintiff's calculation reflected the relative "riskiness" of the combined company's future distributions.[103]

In the event this Court finds that the trial court properly rejected Canessa's primary damages methodology, Plaintiff respectfully submits that damages based on the IDR diversion calculation are properly in the record.

[101] A1451:928:2-6; A1178 ¶¶162-163.

[102] Op.:127.

[103] A1850.

IV. THE COURT OF CHANCERY ERRED IN DISMISSING PLAINTIFF'S TORTIOUS INTERFERENCE CLAIMS

Defendants concede that this Court's review is *de novo*.[104] The Court accepts the Complaint's factual allegations as true, drawing all reasonable inferences in Plaintiff's favor, and grants a motion to dismiss only if Plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[105]

In arguing that the lower court properly dismissed the tortious interference claims against ETE and ETP, Defendants ignore the totality of the Complaint's allegations and improperly ask this Court to draw inferences in their favor.[106] For example, contrary to Defendants arguments, the Complaint alleged that ETE and ETP implemented a plan to use their control over the General Partner to transfer Regency's valuable assets to ETP for their own benefit at an unfair price.[107] The Complaint also alleged that the General Partner—acting for the benefit and under the control of ETE and ETP—breached the LPA by engaging in the "musical chairs" charade to force the Merger through to benefit ETE and ETP. Further, the lower court considered – and rejected – Defendants' argument that a claim for tortious

[104] DB:51.

[105] PB:50.

[106] DB:52-53 (isolating five paragraphs in the complaint).

[107] PB:51.

interference should be unavailable in the context of an LPA.[108] Defendants have not appealed this ruling, which is law of the case. The lower court erred in dismissing Plaintiff's tortious interference claim.

[108] *Dieckman v. Regency*, 2018 WL 1006558 (Del. Ch. Feb. 20, 2018) (Ex. C to PB).

CONCLUSION

The post-trial opinion and the dismissal of Plaintiff's tortious interference claim should be reversed, with costs, and remanded for further proceedings against all Defendants, applying the correct standards for assessing damages.

Respectfully submitted,

GRANT & EISENHOFER P.A.

/s/ Christine M. Mackintosh
Christine M. Mackintosh (#5085)
Vivek Upadhya (#6241)
Michael D. Bell (#6633)
123 S. Justison Street
Wilmington, DE 19801
(302) 622-7000

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ Gregory V. Varallo
Gregory V. Varallo (#2242)
500 Delaware Avenue, Suite 901
Wilmington, DE 19801
(302) 364-3601

Counsel for Appellant

OF COUNSEL:

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Jeroen van Kwawegen
Edward G. Timlin
1251 Avenue of the Americas
New York, NY 10020
(212) 554-1400

GARDY & NOTIS, LLP
Mark C. Gardy
James S. Notis
Tower 56
126 East 56th Street, 8th Floor
New York, NY 10022
(212) 905-0509

DATED: June 25, 2021