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Case No. 7094-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FREDERICK H. DIRIENZO, individually and on behalf of all others similarly situated, Plaintiff, v. WARREN G. LICHTENSTEIN, SANFORD ANTIGNAS, JACK HOWARD, JOSEPH L. MULLEN, MARK E. SCHWARZ, JOHN H. MCNAMERA, JR., ANTHONY BERGAMO, JOHN P. MCNIFF, RICHARD I. NEAL, ALLAN R. TESSLER, STEEL PARTNERS II, LP, a Delaware limited partnership, STEEL PARTNERS II GP, LLC, a Delaware limited liability company, n/k/a STEEL PARTNERS HOLDINGS GP INC., a Delaware corporation, STEEL PARTNERS, LLC, a Delaware limited liability company, WGL CAPITAL CORP., a Colorado corporation, SP GENERAL SERVICES, LLC, a Delaware limited liability company, Defendants, STEEL PARTNERS HOLDINGS L.P., a Delaware limited partnership, f/k/a WEBFINANCIAL L.P., a Delaware limited partnership, f/k/a WEBFINANCIAL CORPORATION, a Delaware corporation, Nominal Defendant.	C.A. No. 7094-VCP

MEMORANDUM OPINION

Submitted: May 22, 2013
Decided: September 30, 2013

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Bruce L. Silverstein, Esq., Martin S. Lessner, Esq., Kathaleen St. J. McCormick, Esq., Lakshmi A. Muthu, Esq., YOUNG CONAWAY STARGATT & TAYLOR LLP, Wilmington, Delaware; *Attorneys for Defendants Warren G. Lichtenstein, Sanford Antignas, Jack Howard, John H. McNamara, Jr., Anthony Bergamo, John P. McNiff, Richard I. Neal, Allan R. Tessler, Steel Partners II, L.P., Steel Partners Holdings GP Inc., Steel Partners, LLC, WGL Capital Corp., SP General Services, LLC, and Steel Partners Holdings L.P.*

John M. Seaman, Esq., Derrick B. Farrell, Esq., ABRAMS & BAYLISS LLP, Wilmington, Delaware; *Attorneys for Special Committee Defendants Joseph L. Mullen and Mark E. Schwarz.*

PARSONS, Vice Chancellor.

This dispute, like many others, has its genesis in the 2008 financial crisis. As the financial markets declined in the Fall of 2008, the defendant hedge fund and its controller found themselves unable to meet the rising number of withdrawal requests from the fund's investors. Facing the prospect of having to liquidate the fund, the controller orchestrated a series of complex and interrelated transactions that had the ultimate effect of converting the fund from a private limited partnership to a publicly traded limited partnership. A key step in that series of transactions was the use of one of the fund's portfolio companies as a conduit to facilitate the exchange of assets necessary for the conversion of the fund into a publicly traded entity. The plaintiff, by virtue of his position as a shareholder in that portfolio company at the time of the transaction, is now a limited partner in the publicly traded limited partnership. The plaintiff alleges, both directly and derivatively on behalf of the limited partnership, that the defendant hedge fund, its controller, the directors of the portfolio company, and the directors of the limited partnership's general partner, breached their fiduciary and contractual (implied and express) duties, and aided and abetted breaches of those duties, throughout the conversion process and the plaintiff seeks, among other relief, damages and restitution.

The defendants have moved to dismiss all of the plaintiff's derivative claims for failure to make demand and for failure to state a claim upon which relief can be granted. A subset of the defendants, members of the portfolio company's special committee formed to evaluate the conduit transaction, also have moved to dismiss the plaintiff's direct claims, to the extent they implicate the special committee, for failure to state a claim upon which relief can be granted.

Having considered the parties' briefs and heard argument on the motions, I conclude that the defendant's motion to dismiss the plaintiff's derivative claims should be granted, in its entirety, due to the plaintiff's failure to make demand. Therefore, Counts IV - VIII of the complaint are dismissed. I also conclude that the plaintiff has failed to state a direct claim upon which relief can be granted against the special committee. Accordingly, I grant the special committee's motion for dismissal of Counts I and III as to them.

I. BACKGROUND[1]

A. The Parties

Plaintiff, Frederick H. DiRienzo, was a shareholder in WebFinancial Corporation ("WebFinancial" or the "Company"), a Delaware corporation whose primary operating asset was WebBank, a Utah state-chartered industrial bank headquartered in Salt Lake City, Utah. DiRienzo was a shareholder until December 31, 2008, when WebFinancial was merged (the "Merger") into a newly formed Delaware limited partnership known as WebFinancial L.P. DiRienzo received common limited partnership units of WebFinancial L.P. as consideration in the Merger, and has held those units at all times since the merger.

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1 Unless otherwise indicated, the facts recited in this action are based on the allegations in Plaintiff's Complaint, documents integral to or incorporated in the Complaint, or facts of which the Court may take judicial notice.

1. Entity defendants

Defendant and Nominal Defendant Steel Partner Holdings L.P. ("SPH" or the "Partnership") is a Delaware limited partnership, and is the successor entity to WebFinancial L.P. and WebFinancial. SPH's holdings include WebBank and various other investments.

Defendant Steel Partners II GP, LLC, a Delaware limited liability company, now known as Steel Partners Holdings GP Inc., a Delaware corporation (the "General Partner"), serves as the General Partner of the Partnership. The General Partner also serves or has served as the general partner of Defendant Steel Partners II, LP, a Delaware limited partnership ("SP II") that is a hedge fund controlled by Defendant Warren G. Lichtenstein, which owned eighty-five percent (85%) of WebFinancial's common stock before the Merger.

Defendant Steel Partners, LLC is a Delaware limited liability company that served as the manager of the Partnership from January 1, 2009 until May 11, 2012. It is controlled by Lichtenstein and Steel Partners Ltd.

Defendant SP General Services, LLC, a Delaware limited liability company, is the successor by assignment to Steel Partners, LLC, and has served as manager of the Partnership since May 11, 2012.

Defendant WGL Capital Corp. ("WGL") is a Colorado corporation that provides investment management services. Lichtenstein is the founder, president, and majority owner of WGL.

2. Individual defendants

Defendant Lichtenstein, in addition to his previously stated roles with various entity defendants, is also the Managing Member, President, and Chairman of the Board of the General Partner.

Defendants Jack Howard, Joseph L. Mullen, Mark E. Schwarz, and John H. McNamera, Jr. comprised the WebFinancial Board of Directors before the Merger. Mullen and Schwarz were on the special committee formed by WebFinancial's Board to evaluate the Merger (the "Special Committee").

Defendants Sanford Antignas, Anthony Bergamo, John P. McNiff, Richard I. Neal, and Allan R. Tessler, along with Lichtenstein and Mullen, became directors of the General Partner as of July 15, 2009. Howard replaced Antignas as a director in October 2011.

B. Facts

In the Fall of 2008, at the peak of the financial crisis, SP II began receiving a large number of redemption requests from the fund's investors. Due to the structure of many of SP II's investments, the fund did not have enough liquidity to satisfy the increasing number of investors who wished to exit their investments in SP II. Faced with the potential prospect of having to liquidate SP II, likely at a significant loss based on the macroeconomic environment at the time, Lichtenstein began to consider options for resolving SP II's difficulties.

Lichtenstein found his solution in WebFinancial, a publicly traded SP II portfolio company in which SP II owned eighty five percent (85%) of the common stock.

Broadly speaking, Lichtenstein's plan was to make SP II a wholly owned subsidiary of WebFinancial, and then convert WebFinancial from a publicly traded corporation to a publicly traded limited partnership. Upon completion of the contemplated transaction, SP II investors would be able to "redeem" their investments in SP II by selling their interests in the limited partnership on an exchange, thus relieving SP II (and the limited partnership) from having to use its own its own cash or assets to compensate an investor who no longer wanted to participate in the fund.[2]

1. Lichtenstein approaches WebFinancial

On October 30, 2008, WebFinancial's Board held a telephonic meeting with Lichtenstein and lawyers from the Olshan Grundman Frome Rosenzweig & Wolosky LLP law firm ("Olshan"). Olshan was participating on behalf of both WebFinancial and SP II. During the meeting, the participants discussed Lichtenstein's framework for a potential transaction between SP II and WebFinancial. At the same meeting, WebFinancial's Board authorized the formation of the Special Committee, comprised of Schwarz and Mullen, to "review and evaluate the terms of the proposed transaction and to make a recommendation to the full WebFinancial Board as to whether the proposed transaction would be in the best interests of the Company and its stockholders."[3] The Special Committee was authorized to retain, at the Company's expense, any advisors the

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2 On or about April 1, 2011, SPH announced that its Common Units would be quoted on the over-the-counter market on the Pink Sheets. SPH's Common Units were listed on the New York Stock Exchange beginning on April 10, 2012.

3 Am. Compl. ¶ 73.

committee deemed "necessary or advisable," and it was decided that counsel retained by the Special Committee, and not Olshan, would represent WebFinancial in any transaction between the Company and SP II.

A few weeks later, on November 24, 2008, the Special Committee was asked to approve the record date for the Merger between the Company and SP II. Counsel for the Special Committee, Gardere Wynne Sewell LLP ("Gardere"), objected to the request based on the "unusual" nature of the transaction and the fact that the Special Committee had not yet convened its first official meeting or seen any drafts of transaction documents. It is not clear whether the Special Committee approved the record date for the Merger at that time.

The Special Committee held its inaugural meeting on December 1, 2008, and officially selected Gardere as its legal counsel and elected Mullen as its Chairman. In addition to reviewing a formal proposal for the Merger prepared by Lichtenstein, the Special Committee discussed the subjects of shareholder notification relating to the Merger and whether the Special Committee should retain an investment bank. The Special Committee defined the scope of any hired investment bank's mandate as rendering an opinion "with respect to the fairness, from a financial point of view, to the successor in interest to the Corporation of the consideration provided for in the proposed transaction."[4] The Special Committee did not discuss whether it should request the

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[4] *Id.* ¶ 74.

investment bank's opinion as to the fairness of the Merger with respect to the Company's minority shareholders.

The next day, Gardere received from Olshan a draft of the proposed notice to be sent to WebFinancial shareholders regarding the Merger. At or around that time, the Special Committee was informed that "Olshan intended the minimum statutorily required notice to be distributed [to the WebFinancial Minority Holders] on December 8."[5]

On December 3, 2008, the Special Committee held a joint telephonic meeting with the rest of the WebFinancial Board, Lichtenstein, and lawyers from Olshan and Gardere. After Lichtenstein reviewed certain materials that had been prepared by SP II, "[a] lengthy discussion ensued regarding the terms and conditions of the proposed transaction, the timing for completing it, and the disclosure to be provided to stockholders of the Corporation."[6] Lichtenstein wanted to use different valuation methods for WebFinancial and SP II. He stated that the Company's valuation should be based on its "book value," and that SP II's valuation should be predicated on its "net asset value" ("NAV").[7] Lichtenstein also informed the Special Committee "that these methods were not open for negotiation." During this meeting, WebFinancial's Board voted to hold a special

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5 *Id.* ¶ 77.

6 *Id.* ¶ 76.

7 The materials prepared by SP II for the meeting indicated that WebFinancial had a NAV of $45 million. WebFinancial's book value was $43.9 million as of November 30, 2008 and $42.1 million as of December 31, 2008. Am. Compl. ¶ 76.

shareholders meeting to approve or reject the Merger (the "Special Meeting") on December 29, 2008.

Upon completion of the joint meeting, the Special Committee met separately with Gardere to discuss certain terms and conditions of the proposed transaction and the disclosures to be given to the Company's shareholders. The Special Committee also reviewed potential investment banking candidates and elected to solicit formal proposals from those candidates.

On December 9, 2008, Lichtenstein effected a temporary suspension of withdrawal rights for investors in SP II, and notified those investors that SP II was unable "to continue to meet all withdrawal requests with cash" as it had done in the past. This information was not conveyed to WebFinancial's minority shareholders even though the Special Committee had urged its disclosure.

The next official Special Committee meetings occurred, telephonically, on December 10 and 11, 2008. During these meetings, Gardere updated the Special Committee on its discussions with Olshan "regarding the disclosure to be provided to the Corporation's stockholders before and after the Special Meeting," and there were also discussions about how the Company would be managed after it was merged into a limited partnership. On December 11, the Special Committee officially engaged Houlihan Lokey Howard & Zukin ("Houlihan") as its investment banker to deliver an opinion "with respect to the fairness, from a financial point of view, to the successor in interest to the Corporation of the consideration provided for in the proposed transaction."

On December 17 and 18, 2008, respectively, Gardere received, for the first time, a draft of the proposed WebFinancial Limited Partnership Agreement ("LPA" or the "Partnership Agreement") and a draft of the proposed agreement governing the exchange of shares and assets (the "Exchange Agreement") between the limited partnership and Steel Partners II Master Fund, L.P. ("Master Fund"), an entity that controlled SP II.

On December 18 and 19, 2008, the Special Committee held at least two telephonic meetings with Gardere. Topics discussed during these meetings included terms of the proposed Partnership Agreement, contractual appraisal rights for WebFinancial's minority shareholders after the Exchange Agreement was executed, and the ability of the general partner of the new limited partnership entity to unwind the transaction contemplated by the Exchange Agreement. Between December 18 and December 26, 2008, Gardere and Olshan discussed the terms of the transaction's underlying agreements. These included the Merger Agreement, the LPA, the Exchange Agreement, and an agreement between the Partnership's general partner and the Partnership's manager (the "Management Agreement"). During these discussions, Gardere raised several issues and requested numerous changes, most of which were rejected by Olshan.

On December 21, 2008, the Special Committee first became aware of the existence of a "Deferred Fee Liability" while reviewing a draft of the Exchange Agreement. The Deferred Fee Liability was an obligation of Steel Partners II (Offshore) Ltd. ("Offshore"), one of several investment vehicles through which SP II operated, owed to WGL for investment management services WGL had provided to Offshore from 2002 to 2008. The Deferred Fee Liability was a product of a "Deferred Fee Agreement" between Offshore and WGL, which prescribed how the liability would be calculated. Under the Exchange Agreement, Offshore was to transfer the Deferred Fee Liability to the newly created limited partnership if the exchange transaction was not unwound. Between December 21 and December 26, 2008, Gardere informed Olshan on numerous occasions that it "needed to understand the Deferred Fee Obligations." Neither Gardere nor the Special Committee ever was provided with a copy of the Deferred Fee Agreement, told the size of the Deferred Fee Liability,[8] or informed that the Deferred Fee Arrangement was modified on December 29, 2008.

On December 26, 2008, the Special Committee held a telephonic meeting with Gardere and Houlihan. During the meeting, the Special Committee and its advisors reviewed both WebFinancial's and SP II's public and non-public financial information. At the meeting, Houlihan provided an oral opinion, followed up by a written fairness opinion dated December 26, 2008, that the transaction was fair from a financial point of view to the Partnership, as successor in interest to WebFinancial. Houlihan's fairness opinion assumed the transaction would be executed as it was presented to Houlihan and there is no evidence that the opinion, in any way, accounted for the Deferred Fee Liability. After further discussions with Gardere, the Special Committee determined that the transaction was "fair to and in the best interests of the stockholders" of WebFinancial, and unanimously recommended that the full WebFinancial Board approve the proposed transaction.

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[8] The Deferred Fee Liability was $58.3 million as of December 31, 2008.

Immediately following the Special Committee meeting, the entire WebFinancial Board held a telephonic meeting in which representatives from SP II, Olshan, and Gardere also participated. After being told that "there was nothing else of which [it] needed to be made aware of with respect to the Steel Proposal," the Special Committee advised the full Board of its recommendation. The full Board then proceeded to approve the Merger Agreement and the Merger, deeming them to be in "the best interests" of the Company.

On December 29, 2008, the Merger was approved by WebFinancial's stockholders. Because the WebFinancial stockholder vote was not made contingent on a "majority of the minority" approving the transaction, and because SP II owned 85% of WebFinancial's common stock, the vote to approve the transaction was a *fait accompli.* The transaction closed on December 31, 2008, and became effective as of January 1, 2009, subject to post-closing adjustments and confirmation of the General Partner's election not to unwind the transaction before June 30, 2009. While the WebFinancial minority shareholders owned 15% of WebFinancial before the Merger, they owned only 0.5% of the limited partnership created by the Merger and Exchange.

2. The Partial Unwind

On December 31, 2008, Lichtenstein sent another letter to SP II investors touting the merits of the WebFinancial transaction as a solution to the liquidity crunch that SP II was facing. On January 9, 2009, Lichtenstein convened a web/teleconference with investors to review the transaction in greater detail. Lichtenstein's discussion of the WebFinancial transaction, however, was not well received by the SP II investors.

In response to the lack of investor support for the transaction, on or about March 12, 2009, Lichtenstein distributed a term sheet to investors, but not to the former WebFinancial minority shareholders, that modified the plan he had described in his December 31, 2008 letter and his January 9, 2009 presentation. Under the revised plan, investors would have two choices: Option A or Option B. Investors who chose Option A would be electing to continue to invest with Lichtenstein and would be entitled to receive common units in the new limited partnership ("SPH Common Units") and certain cash distributions. Investors who chose Option B would be electing to terminate their relationship with SP II, and would be entitled to receive distributions in kind of SP II portfolio securities as well as a cash distribution.

As of April 15, 2009, investors representing 36% and 21% of the economic interests of SP II and its various feeder funds had selected Option A and Option B, respectively. These percentages included the interests corresponding to the Deferred Fee Liability, although it is unclear how those interests were voted.

On May 19, 2009, the General Partner distributed an information memorandum to investors describing Lichtenstein's modified plan in greater detail. This information was not disclosed to the former WebFinancial minority shareholders until November 2009. According to the information memorandum, Option A Investors, as well as the General Partner and its affiliates, would receive certain *pro rata* cash distributions as well as SPH Common Units valued at $17.28 per unit. In addition, investors were informed that

Option B was specifically for those "WHO ELECT NOT TO RECEIVE THE COMMON UNITS [OF SPH] UNDER THE REVISED RESTRUCTURING PLAN."[9]

The General Partner set June 5, 2009, as the final deadline for investors to select either Option A or Option B. If an investor failed to make a selection, they were deemed to have chosen Option B. On June 11, 2009, the General Partner reported that investors representing 38% of the economic interests of SP II had selected Option A, and 62% had either explicitly elected Option B or were deemed to have elected Option B by not responding. As with the prior General Partner's report, these figures included the Deferred Fee Liability.

On June 12, 2009, Lichtenstein sent a letter to investors indicating his decision to implement the modified transaction, effective July 15, 2009. This was followed by a letter on June 24, 2009, in which Lichtenstein: (1) gave Option B shareholders more time to switch to Option A; and (2) revealed that Investors who selected Option B would be receiving SPH Common Units in addition to cash and distributions in kind of SP II portfolio securities. The number of SPH Common Units Option B Investors would receive would be based on "their pro rata share of the Common Units held by SP II . . . at December 31, 2008 before the Exchange Agreement was effective."[10]

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9 Am. Compl. ¶ 116.

10 Before the Merger and the Exchange, SP II owned 1,870,564 shares of WebFinancial.

On June 29, 2009, Lichtenstein, as Managing Member of the General Partner, executed a written consent authorizing the amendment of the LPA, the Exchange Agreement, and the Management Agreement, giving the General Partner the authority to effectuate both a partial unwind (the "Partial Unwind") and a complete unwind of the Exchange transaction.

The modified transaction Lichtenstein proposed to SP II investors was implemented on July 15, 2009. On that date, the General Partner also decided to affect a "partial unwind of the Exchange." Under the Partial Unwind, to satisfy the 56%[11] economic interest in SP II that ultimately elected Option B, a total of $750,399,063 in cash and assets was transferred out of the Partnership. By November 24, 2009, the modified transaction and Partial Unwind had been fully implemented, leaving SPH with an NAV of approximately $450 million. Lichtenstein, WGL, and Lichtenstein's family trusts received over 3.8 million SPH Common Units from the implementation of the modified transaction and Partial Unwind.

3. Management of SPH

After the closing of the Merger on December 29, 2008, the WebFinancial Board and the Special Committee ceased to exist. On that date, however, Gardere wrote an email to the CEO of WebFinancial and Olshan stating that WebFinancial, LP and the Special Committee agreed that "irrespective of the termination of the Special

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[11] Holders of 18% of the Fund explicitly elected Option B; 36% did not submit an election and were deemed to have chosen Option B.

Committee's existence, this firm should continue to consult with and take direction from Mark Schwarz and Joe Mullen with regard to the pending legal representation we are providing." On January 1, 2009, Lichtenstein wrote Mullen and Schwarz a letter stating that Mullen and Schwarz would become independent directors of SPH's General Partner and that the General Partner would "not take any action that requires prior Board approval under the Partnership Agreement without the prior written approval" of both Schwarz and Mullen. This presumably is because, as of January 1, 2009, the General Partner did not have a sitting board of directors. Lichtenstein's letter agreement and Gardere's email were negotiated at some time in December 2008, but were not disclosed to WebFinancial shareholders prior to the Merger.

Between January 1, 2009 and July 15, 2009, Lichtenstein sought approval from Schwarz and Mullen on at least four occasions: (1) on May 19, 2009 before distributing the disclosure statement to SP II investors describing the modified transaction; (2) on June 16, 2009 when Steel Partners wanted to extend the deadline under the Exchange Agreement to implement an unwind; (3) on June 29, 2009 when the Exchange Agreement was amended and restated to allow for a partial unwind; and (4) on July 14, 2009 to effect the Partial Unwind the next day. In response to each request, Gardere would send an email to Lichtenstein stating "Schwarz and Mullen have not refused to grant their consent to any action that we are aware is proposed to be taken."[12]

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[12] Am. Compl. ¶ 156.

Also during this time period, Gardere was permitted to review and comment on the draft transaction documents associated with the Partial Unwind. Gardere's suggestions, however, were "respectfully noted but dismissed" by Olshan and Steel Partners. This includes Gardere's comments on subjects that it asserted "would have been negotiated had they been known by the Special Committee at the time of the Merger."[13]

On July 15, 2009, SPH, through the General Partner, notified Antignas, Bergamo, Lichtenstein, McNiff, Mullen, Neal, and Tessler that they were the incoming directors of the General Partnership. The notice did not specify when their term as directors would begin. The first action taken by the General Partner directors, and thus the first action taken by the General Partner Board, was a written consent authorizing the October 2009 amendment to the Amended and Restated Exchange Agreement.

4. The growth of the Deferred Fee Liability

In conjunction with the Partial Unwind, on November 23, 2009, Lichtenstein caused SPH to enter into an Assignment and Assumption Agreement ("Assumption Agreement") with Offshore. Under the terms of the Assumption Agreement, SPH agreed to assume Offshore's Deferred Fee Liability and to retain WGL as an investment advisor. In exchange, Offshore was to provide SPH with $4,486,496 in cash and 2,725,533 SPH

[13] *Id.* at ¶ 155.

Common Units[14] (valued at $17.28 per unit), or total consideration of $51,583,706. According to the SPH 2009 general ledger, the cash component of the consideration was a receivable only. It is unclear whether SPH ever has received the cash it is owed from Offshore.

The General Partner Board first received a copy of the Deferred Fee Agreement in its inaugural meeting on February 11, 2010. At that same meeting, the General Partner Board authorized Lichtenstein affiliate Steel Partner Limited to pursue "any corporate opportunity with respect to the acquisition of Common Units," including repurchasing SPH Common Units from two investors who had chosen Option B and wanted to sell the SPH Common Units they received back to SPH. The Board granted this approval after it "determined that it is in the best interest of the Company to retain funds to invest in the operations of the Company."[15]

On June 25, 2010, the General Partner Board approved the Second Amended Deferred Fee Agreement. Although the Board gave its approval in June 2010, it made the agreement effective as of July 15, 2009. The Second Amended Deferred Fee Agreement gave WGL the right to elect, without the previously required General Partner Board approval, the manner in which the deferred amount would be paid. Thus, WGL

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14 Although these were deemed to be treasury units, a $3.13 common unit distribution that was paid to all limited partners in April 2010 and 2011 also was paid on these shares. The Complaint does not specify who received the $8.53 million allegedly paid on these treasury shares.

15 *Id.* at ¶ 161.

could elect to be paid in cash, units, or some combination of the two. Furthermore, under the amended agreement, if WGL elected to be paid entirely in SPH Common Units, WGL would be entitled to a 15% "discount"[16] so long as it agreed not to sell those units for at least six months. Finally, the Second Amended Deferred Fee Agreement allowed WGL to "index" the Deferred Fee Liability to SPH's NAV and to cash distributions made to SPH's limited partners such that if SPH's NAV increased or SPH made cash distributions to limited partners, the size of the Deferred Fee Liability also would increase.

On April 11, 2012, the General Partner Board approved the Third Amended and Restated Deferred Fee Agreement. This amendment entitled WGL to an immediate payment of a fee it was entitled to as a result of Offshore's distribution of funds that Offshore had maintained after the Exchange to satisfy certain contingent liabilities. More significantly, on that same date, WGL and SPH terminated the Investor Services Agreement[17] underlying the Deferred Fee Agreement, causing the Deferred Fee Liability to become immediately payable. By May 11, 2012, WGL received 6,939,647 Class B Common Units,[18] worth approximately $80 million, as full payment for the Deferred Fee Liability, which was $70.5 million on March 31, 2012.

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16 If, for example, the Deferred Fee Liability was $100 and SPH Common Units were trading at $1 per unit, WGL would be entitled to 117.6 shares if it elected to be paid entirely in SPH Common Units.

17 WGL had been providing SPH with investment management services since the date of the Assumption Agreement in 2009.

18 Class B Common Units are the functional equivalent of SPH Common Units. Am. Compl. ¶ 171.

C. Procedural History

On December 7, 2011, DiRienzo commenced this action. All Defendants other than the Special Committee filed an answer on February 7, 2012, and the Special Committee answered the following day on February 8. After several months of discovery, DiRienzo moved for leave to amend his complaint, which this Court granted on January 9, 2013. On January 18, 2013, DiRienzo filed an amended complaint (the "Complaint") containing five new derivative counts. That same day, all Defendants other than the Special Committee moved to dismiss the newly added derivative counts in their entirety. On January 22, 2013, the Special Committee moved to dismiss all counts relating to it. After full briefing on those motions, I heard argument on May 22, 2013. This Memorandum Opinion constitutes my ruling on those motions to dismiss.

D. Parties' Contentions

Plaintiff, DiRienzo, has asserted eight counts against Defendants, seven of which are relevant to the pending motions to dismiss. Counts I and III are direct claims, the relevant parts of which assert that the Special Committee breached its fiduciary duties both before and after the Merger. DiRienzo claims that the Special Committee breached its fiduciary duties in conjunction with the Merger by not taking steps to properly protect WebFinancial's minority shareholders and approving an unfair transaction. In addition, DiRienzo avers that after the Merger, the Special Committee functioned as the board of the General Partner and breached their fiduciary duties by approving the modified transaction, the Partial Unwind, and the dissemination of disclosures to SP II investors but not to the WebFinancial minority shareholders.

Counts IV and V are derivative claims brought against the General Partner, its Managing Member, and the General Partner Board for breaches of fiduciary or contractual duties. In Count IV, DiRienzo contends those Defendants breached their duties by having SPH assume and pay the Deferred Fee Liability and by allowing Lichtenstein to purchase corporate opportunity units. In Count V, DiRienzo alleges that those Defendants breached their duties by issuing SPH Common Units to Option B Investors pursuant to the Partial Unwind.

In Count VI, a derivative claim, DiRienzo avers that the General Partner breached its express and implied contractual duties under the LPA by acting without a board of directors from the Merger date until October 2009 and by disposing of substantially all of SPH's assets in the Partial Unwind. DiRienzo also contends in Count VI that the General Partner directors breached their contractual duties by: (1) failing to stop the Partial Unwind, the terms of which were determined based solely on SP II's internal management valuation; (2) causing SPH to assume and pay the Deferred Fee Liability; and (3) causing SPH to issue SPH Common Units to Option B Investors as a component of the Partial Unwind.

Count VII is a derivative claim against the General Partner for breach of the implied covenant of good faith and fair dealing. DiRienzo claims the General Partner breached the implied covenant by: (1) distributing $750 million of SPH assets to Option B Investors; (2) accepting an overvaluation of NAV contributed to the Partnership in the Partial Unwind; (3) assuming and paying the Deferred Fee Liability; and (4) issuing SPH Common Units to Option B Investors.

DiRienzo's final claim, Count VIII, is a derivative claim against Lichtenstein, the General Partner Board, the Manager, and WGL.[19] In Count VIII, DiRienzo alleges that those Defendants aided and abetted the General Partner in breaching its fiduciary and contractual duties, as alleged in Counts IV through VII.

Defendants counter that Claims IV through VIII should be dismissed because DiRienzo has failed to make a pre-suit demand on the General Partner Board, and demand for any of DiRienzo's claims is not excused under either the *Aronson* or *Rales* tests. Defendants further argue that if demand is excused for any of DiRienzo's derivative claims, those claims still should be dismissed because DiRienzo has not alleged that any Defendant engaged in conduct outside of the exculpatory provisions of the LPA. With regard to the claim for a breach of the implied covenant of good faith and fair dealing, Defendants aver that DiRienzo's claim is foreclosed by express contractual language and that, even if it is not, DiRienzo has not pled the requisite elements of an implied covenant claim. Defendants also argue that DiRienzo has failed to assert a valid aiding and abetting claim because: (1) the Complaint does not assert a viable underlying claim for breach of a fiduciary duty; (2) the Count VII Defendants are, themselves, fiduciaries and cannot be considered to have aided and abetted in a breach of fiduciary duty; and (3) the Count VIII Defendants are agents of the fiduciaries who allegedly breached their fiduciary duties, and cannot be held liable for aiding and abetting an

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19 WGL is not actually named in Count VIII of the Complaint. DiRienzo stated in briefing and at argument, however, that WGL's omission from Count VIII was an inadvertent oversight.

alleged breach of fiduciary duty by their principal. Finally, Defendants contend that to the extent a valid aiding and abetting claim exists, it cannot be asserted against WGL because WGL was not named in Count VIII and because this Court lacks personal jurisdiction over WGL.

The Special Committee joins in each of Defendants' arguments, and also contends that DiRienzo has not pled viable direct claims against them. Regarding conduct that occurred before the Merger, the Special Committee asserts that DiRienzo has not alleged that it took any actions that would not be exculpated under WebFinancial's Section 102(b)(7) charter provision. With respect to conduct after the Merger, the Special Committee argues that the Complaint specifically alleges that the General Partner had no board for several months starting on January 1, 2009, and accordingly, the Special Committee cannot be held liable for actions the General Partner took when there was no board. Finally, the Special Committee contends that even if it is found to have constituted the General Partner Board immediately after the Merger, DiRienzo has not alleged the Special Committee took any actions that would not be exculpated by the LPA.

II. ANALYSIS

I first address the Special Committee's motion to be dismissed from the direct claims asserted in Counts I and III of the Complaint.

A. Standard

Pursuant to Court of Chancery Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Delaware

Supreme Court, "the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[20] That is, when considering such a motion, a court must

> accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[21]

This reasonable "conceivability" standard asks whether there is a "possibility" of recovery.[22] If the well-pled factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.[23] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[24] Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.[25]

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20 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC,* 27 A.3d 531, 537 (Del. 2011) (footnote omitted).

21 *Id.* (citing *Savor, Inc. v. FMR Corp.,* 812 A.2d 894, 896–97 (Del. 2002)).

22 *Id.* at 537 & n.13.

23 *Id.* at 536.

24 *Price v. E.I. duPont de Nemours & Co., Inc.,* 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent–A–Car Co.,* 977 A.2d 892, 895 (Del. 2009)).

25 *Crescent/Mach I P'rs, L.P. v. Turner,* 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

Generally, a court will consider only the pleadings on a motion to dismiss under Rule 12(b)(6). "A judge may consider documents outside of the pleadings only when: (1) the document is integral to a plaintiff's claim and incorporated in the complaint, or (2) the document is not being relied upon to prove the truth of its contents."[26]

B. The Special Committee's Conduct Before the Merger

As to whether DiRienzo has stated a claim against the Special Committee for their actions leading up to the Merger, DiRienzo argues that this Court should not consider the fact that WebFinancial's charter includes an exculpatory provision pursuant to 8 *Del. C.* § 102(b)(7). According to DiRienzo, because the Complaint alleges facts that establish that the Merger should be evaluated under the entire fairness standard of review, the Special Committee has the burden of proving that the Merger was entirely fair. He contends that because entire fairness cannot be proven at the motion to dismiss stage, it is premature for the Special Committee to seek dismissal by invoking its 102(b)(7) charter provision. DiRienzio's argument, however, misstates the law governing the interaction of 102(b)(7) charter provisions and entire fairness. Hence, I reject his contention and find that it is appropriate to consider the Company's 102(b)(7) provision in evaluating the Special Committee's motion to dismiss.

"It is a now well-established principle of Delaware corporate law that in an interested merger, *the controlling or dominating shareholder proponent of the*

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[26] *Allen v. Encore Energy P'rs,* 2013 WL 3803977, at *1 n.2 (Del. 2013).

transaction bears the burden of proving its entire fairness."[27] Defendants in this case concede that Lichtenstein, the controlling shareholder proponent of the Merger, will have the burden of establishing the entire fairness of the Merger. But, it does not follow from the fact that Lichtenstein must prove the Merger was entirely fair that the Special Committee shares that same obligation. A special committee must prove the entire fairness of its actions when a plaintiff alleges that the committee engaged in non-exculpated behavior such as by acting disloyally or in bad faith. In such cases, the burden of entire fairness flows from the actions, or lack thereof, of the special committee itself, and not from the separate obligations of a controlling or dominant shareholder.

In support of his argument, DiRienzo cites the Delaware Supreme Court case of *Emerald Partners v. Berlin*[28] for the proposition that "when entire fairness is the applicable standard of judicial review, a determination that the director defendants are exculpated from paying monetary damages can be made only after the basis for their liability has been decided."[29] Importantly, the Court in *Emerald Partners* made that statement after it had been decided that that the directors' actions were subject to entire fairness review.[30] Thus, the directors in *Emerald Partners* were precluded from relying

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27 *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (emphasis added).

28 787 A.2d 85 (Del. 2001).

29 *Id.* at 94.

30 *Id.* at 92-93.

on a 102(b)(7) charter provision by virtue of their conduct, not because the transaction was subject to entire fairness review for other reasons. In that sense, *Emerald Partners* undermines, rather than supports, DiRienzo's contention.[31]

DiRienzio seeks to bootstrap his entire fairness claim against Lichtenstein into an entire fairness claim against the Special Committee. This he cannot do. To burden the Special Committee with proving entire fairness, DiRienzio must allege sufficiently that the committee members breached a non-exculpated fiduciary duty. This inquiry necessarily requires consideration of the Company's 102(b)(7) provision. Having decided it is appropriate to consider WebFinancial's 102(b)(7) provision at this stage of the proceedings, I now turn to whether the Complaint alleges that the Special Committee engaged in conduct outside the exculpatory charter provision.

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31 *See also In re Southern Peru Copper Corp. S'holder. Derivative Litig.,* 52 A.3d 761, 787 n.72 (Del. Ch. 2011) ("The entire fairness standard ill suits the inquiry whether *disinterested directors* who approve a self-dealing transaction and are protected by an exculpatory charter provision authorized by 8 *Del. C.* § 102(b)(7) can be held liable for breach of fiduciary duties. Unless there are facts suggesting that the directors consciously approved an unfair transaction, the bad faith preference for some other interest than that of the company and the stockholders that is critical to disloyalty is absent. The fact that the transaction is found to be unfair is of course relevant, but hardly sufficient, to that separate, individualized inquiry. In this sense, the more stringent, strict liability standard applicable to interested parties . . . is critically different than that which must be used to address directors such as those on the Special Committee.")

1. WebFinancial's 102(b)(7) charter provision

WebFinancial's 102(b)(7) provision exculpates directors for breaches of the duty of care, but it does not exculpate directors from liability for: (1) a breach of the duty of loyalty; (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law; or (3) any transaction from which a director derives an improper personal benefit.[32]

A plaintiff may demonstrate that a director violated the duty of loyalty by alleging non-conclusory facts suggesting that the director has an improper self-interest in a transaction,[33] lacked independence,[34] or acted in bad faith.[35] For the reasons that follow, I conclude that DiRienzo has failed to allege that the Special Committee breached its duty of loyalty or engaged in any conduct beyond the scope of the 102(b)(7) exculpatory provision in negotiating the terms of the Merger.

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32 Special Comm. Defs.' Op. Br. Ex. A, Article TWELFTH. DiRienzo has alleged that the Special Committee breached its fiduciary duties. I consider WebFinancial's charter, therefore, to be integral to the Complaint because it directly implicates the scope of the Special Committee's potential liabilities. *See H–M Wexford LLC v. Encorp, Inc.,* 832 A.2d 129, 139 (Del. Ch. 2003) ("the court may consider, for certain limited purposes, the content of documents that are integral to or are incorporated by reference into the complaint. Under Rule 12(b)(6), a complaint may, despite allegations to the contrary, be dismissed where the unambiguous language of documents upon which the claims are based contradict the complaint's allegations") (citations omitted).

33 *Solomon v. Armstrong*, 747 A.2d 1098, 1115 (Del. Ch. 1999).

34 *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002).

35 *Stone v. Ritter,* 911 A.2d 362, 370 (Del. 2006).

2. The Special Committee was not financially interested in the Merger

When a fiduciary appears on both sides of a transaction or receives a personal benefit that is not shared by all stockholders, that fiduciary has an impermissible self-interest in the transaction that implicates the duty of loyalty.[36] Not all personal benefits, however, create a disqualifying self-interest for a fiduciary. Only benefits that are material to the fiduciary, as judged from the perspective of the fiduciary herself, raise issues under the duty of loyalty.[37]

DiRienzo argues only that Schwarz had a compromising personal financial interest in the Merger. According to the Complaint, Schwarz's investment company Newcastle Capital Management ("Newcastle") partnered with SP II in 2006 to acquire Fox and Hound Restaurant Group ("Fox and Hound") for $161 million.[38] DiRienzo claims that because a liquidation of SP II would have harmed the value of the Fox and Hound investment, Schwarz had a financial interest in approving the Merger and preventing SP II's liquidation.

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36 *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 191 (Del. Ch. 2005).

37 *See In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 364 (Del. Ch. 2008) ("Importantly, the mere fact that a director received some benefit that was not shared generally by all shareholders is insufficient; the benefit must be material.")

38 Am. Compl. ¶ 12.

Although DiRienzo alleges that Fox and Hound was significant to SP II,[39] he does not make any allegations pertaining to the materiality of the Fox and Hound investment to Schwarz. There are no allegations pertaining to Schwarz's personal finances, the size of his stake in Newcastle, or even the significance of Fox and Hound to Newcastle's portfolio. A director's potentially conflicting financial interest need not be large, but there must be some basis to conclude it is material enough to that director that it could overcome their rational business judgment.[40] DiRienzo has not made any such allegations regarding Schwarz; thus, DiRienzo has failed to establish that Schwarz was financially interested in the Merger.

3. The Special Committee was independent

DiRienzo next argues that the Special Committee directors breached their duty of loyalty by virtue of their lack of independence from Lichtenstein and SP II. Delaware law presumes the independence of corporate directors.[41] "Our law is clear that mere allegations that directors are friendly with, travel in the same social circles, or have past

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39 *Id.* ("[Fox and Hound] was one of SP II's top holdings at the time of the Merger, representing 3% of the value of the Fund at that time. Because [Fox and Hound] was a private holding of the Fund, SP II estimated it could take three (3) years to liquidate its position.")

40 *See Gantler v. Stephens*, 965 A.2d 695, 708 (Del. 2009) (finding the potential loss of a single-branch bank as a client of a director's heating and air conditioning company was material to that director and sufficient to compromise that director's independence when the complaint alleged that the director was "a man of comparatively modest means, and that his company had few major assets and was completely leveraged.")

41 *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984).

business relationships with the proponent of a transaction or the person they are investigating, are not enough to rebut the presumption of independence."[42] Rather, to demonstrate that a director lacks independence, a plaintiff must demonstrate that a director is "beholden" to a controlling party "or so under their influence that [the director's] discretion would be sterilized."[43] For a director to be beholden to a controlling party, the ties between the director and that party must be material to the director, meaning that the ties could affect the director's impartiality.[44] As is the case with personal financial interests, materiality is judged from the perspective of the director in question.[45]

DiRienzo's allegations regarding the independence of the Special Committee do not state a viable claim against either Mullen or Schwarz. According to the Complaint, Mullen had served as a director of WebFinancial from 1995 until the date of the Merger.[46] DiRienzo has not cited any authority for the proposition that Mullen's length of service, without more, compromises his independence. The allegations in the Complaint pertaining to Schwarz are no more compelling. In addition to the Fox and

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42 *In re MFW S'holder Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013).

43 *Rales v. Blasband,* 634 A.2d 927, 936 (Del. 1993) (citing *Aronson,* 473 A.2d at 815).

44 *In re Alloy, Inc. S'holder Litig.,* 2011 WL 4863716, at *7 (Del. Ch. Oct. 13, 2011).

45 *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 364 (Del. 1993).

46 Am. Compl. ¶ 13.

Hound investment, Schwarz also has a connection to SP II by having served as a director of SL Industries, another SP II portfolio company, since 2001.[47] Regardless of whether I consider these allegations separately or together, they are insufficient to show that any of these relationships were material to Schwarz. Without any allegations pertaining to materiality, I do not consider it reasonably conceivable that Schwarz's Fox and Hound investment and service on the SL Industries board would have influenced his decision making with respect to the Merger.[48]

For similar reasons, DiRienzo also has failed to demonstrate that the Special Committee was beholden to Lichtenstein or SP II. "[T]he Supreme Court has made clear that a plaintiff seeking to show that a director was not independent must meet a materiality standard . . . the simple fact that there are some financial ties between the interested party and the director is not disqualifying."[49] At most, DiRienzo has established financial ties between Lichtenstein and the Special Committee. Without any allegations that Schwarz or Mullen had personal or financial ties to Lichtenstein that were material to them, it is not reasonably conceivable that the Special Committee was

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47 *Id.* ¶ 12.

48 It is by no means certain that a liquidation of SP II would harm Schwarz's Fox and Hound investment or necessarily cause him to lose his SL Industries directorship. Even assuming his investment would decline and he would lose the directorship, however, I reach the same conclusion.

49 *In re MFW S'holders Litig.*, 67 A.3d at 509.

beholden to Lichtenstein. Accordingly, DiRienzo has failed to establish that the Special Committee lacked independence.

4. The Special Committee did not approve the Merger in bad faith

Having determined that the Special Committee was disinterested and independent, I now address DiRienzo's contentions that the Special Committee acted in bad faith in negotiating the Merger. Under Delaware law, bad faith will be found if a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[50] "In the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties."[51] The proper inquiry is not whether a director neglected to do all that they should have under the circumstances, which implicates the duty of care, but rather whether the director "knowingly and completely failed to undertake their responsibilities."[52]

DiRienzio claims the Special Committee acted in bad faith based on: (1) the Special Committee's failure to obtain structural protections for WebFinancial's minority shareholders; and (2) its turning a "blind eye" to the Deferred Fee Agreement.

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50 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009) (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

51 *Id.* (quoting *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 654–55 (Del. Ch. 2008)).

52 *Id.* at 243–44.

Regarding the Special Committee's failure to negotiate for adequate structural protections, DiRienzo argues the Special Committee: (1) accepted Steel Partners' valuation terms for the merger "without question"; (2) did not obtain any deal protection devices such as a majority of the minority vote; (3) agreed to give minority shareholders, in time and substance, the minimum allowable notice for the Merger; (4) failed to ensure disclosure of material information to minority shareholders; (5) used a deeply flawed fairness opinion; (6) agreed to reduce or eliminate fiduciary duties for the GP and board of the successor entity; and (7) failed to make a recommendation about the Merger to the shareholders. These allegations, individually or collectively, do not support a conclusion that DiRienzo could recover under any reasonably conceivable set of circumstances on his claim that the Special Committee acted in bad faith.

Before addressing what the Special Committee allegedly failed to do, I first note what actions the Special Committee did take. The Special Committee hired reputable outside counsel and a reputable financial advisor. Throughout December 2008, the Special Committee met either in person or telephonically, on at least eight separate occasions. In addition to those meetings, between December 18 and December 26, 2008, Gardere negotiated the terms of the Merger Agreement, Partnership Agreement, Exchange Agreement, and Management Agreement with Olshan, and Gardere raised "material issues" with Olshan during those negotiations. Finally, the Special Committee approved the Merger transaction after reviewing public and non-public financial information for WebFinancial and SP II, receiving a favorable fairness opinion from its financial advisor, and discussing the transaction with its outside legal and financial advisors. Although the Special Committee here was relatively ineffectual and performed their obligations in a less-than-exemplary manner, I do not consider it reasonably conceivable, based on the actions the Special Committee took, that Plaintiff could prove that either Mullen or Schwarz "knowingly and completely failed to undertake their responsibilities." With that in mind, I turn to DiRienzo's claims.

DiRienzio argues, but did not allege, that the Special Committee accepted without question the financial information prepared by Steel Partners in support of the Exchange Ratio. The Complaint does not allege explicitly that the Special Committee never questioned the information Steel Partners provided them. On December 3, 2008, the Special Committee and Lichtenstein participated in a telephonic meeting that included "[a] lengthy discussion . . . regarding the terms and conditions of the proposed transaction."[53] In that regard, the Complaint asserts that Lichtenstein "chose the methods of valuation" for the Merger and those "methods were not open for negotiation."[54] Drawing all inferences in DiRienzo's favor, I assume from the allegations that the Special Committee never challenged Lichtenstein's financial information.

That failure, however, does not constitute bad faith in the circumstances of this case. There are no allegations in the Complaint that the Special Committee knew the information Steel Partners provided was wrong or otherwise misleading, nor are there any allegations that the Special Committee actually knew that the Exchange Ratio was

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53 Am. Compl. ¶ 76.

54 *Id.*

unfair. "For purposes of stating a duty of loyalty claim, what the Defendant Directors *should have known* is substantively less culpable, for liability purposes, than what they *actually knew*."[55] In the absence of allegations that the Special Committee knew there were problems with the financial information Lichtenstein provided to them, their failure to question that information may have been negligent, but it did not rise to the level of bad faith.

DiRienzio's contention that the Special Committee's failure to obtain structural protections for WebFinancial's minority shareholders constitutes bad faith is equally without merit. There is no *per se* rule under Delaware law that requires a special committee to obtain protections for minority shareholders. Allegations that the Special Committee failed to obtain a "majority of the minority" provision or other minority protections speak to the quality of the deal the Special Committee reached, which implicates the duty of care, not good faith. This is especially true in this instance where the Special Committee hired outside counsel who negotiated repeatedly, albeit unsuccessfully, with Olshan and Lichtenstein.

DiRienzo's criticisms pertaining to disclosure also do not state a claim that the Special Committee acted in bad faith. The failure of the Special Committee to ensure the disclosure of material information to shareholders speaks to the degree of care that it exercised in negotiating the Merger. The Complaint does not support a reasonable

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55 *In re BJ's Wholesale Club, Inc. S'holders Litig*., 2013 WL 396202, at * 12 (Del. Ch. Jan. 31, 2013).

inference that the Special Committee either deliberately agreed to give the WebFinancial minority shareholder's insufficient notice or knowingly withheld material information from them. In fact, in at least once instance, the Special Committee "urged" Lichtenstein and SP II to disclose information about Lichtenstein's communications with SP II investors to WebFinancial's minority shareholders.[56] Under these circumstances, it is not reasonably conceivable that any flaws in the disclosure disseminated to WebFinancial's minority shareholders will be shown to have resulted from the Special Committee's knowing and complete failure to undertake their responsibilities.

The Special Committee's reliance on an allegedly deeply flawed fairness opinion is similarly not evidence of bad faith. DiRienzo complains that Houlihan, among other things, never accounted for the Deferred Fee Liability, did not address the appropriateness of the methodology used in the Exchange, never expressed any opinion as to what the SPH Common Units would be worth after the Exchange, and did not estimate or express any opinion regarding the liquidation value of either SP II or WebFinancial. Even assuming each of these represents a serious flaw in Houlihan's fairness opinion, there are no allegations that the Special Committee knew, or had reason to know, that the opinion was flawed when it relied on it. If the Special Committee did

[56] Am. Compl. ¶ 78.

not knowingly rely on a flawed opinion, it is not reasonably conceivable that the Special Committee acted in bad faith by accepting the opinion of its outside financial advisor.[57]

DiRienzo's contention that the Special Committee acted in bad faith by "conceding" to "Defendants' and Olshan's demand to eliminate fiduciary duties for the GP and the members of the Board, to attempt to give the General Partner virtually unbridled discretion in the LPA," is unpersuasive. Delaware law expressly permits parties to limited partnership agreements to modify the scope of the fiduciary duties that govern their relationship.[58] The fact that the original LPA eliminated fiduciary duties for the General Partner and the General Partner Board[59] is not, itself, evidence that the Special Committee acted in bad faith. The Special Committee did not have an obligation to negotiate an LPA that actually preserved or expanded the rights of WebFinancial's minority shareholders. The allegations in the Complaint do not support a reasonable inference that the Special Committee made no effort to protect the rights of WebFinancial's minority shareholders, nor do they support a reasonable inference that

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57 *See In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at *12 ("While the Plaintiffs quibble with Morgan Stanley's use of supermarkets in its public company analysis, they fail to allege that the Board actually knew that the analysis resulted in an incorrect fairness opinion.")

58 *See In re K-Sea Transp.,* 2012 WL 1142351, at *5 ("[T]he Delaware Revised Uniform Limited Partnership Act provides that a limited partnership agreement may expand, restrict, or eliminate any duty, other than the implied contractual covenant of good faith and fair dealing").

59 Special Comm. Defs.' Op. Br. Ex. B, § 7.9(e). As discussed below, the LPA was amended later and no longer includes this provision.

the Special Committee believed that the minority shareholders would have been better off by not agreeing to the Merger. The Complaint indicates that the Special Committee made an effort in numerous respects to satisfy their obligations to WebFinancial's minority shareholders. Having made those efforts, the Special Committee's level of success or failure in negotiations in this case implicates, at most, their duty of care. Accordingly, the Special Committee's agreement to an LPA that eliminated fiduciary duties for the General Partner and the General Partner Board, when the Special Committee actually negotiated the terms of the LPA with SP II and Lichtenstein, does not support a reasonable inference that the Special Committee acted in bad faith.

Finally, the Special Committee's failure to recommend the Merger to WebFinancial's minority shareholders does not give rise to a claim of bad faith. To the extent the Special Committee had an obligation to make a recommendation to the minority shareholders, there are no allegations suggesting that the Special Committee knowingly failed to satisfy that obligation. There is also no reasonable basis to conclude that the Special Committee deliberately would have failed to notify the minority shareholders, as it had nothing to lose by doing so given that the Special Committee was in favor of the transaction. Accordingly, it is not reasonably conceivable that the Special Committee's failure to recommend the Merger to WebFinancial's minority shareholders was done in bad faith.

5. Acceptance of the Deferred Fee Liability is not evidence of bad faith

DiRienzo argues that the Special Committee's treatment of the Deferred Fee Liability during negotiations for the Merger also manifests bad faith. This claim fails for largely the same reasons discussed above. The Complaint alleges that: (1) the Special Committee became aware of the Deferred Fee Agreement; (2) Gardere inquired about the Deferred Fee Agreement and expressed its need to understand it; (3) the Special Committee was never given a copy of the Deferred Fee Agreement; and (4) the Special Committee was told before recommending the Merger that "there was nothing else of which [it] needed to be made aware of with respect to the Steel Proposal."[60] The Complaint does not allege, however, that the Special Committee was actually aware of how the Deferred Fee Agreement would affect the Merger and the Exchange. Although the Complaint states that Grant Thorton, SP II's auditor, considered SPH's assumption of the Deferred Fee Liability to be an "integral part" of the Merger and Exchange,[61] there are no allegations that the Special Committee knew of Grant Thorton's position. Simply stated, the Special Committee was aware of the Deferred Fee Agreement, the Special Committee tried to obtain information about the Deferred Fee Agreement, and the Special Committee was unable to acquire the information it sought through no fault of its own, other than possibly a lack of diligence or assertiveness. The Special Committee did not know, and had no reason to know, the "materiality" of the Deferred Fee Agreement to the Exchange. Without such knowledge, I conclude that it is not reasonably conceivable

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60 Am. Compl. ¶ 147.

61 Am. Compl. ¶ 146.

that the Special Committee acted in bad faith by recommending the Merger and Exchange without fully understanding the scope of the Deferred Fee Agreement.[62]

DiRienzo has failed to allege, therefore, that the Special Committee engaged in any conduct that would not be exculpated by WebFinancial's 102(b)(7) charter provision. Accordingly, to the extent Counts I and III of the Complaint assert claims against the Special Committee for actions taken during the negotiation of the Merger, those claims are dismissed.

C. The Special Committee's Conduct After the Merger

The Special Committee also argues that DiRienzo has failed to state any viable claim relating to actions taken by Mullen or Schwarz after the Merger for two reasons. First, because the Complaint alleges that the General Partner did not have a board of directors from January 2009 to October 2009, the Special Committee Defendants assert that they cannot be held liable for any actions taken in that time period because they were not on the General Partner Board. Second, even if Mullen or Schwarz is presumed to have been a director on the General Partner Board, the Complaint does not allege that either of them engaged in conduct that would not be exculpated by the LPA. I address these contentions in turn.

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[62] Even if this conduct was grossly negligent, gross negligence does not constitute bad faith under Delaware law. *See In re Walt Disney Co. Deriv. Litig.*, 906 A.2d at 66 ("There is no basis in policy, precedent or common sense that would justify dismantling the distinction between gross negligence and bad faith.").

1. The Special Committee is not liable for conduct that occurred when there was no General Partner Board

The Complaint states that "[a]fter the closing of the Merger, the WebFinancial Board of Directors and the Special Committee ceased to exist"[63] and "[t]here was no Board of the GP from January 1, 2009 through at least September 30, 2009, and during that time, if not longer, Lichtenstein dictated the terms of the challenged transactions with no Board oversight."[64] In addition, "there is no evidence in the record to suggest that the Special Committee ever convened after the Merger Date."[65]

Despite specifically pleading that there was no General Partner Board from at least January 1, 2009 to September 30, 2009, DiRienzo claims that the Special Committee is liable for conduct during this period based on Gardere's December 29, 2008 email and Lichtenstein's January 1, 2009 letter. This argument fails for two primary reasons. First, DiRienzo cannot argue that Lichtenstein simultaneously was running the General Partner both with and without supervision. The contradictory allegations preclude a finding that it was reasonably conceivable that the Special Committee had an obligation to act as directors of the General Partner Board when there was no General Partner Board. Second, the email and the letter that DiRienzo relies on do not indicate that Mullen and Schwarz actually agreed to assume any director or quasi-director role with the General Partner. Given the contradictory allegations about the existence of a board, and the vague

63 Am. Compl. ¶ 151.

64 *Id.* ¶ 184.

65 *Id.* ¶ 155.

nature of the cited documents, it is not clear what, if anything, Mullen and Schwarz allegedly agreed to.

DiRienzo's contention that Mullen and Schwarz were *de facto* directors during this time period is also unpersuasive. "A [d]e facto director is one who is in possession of *and exercising the powers of that office* under claim and color of an election."[66] There are no allegations that Mullen and Schwarz did *anything* between January 2009 and October 2009. The fact that Mullen and Schwarz reportedly "did not refuse to grant their consent" to Lichtenstein on four occasions does not constitute an exercise of directorial power.[67] DiRienzo has not alleged facts that would support a reasonable inference that Mullen and Schwarz were *de facto* directors or otherwise were obligated to act as directors of the General Partner Board between January 2009 and October 2009. Furthermore, DiRienzo has offered no legal or factual support for the contention that Mullen and Schwarz can be held liable for the General Partner's conduct during a time period when they were not directors or otherwise obligated to act.[68] Therefore, all claims

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66 *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 459 (Del. Ch. 2012) (quoting *Prickett v. Am. Steel & Pump Corp.*, 253 A.2d 86, 88 (Del. Ch. 1969)) (emphasis added).

67 *See Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d at 60 (citing the facts that "each [de facto director] participated in multiple board meetings per year, voted on numerous issues, and devoted significant time and energy to the business and affairs of the Center" as evidence of *de facto* director status).

68 *See Official Comm. of Unsecured Creds. of Integrated Health Servs., Inc. v. Elkins*, 2004 WL 1949290, at *8 (Del. Ch. Aug. 24, 2004) ("The Defendants have argued that once a director has resigned, that director may no longer be held liable for the subsequent actions of the Board. To the extent that the Plaintiff is suing the

in Counts I and III of the Complaint against Mullen and Schwarz that relate to that time period are dismissed.

2. The Special Committee is not liable for conduct after the Merger

The claims against the Special Committee seek money damages only. DiRienzo, however, has not alleged that the Special Committee engaged in any unexculpated conduct after October 2009. In addition, Schwarz ceased to be a director of WebFinancial, or any of its successor entities, once the Merger was completed. Schwarz cannot be liable, therefore, for any actions taken by the General Partner after that time. Thus, all claims against Schwarz involving actions taken on or after January 1, 2009 are dismissed.

Mullen eventually became a director on the General Partner Board, but that did not occur until October 1, 2009, at the earliest. Once Mullen became a director of the General Partner Board, as discussed in greater detail in Section II.D.3.a, *infra*, he was entitled to rely on the exculpatory provisions of the LPA. Counts I and III assert claims relating to the Merger, the Exchange, and the Partial Unwind. The Merger closed on December 31, 2008, and the Partial Unwind was effected on July 14 or 15, 2009,[69] so both transpired before Mullen was a director on the General Partner Board. The Exchange Agreement was modified on October 1, 2009, but the Complaint does not

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non-Elkins Defendants solely based on their positions as board members, this is a correct statement of law.") (citation omitted).

[69] Am. Compl. ¶¶ 1, 154.

allege facts from which it appears reasonably conceivable that Mullen took any actions related to the October 1, 2009 amendment that were grossly negligent or done in bad faith. Even if the amendment was harmful to SPH, there are no allegations that Mullen and the other General Partner directors were uninformed or acted with a conscious disregard for their duties. The same is true regarding the instructions SPH gave its transfer agent between October 13, 2009 and November 23, 2009 to distribute SPH Common Units pursuant to the modified transaction plan. As the Complaint fails to allege that Mullen engaged in any unexculpated conduct once he became a director on the General Partner Board, all claims in Counts I and III against Mullen for acts he committed after that time are dismissed.

D. The Derivative Claims

The Complaint states five derivative causes of action on behalf of SPH. SPH is a limited partnership organized pursuant to the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). Section 17-1003 of DRULPA provides that "[i]n a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort."[70] Delaware courts have adopted the pleading standard used in the corporate context to determine whether demand is excused under Section 17-1003.[71]

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70 6 *Del. C.* § 17-1003.

71 *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2007 WL 2982247, at *5 (Del. Ch. Oct. 9, 2007).

Accordingly, a plaintiff bringing a derivative action on behalf of a limited partnership must plead particularized facts sufficient to demonstrate that demand is excused. This particularized pleading requirement is "an exception to the general notice pleading standard," and a derivative plaintiff's pleading burden is "more onerous that that required to withstand a Rule 12(b)(6) motion to dismiss."[72]

1. On whom should demand be made

DiRienzo asserts that in the limited partnership context, whether demand would be futile should only be considered from the perspective of the general partner itself, and not from the general partner's board or other "internal decision making apparatus." In other words, futility of demand is a function of how likely it is that the general partner would be liable to the limited partners, and the disinterestedness or independence of the general partner's board is irrelevant. In support of his argument, DiRienzo cites four cases[73] that purportedly stand for the proposition that demand in the limited partnership context should be directed at a general partner itself, and not at the directors of the general partner's board.

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72 *Levine v. Smith*, 591 A.2d 194, 207, 210 (Del. 1991).

73 The cases are: *Gerber v. EPE Hldgs., LLC*, 2013 WL 209658, at *13 (Del. Ch. Jan. 18, 2013); *Gotham P'rs, L.P. v. Hallwood Realty P'rs*, 1998 WL 832631, at *5 (Del. Ch. Nov. 10, 1998); *Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2007 WL 2982247, at *8-9 (Del. Ch. Oct. 9, 2007); and an October 26, 2012 transcript ruling from *Brinckerhoff v. El Paso Pipeline G.P. Co.*, C.A. No. 7141-CS, Defs.' Mot. Dismiss Tr., at 42-45 Oct. 26, 2012.

All of the cases DiRienzo cites, however, are distinguishable from this case for the same reason. SPH's LPA provided that the limited partners shall elect the directors of the General Partner. In each of the cases referenced by DiRienzo, the limited partners do not appear to have had any say in how the general partner was governed or operated.[74] In this case, the LPA required that: (1) the limited partners vote for the General Partner Board; (2) a majority of the directors be "independent," as defined by the LPA; and (3) the directors of the General Partner Board expressly owe the limited partners fiduciary duties.[75] This differs materially from *Gotham Partners*, in which pre-suit demand against the general partner's board was inappropriate because "it would ignore the reality that it is the general partner who owes the limited partners fiduciary duties, not the management of the general partner."[76] Because the General Partner Board is elected by the limited partners and because the members of the board owe fiduciary duties to the limited partners, demand in this case should be directed at the board of the General Partner, and not the General Partner itself.[77]

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74 *See*, *e.g., Forsythe,* 2007 WL 2982247, at *2 ("the General Partner is 100% owned by three individuals who make up the General Partner's board of directors").

75 Defs.' Op. Br. Ex. 1, § 13.4(c)(i-iii, ix).

76 *Gotham P'rs,* 1998 WL 832631, at *5.

77 DiRienzo's argument that demand should have been directed only to the General Partner itself also is belied by his own Complaint, in which he specifically alleges that demand on the "board of SPH's GP" would be futile, but makes no allegations pertaining to the futility of making demand on SPH's General Partner itself. Am. Compl. ¶¶ 182–194.

2. The applicability of the LPA

Before directly examining the issue of whether demand was excused in this case, I first address DiRienzo's more general argument that the LPA, and its exculpatory provisions, are unenforceable with respect to the transactions that he challenges. As discussed below, a director's potential liability for a challenged transaction is a relevant factor in determining demand futility. Where directors are exculpated contractually or otherwise from liability for certain conduct, "then a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts."[78] Therefore, the enforceability of the LPA has an important bearing on whether demand was excused in this case.

DiRienzo avers that the exculpatory provisions of the LPA should not be enforced because: (1) the LPA was imposed upon the limited partners who did not agree to be bound by its terms; (2) the LPA is unenforceable because it was adopted by a board that had breached its fiduciary duties; and (3) the limited partners received insufficient notice about the LPA before it was adopted. I discuss each of these contentions in turn.

a. The limited partners agreed to the LPA

DiRienzo avers that because he and other limited partners did not participate in the negotiation of, or voluntarily agree to be bound by, the terms of the LPA, it does not constitute a valid contractual relationship between him and SPH. DiRienzo's description of proper consent in this context is incorrect. At some point before the Merger, DiRienzo

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78 *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008).

voluntarily purchased shares of WebFinancial. Because "[c]orporate charters and bylaws are contracts among a corporation's shareholders,"[79] when DiRienzo became a shareholder of WebFinancial, he agreed to be bound by the terms of the charter and its bylaws. He also agreed, subject to his right to sell his shares or seek appraisal in certain instances, to be bound by changes to WebFinancial's charter and bylaws. As a default rule, Delaware corporations are permitted to merge with limited partnerships and convert their shareholders' stock into limited partnership units of that limited partnership. DiRienzo has not alleged that WebFinancial had any bylaw or charter provision that varied that default rule. Thus, DiRienzo, when he purchased his stock in WebFinancial, agreed to be bound by the terms of a legally valid conversion of the Company from a corporation to a limited partnership.

DiRienzo also agreed to be bound by the terms of the LPA well after he purchased WebFinancial stock. After the Merger was announced, DiRienzo effectively could have rejected the terms of the LPA by perfecting his appraisal rights and exiting his investment in WebFinancial. Although, in fact, he did seek appraisal, DiRienzo failed to comply with the statutory record holder requirement of Section 262(a) of the Delaware General Corporation Law ("DGCL"),[80] and accordingly, he was denied appraisal.[81] Because

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[79] *Airgas, Inc. v. Air Products & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

[80] 8 *Del. C.* § 262(a).

[81] *DiRienzo v. Steel P'rs Hldgs. L.P.*, 2009 WL 4652944, at *9 (Del. Ch. Dec. 8, 2009).

DiRienzo failed to perfect his appraisal rights, he constructively consented to becoming a limited partner in SPH, and to be bound by the LPA.

Finally, the LPA is a valid and binding agreement because nearly 99% of the originally issued partnership units in SPH were disseminated to former investors in SP II who, even if DiRienzo did not, voluntarily agreed to be bound by its terms. The fact that a majority of former SP II investors did not want to become limited partners in SPH is irrelevant, and if anything, confirms that the former SP II investors who did decide to join the limited partnership and be bound by the LPA, did so voluntarily. Thus, not only did DiRienzo himself agree to be bound by the terms of the LPA, but the LPA was agreed to voluntarily by an overwhelming majority of SPH unit holders, making it binding on all of SPH's limited partners.

b. No invalidation due to breach of fiduciary duty

DiRienzo next argues that if the Special Committee, WebFinancial Board, and the SP II, as the controlling shareholder, breached their fiduciary duties in authorizing the Merger and adopting the LPA, then the LPA cannot be enforceable. In support of this argument, DiRienzo cites *Paramount Commc'ns Inc. v. QVC Network Inc.*, for the proposition that Defendants "cannot be now heard to argue that [they] obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties."[82] But, DiRienzo's reliance on *Paramount* in this instance is misplaced.

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[82] 637 A.2d 34, 51 (Del. 1994).

In *Paramount*, the Delaware Supreme Court found that certain agreements between Paramount and Viacom that were designed to protect a potential merger between the two companies were inherently invalid, and thus unenforceable. In that context, the Court rejected Viacom's argument that it had a legitimate expectation of enforcing those agreements because Viacom was aware that the agreements were unenforceable in that they were both unreasonable and inconsistent with Paramount's board's fiduciary duties. *Paramount* stands for the proposition that a party cannot obtain contract rights from a board when the act of agreeing to that contract is itself a violation of the board's fiduciary duties. Unlike the deal protection devices in *Paramount*, there is no credible basis for the assertion that WebFinancial's pursuit of a merger or adoption of the LPA was inherently invalid. I therefore decline to extend the logic of *Paramount* to the facts of this case, where the Merger was validly consummated in accordance with the DGCL and WebFinancial's certificate of incorporation, and DiRienzo's ownership interest in WebFinancial was converted into a limited partnership interest in SPH.

c. No invalidation due to disclosure issues

Assuming that insufficient disclosure could undermine the enforceability of the LPA, such a claim would belong to the former investors of SP II. It was those former investors who comprised a substantial majority of SPH's original unit holders, and thus, any invalidation of the LPA would be a function of their uninformed acceptance. Whether or not SP II investors were provided adequate disclosures to make an informed decision regarding acceptance of the LPA is a claim that belongs to, and can only be asserted by, those investors. DiRienzo was not an investor in SP II and has no basis to challenge the LPA on their behalf. I conclude, therefore, that none of DiRienzo's challenges to the enforceability of the LPA has merit. Thus, I will consider the LPA's provisions in assessing whether DiRienzo's failure to make demand was excused in this case.

3. Exculpation of Claims under the LPA

a. Is the LPA ambiguous?

Having determined that the LPA is a valid and enforceable agreement, I turn next to DiRienzo's claim that the LPA's exculpatory provisions are ambiguous and fail to eliminate fiduciary duties.

The LPA contains numerous sections dealing with fiduciary duties and exculpation. Section 13.4(c)(ix) states, "[e]xcept as provided in this Agreement or otherwise required by the Delaware Limited Partnership Act, each Director shall have the same fiduciary duties and obligations to the Partnership and the Limited Partners as a director of a corporation incorporated under the DGCL has to such corporation and its stockholders."[83] Thus, under the LPA, directors on the General Partner Board owe the limited partners and SPH the full range of common law fiduciary duties.

The exposure of directors to personal liability for breaches of those fiduciary duties is limited by Section 7.8(a) of the LPA which reads:

> Notwithstanding anything to the contrary set forth in this Agreement, no Indemnitee shall be liable to the Partnership, the Limited Partners or any other Persons who have acquired

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83 Defs.' Op. Br. Ex. 1, § 13.4(c)(ix).

> interests in the Partnership Securities, for any losses, claims, damages, liabilities, joint or several, expenses (including legal fees and expenses), judgments, fines, penalties, interest, settlements or other amounts arising as a result of any act or omission of an Indemnitee, or for any breach of contract (including breach of this Agreement) or any breach of duties (including breach of fiduciary duties) whether arising hereunder, at law, in equity, or otherwise, unless there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that, in respect of the matter in question, the Indemnitee acted in bad faith or engaged in fraud, willful misconduct or gross negligence.[84]

The definition of an "Indemnitee" under the LPA includes both the General Partner and the directors on the General Partner Board.[85] Accordingly, the General Partner and the directors can be liable to the Partnership or the limited partners only if they act in bad faith or engage in fraud, willful misconduct or gross negligence.

Defendants complain that the LPA further limits the liability of the General Partner and the directors in the specific context of the agreements the Partnership entered into to effectuate the Merger and the Exchange. Defendants first point to Section 7.9(a) of the LPA, which states in relevant part:

> Notwithstanding anything to the contrary in this Agreement or any duty otherwise existing at law or equity, and without limitation of Section 7.6, the existence of the conflicts of interest described in or contemplated by this Agreement, the Management Agreement, the Exchange Agreement and all agreements, documents and instruments related to the Merger or the Exchange are hereby approved, and all such conflicts

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84 *Id.* § 7.8(a).

85 *Id*. at 5.

> of interest are waived, by all Partners and shall not constitute a breach of this Agreement.[86]

Defendants also focus on to Section 7.1(c), which provides:

> Notwithstanding any other provision of this Agreement, the Delaware Limited Partnership Act or any applicable law, rule or regulation, each of the Partners and each other Person who may acquire an interest in Partnership Securities hereby (i) approves, ratifies and confirms that execution, delivery and performance by the parties thereto of this Agreement, the Management Agreement, the Exchange Agreement and all agreements, notices, consent forms and other documents or instruments in connection with, or contemplated by, the Merger and the Exchange . . . and (iii) agrees that the execution, delivery, or performance by the General Partner, any Group member or any Affiliate of any of them, of this Agreement or any agreement authorized or permitted under this Agreement . . . shall not constitute a breach by the General Partner of any duty that the General Partner may owe the Partnership or the Limited Partners or any other Persons under this Agreement (or any other agreements) or of any duty existing at law, in equity or otherwise.[87]

Based on my reading of the LPA, I conclude that it is unambiguous and that the LPA restricts the limited partners' ability to challenge many aspects of the Merger. Section 7.8(a) provides a ceiling, not a floor, for Indemnitee liability. There is nothing in that provision that would preclude another portion of the LPA from further reducing or eliminating the liability of the General Partner.[88] Sections 7.1(c)(iii) and 7.9(a) plainly

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86 *Id.* § 7.9(a).

87 *Id.* § 7.1(c).

88 Nor would there be any restriction at law. By statute, the only duty that the parties to a limited partnership agreement cannot eliminate is the implied contractual covenant of good faith and fair dealing. 6 *Del. C.* § 17-1101(d).

exercise that prerogative in situations where the General Partner executes, delivers, or performs any agreement authorized or permitted under the LPA. In those situations, the General Partner contractually has eliminated its liability to limited partners to the greatest extent allowed by law.

It is also evident that the Merger, the Exchange, and all agreements related to the Merger and Exchange are "agreement[s] authorized or permitted under" the LPA. In addition to the language of Sections 7.9(a) and 7.1(c)(i), which unequivocally authorizes and approves those agreements, Section 14.3(d)(i)[89] and Section 13.1(k)[90] also support the argument that the Merger and the Exchange are covered by the exculpatory provisions in Section 7.1(c)(iii) and that those exculpatory provisions were intended to reach broadly.

With that framework in mind, I turn to the last key element of the demand futility analysis that is common throughout all of DiRienzo's claims: the General Partner Board.

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89 Section 14.3(d)(i) reads "Notwithstanding anything else contained in this Article XIV or in this Agreement, the General Partner is permitted, without Limited Partner approval, to (i) effect the Merger, the Exchange and all transactions contemplated by the Exchange Agreement." Defs.' Op. Br. Ex. 1, § 14.3(d)(i).

90 Section 13.1(k) reads "[e]ach Partner agrees that the General Partner, without the approval of any Partner, any Unitholder or any other Person, may amend any provision of this Agreement and execute, swear to, acknowledge, deliver, file and record whatever documents may be required in connection therewith, to reflect . . . (k) an amendment that the General Partner determines in its sole discretion to be necessary or appropriate in order to consummate any of the transactions contemplated by the exchange agreement." *Id.* § 13.1(k).

4. The General Partner Board

At all relevant times when the General Partner had a board of directors, that board consisted of seven members. Under the express terms of the LPA, the Board must consist of "at least a majority of Independent Directors."[91] The term "Independent Directors," is defined in the LPA to mean a "Director who meets the independence standards required to serve on an audit committee of a board of directors, as established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by any National Securities Exchange on which the Common Units are listed for trading."[92]

The original General Partner Board consisted of Antignas, Bergamo, Lichtenstein, McNiff, Mullen, Neal, and Tessler. Since the General Partner Board's inception in October 2009, the only change in membership occurred in October 2011, when Howard replaced Antignas. This change is of minimal importance for futility of demand purposes, however, because Defendants concede that neither Howard nor Antignas were independent directors.[93] Defendants do claim, however, that the remaining five directors Bergamo, McNiff, Mullen, Neal, and Tessler are all independent ("Independent Directors"), a claim that DiRienzo contests.

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91 *Id.* § 13.4(c)(iii).

92 *Id.* at 5.

93 Defendants also concede Lichtenstein's lack of independence.

Before examining the independence of each of these directors, I note that SPH is now a New York Stock Exchange-listed company. As an NYSE company, SPH is required to comply with the NYSE rules pertaining to director independence. As Chancellor Strine recently noted, "[a]lthough the fact that directors qualify as independent under the NYSE rules does not mean that they are necessarily independent under our law in particular circumstances," the NYSE rules were "influenced by experience in Delaware . . . and were the subject of intensive study by expert parties."[94] As such, because "[t]hey cover many of the key factors that tend to bear on independence . . . they are a useful source for this court to consider when assessing an argument that a director lacks independence."[95]

The General Partner Board's composition has remained identical, for all intents and purposes, since it was established. The current directors of the General Partner Board who had to satisfy the NYSE independence requirements for SPH to become a listed company are the same directors who have been on the General Partner Board since the Board was created. I infer, therefore, that the General Partner Board has been in compliance with the NYSE independence rules at all times since the Board's inception.[96]

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94 *In re MFW S'holders Litig.*, 67 A.3d 496, 510 (Del. Ch. 2013).

95 *Id.*

96 DiRienzo has not alleged that there were any other changes (*e.g.,* changes in director compensation, new consulting or advisory arrangements, material changes in a director's financial circumstances) that might affect board independence since SPH has become a NYSE-listed entity.

DiRienzo does not appear to dispute this fact.[97] Thus, there is at least one "useful source" that indicates that the General Partner Board always has included a majority of independent directors.

An inquiry of director independence is individualized in nature and not based on the board as a whole. For the reasons that follow and consistent with the inference drawn above, I conclude that all of the Independent Directors were, in fact, independent.

a. Bergamo

According to the Complaint, Bergamo "has been affiliated with SP II since as early as 2007 and has been a nominee of SP II to portfolio companies of the hedge fund."[98] In addition, Bergamo "serves on the board of SP Acquisitions Holdings, of which Lichtenstein is President, Chairman, and CEO."[99] There are no other allegations regarding Bergamo's relationship with SPH or Lichtenstein; thus, DiRienzo essentially challenges Bergarmo's independence based on the fact that Bergamo and Lichtenstein have a business relationship beyond SPH. Allegations such as these fall well short of what is required under Delaware law to establish that a director lacks independence. DiRienzo has failed to provide a reasonable basis for this Court to conclude that

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[97] The LPA incorporates the NYSE independence rules through its definition of "Independent Directors." If at least a majority of the directors on the General Partner Board failed to satisfy the NYSE criteria, then the General Partner Board would be in breach of the LPA. DiRienzo has alleged numerous breach of contract claims against Defendants, but none related the General Partner Board's independence.

[98] Am. Compl. ¶ 17.

[99] *Id.*

Bergamo's "affiliation" with SP II was somehow sufficient to compromise his independence. Furthermore, there are no allegations that Bergamo's "affiliation" with SPH, his role as a nominee of SP II portfolio companies, or his service as a director of SP Acquisitions Holdings was material to him in any way. The particularized allegations DiRienzo has made regarding Bergamo fail to demonstrate that he lacked independence from Lichtenstein or SPH.

b. McNiff

The Complaint states only that McNiff was a director on the General Partner Board.[100] As there are no other particularized allegations pertaining to McNiff, DiRienzo has not alleged any basis to support a reasonable inference that McNiff lacked independence.

c. Mullen

As previously discussed, DiRienzo did not allege sufficient facts to call into question Mullen's independence as a member of WebFinancial's Special Committee. Other than Mullen joining the General Partner Board, there are no particularized allegations regarding Mullen after the Merger. Without additional allegations that support a reasonable inference that any of Mullen's interactions with Lichtenstein or SPH were material to him, I cannot conclude that he lacked independence.

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100 *Id.* ¶ 15.

d. Neal

In the Complaint, DiRienzo alleges, "Neal has served as a director with Lichtenstein in the past, having served as a director of SP II portfolio company United Industrials Corp. as far back as 2007."[101] There are no other particularized allegations pertaining to Neal. For the reasons previously stated, this allegation fails to create any meaningful doubt as to Neal's independence.

e. Tessler

As with McNiff, the Complaint states only that Tessler was a director on the General Partner Board.[102] As there are no other particularized allegations pertaining to Tessler, DiRienzo has not established any basis to conclude that Tessler lacked independence. The General Partner Board, therefore, consisted of a majority of independent directors at all times relevant to the pending motions to dismiss. Based on that premise, I next consider the substance of DiRienzo's derivative claims.

5. Count IV of the Amended Complaint

Count IV of the Complaint claims that the SPH General Partner, the General Partner's Managing Member, and the General Partner Board breached their "fiduciary and/or contractual" duties by: (1) assuming the Deferred Fee Liability; (2) paying the Deferred Fee Liability; and (3) authorizing Lichtenstein and his affiliates to purchase corporate opportunity units. Before addressing whether demand is excused for any of

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[101] *Id.* ¶ 18.

[102] *Id.* ¶ 15.

these claims, I first consider DiRienzo's argument that because these claims are both direct and derivative in nature, demand was not required, at least with regard to the direct claims.

a. The *Tri-Star* and *Gentile* doctrines

Although the Complaint specifically states that Count IV is a derivative claim, in briefing and at argument, DiRienzo asserted that some of his claims are both direct and derivative. In support of this argument, DiRienzo cites the Delaware Supreme Court cases of *In Re Tri-Star Pictures Inc.*[103] and *Gentile v. Rosette*.[104] *Tri-Star* and *Gentile* both involved similar situations in which a stockholder with majority or effective control of a corporation consummated a transaction with the entity they controlled. As a result of the transactions, the controlling stockholders received shares in those corporations that were substantially more valuable than the consideration that the shareholders had given the corporations. When minority shareholders sued to challenge the transactions, the Court held, in each instance, that the minority shareholders had stated a direct, as well as a derivative claim, because the minority shareholders had suffered a separate and direct harm in that "the end result of this type of transaction is an improper transfer-or expropriation-of economic value and voting power from the public shareholders to the majority or controlling stockholder."[105]

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[103] 634 A.2d 319 (Del. 1993).

[104] 906 A.2d 91 (Del. 2006).

[105] *Id.* at 100.

Tri-Star and *Gentile* represent an exception to the premise that, "[i]n the typical corporate overpayment case, a claim against the corporation's fiduciaries for redress is regarded as exclusively derivative, irrespective of whether the currency or form of overpayment is cash or the corporation's stock."[106] A plaintiff can assert claims that are both direct and derivative under *Tri-Star* and *Gentile* where:

> (1) a stockholder having majority or effective control causes the corporation to issue "excessive" shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders.[107]

Under *Tri-Star* and *Gentile*, the minority shareholders' direct claim was against the majority or controlling shareholder. This is because "the harm to the minority shareholder plaintiffs result[s] from a breach of a fiduciary duty owed to them by the controlling shareholder."[108]

b. The assumption of the Deferred Fee Liability is a derivative claim only

DiRienzo's contention that SPH improperly assumed the Deferred Fee Liability is best described as a corporate overpayment claim. In agreeing to take on a large and inherently contingent liability, SPH received cash and stock from Offshore that, according to DiRienzo, inadequately compensated SPH for the risk it was undertaking.

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[106] *Id.* at 99.

[107] *Id.* at 100.

[108] *Id.* at 103.

The actual transfer of the Deferred Fee Liability from Offshore to SPH, in itself, did not result in the issuance of any SPH Common Units or the dilution of any minority unit holder. Furthermore, it was not inevitable that the act of assuming the Deferred Fee Liability would have resulted in the issuance of SPH Common Units and the dilution of minority unit holders, because the liability could have been satisfied either with cash or with common units. As the act of accepting the Deferred Fee Liability did not actually or necessarily result in the dilution of SPH's minority unit holders, DiRienzo has not alleged a claim that could be characterized as direct under either *Tri-Star* or *Gentile.* Accordingly, his corporate overpayment allegation relating to the assumption of the Deferred Fee Liability is derivative only.

c. The payment of the Deferred Fee Liability is a derivative claim only

DiRienzo's claim that SPH actually paid WGL more than it should have is similarly derivative in nature. By paying WGL far more than it received from Offshore to assume the Deferred Fee Liability, SPH itself was harmed, and SPH would be the party entitled to recovery.[109] The question then becomes whether SPH's satisfaction of the Deferred Fee Liability constituted a corporate overpayment that also could be classified as a direct claim under the *Tri-Star* and *Gentile* framework. As stated, a direct

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[109] *See Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) ("We set forth in this Opinion the law to be applied henceforth in determining whether a stockholder's claim is derivative or direct. That issue must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?").

claim under *Tri-Star* and *Gentile* is against a majority or controlling shareholder only. DiRienzo has not alleged that Lichtenstein owned a majority of SPH's Common Units at any time before SPH's payment of the Deferred Fee Liability to WGL. The Complaint also fails to allege that Lichtenstein and his affiliates constituted a control group.[110] Lichtenstein was the Managing Member of the General Partner and the Manager of SPH. In those capacities, he and his affiliates had control over the day-to-day operations of the General Partner. Those roles do not establish, however, that Lichtenstein also controlled the General Partner Board, which consisted of a majority of independent directors without any material financial interest in SPH's decision to amend the Deferred Fee Agreement. The "expropriation" that DiRienzo alleges was ultimately the result of decisions made by the General Partner Board, not unilateral action taken by Lichtenstein as Managing Member of the General Partner or as the General Partner's Manager. The Complaint does not contain allegations that support a reasonable inference that Lichtenstein controlled the General Partner's independent and disinterested board as a majority unit holder, as member of a control group, or otherwise. The expropriation principle that serves as the basis for *Tri-Star* and *Gentile* claims "operates only when defendant fiduciaries (i) had the ability to use the levers of corporate control to benefit

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[110] *See In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 771897, at *6 (Del. Ch. Feb. 28, 2013) (finding claims that a control group existed sufficient to survive a motion for summary judgment where representatives of the entity defendants held a majority of the outstanding shareholder votes and were majority controllers of the board); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 659 (Del. Ch. 2013) (finding claims that a control group existed sufficient to survive a motion to dismiss where defendants were significant stockholders and controlled the board).

themselves and (ii) took advantage of the opportunity."[111] I conclude that Lichtenstein lacked the requisite control over the General Partner Board to establish a direct claim under *Tri-Star* and *Gentile*, and accordingly, hold that DiRienzo's claims regarding the payment of the Deferred Fee Liability to WGL are derivative only.

d. The usurpation of a corporate opportunity is a derivative claim only

Lichtenstein's authorization to purchase corporate opportunity units does not give rise to claim under *Tri-Star* and *Gentile*. The corporate opportunity units that Lichtenstein was permitted to purchase already were in existence and outstanding, meaning that Lichtenstein did not cause SPH "to issue excessive shares of its stock in exchange for assets of the controlling stockholder." Beyond this technical distinction is the fact that *Tri-Star* and *Gentile* require the showing of "an extraction from the public shareholders, and a redistribution to the controlling shareholder, of a portion of the economic value and voting power embodied in the minority interest."[112] Even assuming Lichtenstein's purchase of corporate opportunity units diminished the minority unit holder's voting power, the economic value of the minority's units remained unchanged. That is, Lichtenstein's pursuit of corporate opportunity units did not change the total number of units outstanding, and each unit maintained its relative claim to SPH's profits and other distributions. Lichtenstein did nothing to amend or otherwise alter the economic entitlement of SPH's Common Units, he simply acquired more of them from

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111 *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 658-59 (Del. Ch. 2013).
112 *Id.* (emphasis added).

Option B Investors and other SPH Common Unit holders. Having failed to establish that Lichtenstein's pursuit of corporate opportunity units reduced the economic value of the minority's units, DiRienzo has alleged only a traditional usurpation of corporate opportunity claim, which under settled Delaware law is exclusively derivative in nature.[113]

6. Assumption of the Deferred Fee Liability

Having determined that DiRienzo's challenge to the assumption of the Deferred Fee Liability is a derivative claim, I consider next whether DiRienzo's failure to make demand on the General Partner Board is excused as being futile. According to the Complaint, SPH undertook the Deferred Fee Liability pursuant to an Assignment and Assumption Agreement executed on November 23, 2009.[114] Lichtenstein, not the General Partner Board, caused SPH to enter into the agreement, and the Complaint does not allege that the General Partner Board had any role in SPH's assumption of the Deferred Fee Liability.

Defendants argue that the appropriate standard for determining whether DiRienzo was excused from making demand is the test articulated by the Delaware Supreme Court in *Rales v. Blasband*.[115] The Supreme Court has instructed that:

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113 *See In re Digex Inc. S'holders Litig.*, 789 A.2d 1176, 1189 (Del. Ch. 2000) ("A claim that a director or officer improperly usurped a corporate opportunity belonging to the corporation is a derivative claim").

114 Am. Compl. ¶ 157.

115 634 A.2d 927 (Del. 1993).

> Demand futility under Rule 23.1 must be determined pursuant to either the standards articulated in *Aronson v. Lewis* or those set forth in *Rales v. Blasband. . . .* In *Rales v. Blasband,* this Court identified three circumstances in which the *Aronson* standard will not be applied: "(1) where a business decision was made by the board of a company, but a majority of the directors making the decision has been replaced; (2) where the subject of the derivative suit is not a business decision of the board; and (3) where ... the decision being challenged was made by the board of a different corporation."[116]

SPH's assumption of the Deferred Fee Liability was not a business decision of the General Partner Board. Accordingly, demand futility in this instance must be assessed under *Rales*.

a. The *Rales* standard

When a derivative complaint is evaluated under the *Rales* test, "demand is excused only where particularized factual allegations create a reasonable doubt that, as of the time the complaint was filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand."[117] A board exercises its independent and disinterested business judgment in responding to a demand when it does so "free of personal financial interest and improper extraneous influences."[118] Extraneous influences that can raise a reasonable doubt as to whether a

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[116] *Braddock v. Zimmerman*, 906 A.2d 776, 784-85 (Del. 2006) (citations omitted).

[117] *Id.* at 785.

[118] *Rales*, 634 A.2d at 935.

director exercised their independent business judgment include domination by a controlling shareholder[119] and a substantial risk of personal liability.[120]

b. Demand is not excused

Under *Rales*, the relevant board for analyzing demand futility is the board that was in place when the complaint was filed.[121] DiRienzo filed his Complaint on January 18, 2013. At that time, the General Partner Board consisted of seven members: Bergamo, Howard, Lichtenstein, McNiff, Mullen, Neal, and Tessler. Neither party disputes that Lichtenstein and Howard lack independence; thus, I focus my inquiry on the five remaining directors, namely, Bergamo, McNiff, Mullen, Neal, and Tessler. For the reasons that follow, I conclude that DiRienzo has failed to plead particularized allegations that raise a reasonable doubt that the General Partner Board could have properly exercised its independent and disinterested business judgment in responding to a demand.

1. The board is free of any personal financial interest in the assumption of the Deferred Fee Liability

The Complaint does not contain a single allegation that the Independent Directors had a financial interest in SPH's assumption of the Deferred Fee Liability. Likewise, there is no suggestion that the Independent Directors had any interest, let alone a material interest, in WGL. Thus, there are no allegations that they stood on both sides of the

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[119] *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984).

[120] *Rales*, 634 A.2d at 936.

[121] *Braddock,* 906 A.2d at 786.

transaction and were engaged in self-dealing. If anything, as unit holders in SPH, it would be in the Independent Director's personal financial interest to challenge the validity of SPH's assumption of a large, contingent liability. DiRienzo, therefore, has not pled particularized facts that the Independent Directors had a financial interest in SPH's assumption of the Deferred Fee Liability that compromised their ability to evaluate a demand with independent and disinterested business judgment.

2. The board is not otherwise interested or controlled by Lichtenstein

DiRienzo avers that Lichtenstein controls the Independent Directors and that, as such, the Independent Directors are not capable of exercising independent and disinterested business judgment involving any action taken by Lichtenstein. A plaintiff alleging that directors are controlled by another "must allege particularized facts manifesting a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."[122] In addition, a plaintiff must allege that "the directors are 'beholden' to [the controlling person] or so under their influence that their discretion would be sterilized."[123]

The Complaint lacks particularized allegations that the Independent Directors were beholden to Lichtenstein. The facts that Lichtenstein actively was involved with the General Partner and that he was responsible for originally appointing each of the Independent Directors does not establish, under Delaware Law, that the Independent

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122 *Orman v. Cullman*, 794 A.2d 5, 24 (Del. Ch. 2002).

123 *Id.* (quoting *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)).

Directors are beholden to him.[124] Furthermore, even assuming that from the time of their instatement the Independent Directors have acted in a manner that comports with Lichtenstein's wishes and interests, DiRienzo has not alleged particular facts that raise a reasonable inference that the Independent Directors are beholden to Lichtenstein. Broadly stated, DiRienzo alleges that some of the Independent Directors had served with Lichtenstein on other boards or had known Lichtenstein prior to their tenure on the General Partner Board. Of equal importance to what DiRienzo alleges about the Independent Directors, however, is what he does not allege. The Complaint does not have a single particularized allegation that indicates any of the Independent Directors had a material financial or personal relationship with either SPH or Lichtenstein. For these reasons, and the reasons I previously discussed in analyzing the Independent Directors, DiRienzo has failed to allege particularized facts that create a reasonable doubt as to the Independent Directors' independence from Lichtenstein.

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[124] *See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1054 (Del. 2004) (holding that where controlling stockholder owned 94% of the company that, "[a] stockholder's control of a corporation does not excuse pre-suit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder."); *Stroud v. Milliken Enters., Inc.,* 585 A.2d 1306, 1307 (Del. Ch. 1988) (stating that control of a corporation by a majority stockholder who nominates or elects the directors is not sufficient to raise a reasonable doubt about a director's independence; rather, the nature of the relationships between them must demonstrate that the director is beholden to the stockholder).

3. The General Partner Board does not face a substantial likelihood of personal liability

A plaintiff is entitled to a reasonable inference of interestedness where a complaint indicates that a substantial likelihood of liability will be found.[125] It is, difficult, however, to meet this standard.[126] Furthermore, "[w]here directors are contractually or otherwise exculpated from liability for certain conduct, then a serious threat of liability may only be found to exist if the plaintiff pleads a *non-exculpated* claim against the directors based on particularized facts."[127]

As discussed in Section II.D.3.a, *supra*, the General Partner and the General Partner Board are exculpated contractually for acts taken to effectuate the Merger and Exchange Agreements. Section 5.3(a) of the Amended and Restated Exchange Agreement required Offshore to transfer "any deferred fees that are owed to any entity by the OffShore Feeder (the "Deferred Fees") to Steel Partners Holdings" if there was not a "complete unwind" of the Exchange.[128] Because the Exchange was never completely unwound, under the express terms of the Exchange Agreement, Offshore was required to

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125 *In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 990 (Del. Ch. 2007).

126 *Id. See also Seminaris v. Landa,* 662 A.2d 1350, 1354 (Del. Ch. 1995) (describing the "rare case, envisioned by the Supreme Court in *Aronson,* where defendants' actions were so egregious that a substantial likelihood of director liability exists").

127 *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (internal quotations omitted).

128 Defs.' Op. Br. Ex. 3, § 5.3.

transfer its deferred fee obligations to SPH, and SPH was required to accept them.[129] The Assignment and Assumption Agreement was "related to," and an integral part of SPH's performance of, the Exchange Agreement. Accordingly, SPH's acceptance of the Assignment and Assumption Agreement falls within the exculpatory provisions set forth in Sections 7.1(c) and 7.9(a) of the LPA. Because acceptance of such an agreement is exculpated explicitly by the LPA, DiRienzo has failed to allege that the General Partner Board faced a substantial likelihood of personal liability based on their actions related to the Assignment and Assumption Agreement. Thus, DiRienzo has failed to create a reasonable doubt that the General Partner Board could not have considered a demand request using its independent and disinterested business judgment. I will dismiss DiRienzo's derivative claim pertaining to SPH's acceptance of the Assignment and Assumption Agreement, therefore, for failure to make demand.

7. Payment of the Deferred Fee Liability

As previously discussed, DiRienzo's claim relating to the payment of the Deferred Fee Liability is also derivative only.

The Complaint states that growth in the Deferred Fee Liability can be attributed to, at least in large part, amendments that the General Partner Board made to the Deferred

[129] Accordingly, had the General Partner Board not allowed SPH to enter the Assignment and Assumption Agreement, it potentially would have exposed SPH to liability for breach of contract.

Fee Agreement.[130] The General Partner Board's decisions to modify the Deferred Fee Agreement do not fall within one of the three situations where *Rales* applies; therefore, I must assess demand futility in this instance under the framework established in *Aronson v. Lewis*.

a. The *Aronson* standard

For a derivative plaintiff to establish demand futility under *Aronson*, that plaintiff must plead particularized facts that create a reasonable doubt that: (1) the directors are disinterested and independent or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.[131] The first prong of *Aronson* is, for all intents and purposes identical, to the *Rales* standard. As to the second prong of *Aronson*, plaintiffs must plead particularized facts sufficient to raise: (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision.[132] As the General Partner Board has remained essentially unchanged since it was established in 2009, for purposes of evaluating demand futility under *Aronson*, I will continue to focus on the five Independent Directors.

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130 Am. Compl. ¶ 173 ("Because the Deferred Fee Liability was indexed to the value of SPH, this allowed the $47 million liability at 07/15/2009 to grow to $70.5 million by 03/31/2012").

131 *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984); *see also Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) ("These [*Aronson*] prongs are in the disjunctive. Therefore, if either prong is satisfied, demand is excused.")

132 *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 286 (Del. Ch. 2003).

b. DiRienzo has not satisfied the first *Aronson* prong

For the reasons stated in Sections II.D.6.b.3-7, *supra*, DiRienzo has failed to allege particularized facts that call into question the independence of the Independent Directors. Furthermore, the Complaint does not allege that any of the Independent Directors had a personal financial interest in amending the Deferred Fee Agreement. Thus, for DiRienzo to satisfy the first prong of *Aronson*, he must allege that the General Partner Board faced a substantial likelihood of personal liability for their decision to amend the Deferred Fee Agreement.

As previously discussed, the LPA exculpates the General Partner from a wide range of conduct related to the Merger and its implementation. It is reasonably conceivable, however, that the General Partner Board's decision to amend the Deferred Fee Agreement was not "related to" the Merger or the Exchange Agreement. Under the Merger and the Exchange, SPH's obligations ended at the assumption of the Deferred Fee Agreement. Any subsequent amendments to the agreement had no bearing on the terms of the Merger and the Exchange. Because that decision may not fall within Sections 7.1(c) or 7.9(a) of the LPA, I must consider how the LPA defines the General Partner Board's duties to the limited partners and the extent to which the actions of board members may be exculpated. As discussed, under Section 7.8 of the LPA, the General Partner Board is only liable to limited partners if the board acts in bad faith or engages in fraud, willful misconduct or gross negligence.[133] For the reasons I now discuss,

[133] The Complaint does not allege that any of the Defendants engaged in fraud.

DiRienzo has failed to allege facts that make it reasonably conceivable that the conduct of the Independent Directors challenged in the Complaint would not be exculpated.

c. Gross negligence

Under the law of entities in Delaware, "[i]n order to prevail on a claim of gross negligence, a plaintiff must plead and prove that the defendant was recklessly uninformed or acted outside the bounds of reason."[134] DiRienzo has failed to make such allegations against the Independent Directors regarding the amendments of the Deferred Fee Agreement. The Complaint does not allege that the Independent Directors were uninformed, let alone recklessly so, in deciding whether to agree to alter the terms of the Deferred Fee Agreement. There is not a single allegation pertaining to the process, or potential lack thereof, the General Partner Board utilized in addressing matters related to the Deferred Fee Agreement on or after October 1, 2009. Thus, the Complaint does not support a reasonable inference that the allegations that the General Partner Board was recklessly uninformed when it amended or terminated the Deferred Fee Agreement indicate that a substantial likelihood of liability will be found.

In addition, DiRienzo has failed to allege facts that would support a reasonable inference that he would succeed in proving that the General Partner Board's actions were outside the bounds of reason. Many of the amendments to the Deferred Fee Agreement benefitted Lichtenstein and WGL, but those amendments provided benefits to SPH as

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[134] *Metro. Life Ins. Co. v. Tremont Gp. Hldgs., Inc.*, 2012 WL 6632681, at *7 (Del. Ch. Dec. 20, 2012) (internal quotations omitted).

well. For example, the decision to give WGL a 15% "discount" if it elected to be paid in SPH Common Units instead of in cash helped SPH preserve liquidity. That is a reasonable action for a company to take, and particularly reasonable for a company that was created as a result of a liquidity crisis. I similarly conclude that it was not outside the bounds of reason for SPH to allow WGL to index the deferred fee to the value of SPH and the cash distributions SPH made to its limited partners.[135] WGL provided services to SPH from 2009 until April 2012. Indexing the value of the Deferred Fee Liability to the value of SPH reasonably could be viewed as a means to incentivize WGL to help SPH reach as high a value as possible.[136] Even if I assume that the General Partner Board's decisions regarding the Deferred Fee Agreement were bad for SPH, those decisions would be grossly negligent under Delaware Law only if they were recklessly uninformed or outside the bounds of reason. DiRienzo has not alleged sufficient facts to satisfy either of those criteria or to enable this court to reach that conclusion, and thus, I reject his argument that the General Partner Board faced a substantial likelihood of liability for having been grossly negligent in its decisions pertaining to the Deferred Fee Agreement.

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[135] The Deferred Fee Liability appears to have been indexed to the value of Offshore when the Deferred Fee Agreement was between WGL and Offshore. Am. Compl. ¶ 148.

[136] The Amended Complaint alleges that WGL was compensated retroactively for distributions made to limited partners in April 2010 and April 2011. Am. Compl. ¶ 167. There are, however, no allegations that WGL was not entitled to any such compensation or that SPH did not receive any consideration in exchange for agreeing to the retroactive compensation. Thus, DiRienzo has not alleged particularized facts indicating that such retroactive compensation was outside the bounds of reason.

d. Bad faith and willful misconduct

A fiduciary's conduct is in bad faith if the fiduciary acted with a purpose other than advancing shareholder interests (*i.e.,* the best interests of the corporation), intentionally violated relevant positive law, intentionally failed to respond to a known duty, or exhibited a conscious disregard of a known duty.[137] To overcome the presumption that a fiduciary acted in good faith and state a claim for bad faith conducted by a fiduciary, a plaintiff may show that "the fiduciary's actions were so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[138]

DiRienzo has failed to allege particularized facts regarding the Independent Directors that evidences either bad faith or willful misconduct. The Amended Complaint does not allege facts supporting a reasonable inference that the Independent Directors acted with the purpose of benefitting Lichtenstein at the expense of the minority, nor does the Complaint provide a reasonable basis for believing that independent and disinterested directors consciously disregarded their obligations to the limited partners. The increase in the size of the Deferred Fee Liability is troubling. DiRienzo essentially has alleged that the General Partner Board made a questionable business decision in how it handled the Deferred Fee Agreement, but the amendments to the Deferred Fee Agreement were

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137 *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (quoting *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006)).

138 *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560, at *10 (Del. Ch. Jan. 3, 2013) (quoting *In re Alloy, Inc.*, 2011 WL 4863716, at *12 (Del. Ch. Oct. 13, 2011)).

approved by independent and disinterested directors who, as previously discussed, conceivably had a reasonable basis for many of the changes. In any event, bad business decisions do not constitute bad faith or willful misconduct. DiRienzo has not alleged facts to support a reasonable inference that the Independent Directors faced a substantial likelihood of personal liability for committing willful misconduct or acting in bad faith with regard to the Deferred Fee Agreement. Accordingly, DiRienzo has not satisfied the first prong of the *Aronson* test.

e. DiRienzo has not satisfied the second *Aronson* prong

When directors are disinterested and independent under the first prong of *Aronson*, a plaintiff has a "heavy burden" to establish that the second prong has been satisfied.[139] This "heavy burden" can be carried if there are particularized allegations that support a plaintiff's contentions that the directors acted in bad faith or were grossly negligent.[140]

As discussed in the analysis of the first *Aronson* prong, the General Partner Board was comprised of a majority of independent and disinterested directors. In addition, I also concluded that the allegations in the Complaint did not support a claim of gross negligence or bad faith against the Independent Directors or the General Partner Board. Therefore, DiRienzo is unable to carry his "heavy burden" and has not satisfied the second *Aronson* prong by demonstrating the amendments to the Deferred Fee Agreement were not the product of a valid exercise of business judgment. Because DiRienzo has not

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[139] *White v. Panic*, 783 A.2d 543, 551 (Del. 2001).

[140] *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000).

satisfied either of the *Aronson* prongs, demand is not excused, and his derivative claim pertaining to the modification and payment of the Deferred Fee Liability is dismissed.

8. Usurpation of corporate opportunity

DiRienzo's derivative claim for usurpation of a corporate opportunity arises from the General Partner Board's decision in February 2010 to allow Lichtenstein affiliate Steel Partners Ltd to pursue "any corporate opportunity with respect to the acquisition of Common Units."[141] As DiRienzo is challenging a business decision by the General Partner Board, *Aronson* applies.

Again, DiRienzo has failed to satisfy either prong of the *Aronson* test, and accordingly, demand is not excused. The General Partner Board's decision to grant the corporate opportunity to Steel Partners Ltd was approved by the Independent Directors. For the reasons already discussed, the Complaint does not contain allegations sufficient to raise a reasonable inference that the Independent Directors were beholden to Lichtenstein. Furthermore, there are no allegations that any of the Independent Directors had a personal financial interest in allowing Steel Partners Ltd to purchase available SPH Common Units.

DiRienzo also has not alleged sufficient facts to create a reasonable inference that the General Partner Board's decision to grant Steel Partners Ltd permission to pursue this corporate opportunity was in bad faith or grossly negligent. According to the Complaint, the General Partner Board's rationale for authorizing Steel Partners Ltd to pursue the

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[141] Am. Compl. ¶ 161.

corporate opportunity was that it "determined that it is in the best interest of the Company to retain funds to invest in the operations of the Company."[142] This rationale hardly demonstrates either gross negligence or bad faith, and DiRienzo has not alleged sufficiently that the General Partner Board's stated rationale was a pretext for otherwise improper conduct. There are no allegations that the General Partner Board failed to inform itself about the corporate opportunity, nor are there allegations that the Partnership was even capable of pursing the corporate opportunity itself. The fact that Lichtenstein eventually received distributions on the corporate opportunity SPH common units does not bolster DiRienzo's claim. Because the Complaint does not allege that Lichtenstein received anything other than a *pro rata* share of Partnership distributions on his corporate opportunity units, the Complaint does not allege anything improper about Lichtenstein's receipt of distributions.

In sum, DiRienzo has not raised a reasonable doubt that the Independent Directors who authorized Steel Partners Ltd to pursue corporate opportunity units were disinterested and independent or that the authorization was anything other than the product of a valid exercise of business judgment. Having failed to establish futility of demand under *Aronson*, DiRienzo's derivative claim pertaining to the usurpation of a corporate opportunity is dismissed.

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[142] *Id.*

E. Count V of the Amended Complaint

DiRienzo argues that by issuing SPH Common Units to Option B Investors, the General Partner, Lichtenstein, and the General Partner Board breached their "fiduciary and/or contractual" duties. I first address whether this claim is derivative or direct.

1. Count V is Derivative

Count V of the Complaint claims that as a result of the issuance of SPH common units to Option B Investors, the NAV of assets contributed to SPH in the Partial Unwind was overvalued and that the non-Option B Investors were unfairly diluted. "Equity dilution claims are typically viewed as derivative under Delaware law."[143] The exception to this general rule is the previously discussed *Tri-Star* and *Gentile* line of cases that are "predicated on the idea that [dilutive] transactions of th[e] type [at issue in those cases] result in an improper transfer of both economic value and voting power from the minority to the controlling stockholder."[144]

The issuance of SPH common units to Option B Investors does not fall within the *Tri-Star* and *Gentile* exception to the general rule that equity dilution claims are solely derivative. There is no allegation that the Option B Investors included Lichtenstein, the General Partner, or the General Partner Board. Consequently, even assuming some or all of these parties were controlling shareholders, there was no transfer of economic or voting power from the minority to them as a result of issuing SPH Common Units to

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143 *Feldman v. Cutaia*, 956 A.2d 644, 655 (Del. Ch. 2007).

144 *Id.* at 657.

Option B investors. In fact, to the extent that Lichtenstein and the General Partner directors held common units, they were diluted to the exact same extent as any other Option A holder. The Partial Unwind did not transfer economic and voting power from the minority to a controlling shareholder. Rather, the Partial Unwind transferred economic and voting power from all common unit holders, equally, to Option B Investors. Count V, therefore, states a traditional equity dilution claim and does not fall within the *Tri-Star* and *Gentile* exceptions. Accordingly, Count V is solely a derivative claim.

2. Count V should be assessed under *Rales*

The issuance of SPH common units to Option B Investors was not the result of any action taken by the General Partner Board. As Count V does not challenge a business decision made by the General Partner Board, *Rales* is the appropriate standard to assess demand futility.

a. Demand is not excused under *Rales*

The Complaint does not contain particularized allegations that any of the Independent Directors had a personal financial interest in the issuance of SPH common units to Option B Investors. As previously noted, if anything, it appears that issuing common units to Option B investors was against the Independent Directors' and Lichtenstein's financial interests because of its dilutive effect. Based on the previously established independence of a majority of the General Partner Board and the absence of allegations supporting an inference that the Independent Directors had a financial interest in issuing common units to Option B Investors, DiRienzo would have to plead that the Independent Directors face a substantial likelihood of liability for demand to be excused. Because the issuance of SPH common units to Option B investors is conduct that is exculpated under the LPA, DiRienzo has failed to meet his burden in that regard.

Option B Investors were issued SPH common units pursuant to the Partial Unwind. Section 5.2 of the Amended and Restated Exchange Agreement specifically contemplated the Partial Unwind.[145] As discussed, Sections 7.1(c) and 7.9(a) of the LPA essentially exculpate the General Partner for any action it took or might take to effectuate the Merger or the Exchange. The issuance of SPH Common Units to Option B Investors to facilitate the Partial Unwind falls within the exculpatory language of Sections 7.1(c) and 7.9(a). As a result, DiRienzo has not asserted claims that create a substantial likelihood of liability for the General Partner Board. DiRienzo, therefore, has failed to demonstrate futility of demand under *Rales*. Accordingly, Count V of the Complaint is dismissed in its entirety for failure to make demand.

F. Count VI of the Amended Complaint

Count VI of the Amended Complaint alleges that the General Partner breached its express and implied contractual duties by: (1) acting without General Partner Board oversight from January 1, 2009 to October 2009 in violation of the LPA; (2) causing the Partial Unwind and distributing 62.5% of the Partnership's NAV to Option B Investors in violation of Section 7.3 of the LPA; (3) ratifying the Partial Unwind based solely on SP

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[145] Defs.' Op. Br. Ex. 5, § 5.2.

II's internal management valuations; (4) causing SPH to assume, and authorizing the payment of, the Deferred Fee Liability; and (5) issuing SPH common units to Option B Investors.

1. Express breaches[146]

a. Demand is not excused for the claim regarding the General Partner's unsupervised actions

DiRienzo contends that the General Partner violated the terms of the LPA by acting without Board oversight from January 2009 to October 2009. Neither the Complaint itself nor DiRienzo's briefing specify what section or sections of the LPA this conduct allegedly violates. As DiRienzo is not challenging a business decision of the Board during this time period, demand futility is assessed under *Rales.*

Because there are no allegations that the Independent Directors acquired a unique, personal financial benefit from the General Partner's actions between January 2009 and October 2009, the issue of whether demand is excused turns, again, on the likelihood that the Independent Directors are subject to a substantial likelihood of personal liability for the General Partner's actions taken during that time period. DiRienzo argues that although the General Partner did not have directors until October 2009, the Independent Directors still face such a risk of liability because they acquiesced in or ratified the General Partner's actions during this period via an October 1, 2009 written consent.

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[146] The claims for breach of contract regarding the assumption and payment of the Deferred Fee Liability and the issuance of SPH Common Units were addressed in Counts IV and V. For the reasons explained in Sections II.D and II.E, *supra*, these claims are dismissed.

It does not appear, however, that the General Partner violated any provisions of the LPA by acting without Board oversight from January 1, 2009 to October 2009. The original LPA states that limited partners will elect directors beginning in 2010,[147] but is silent as to how directors were to be selected before that. Furthermore, none of the actions taken by the General Partner from January 1, 2009 to October 2009 required mandatory Board approval under the LPA. Accordingly, DiRienzo has articulated no theory under which the fact that the General Partner operated for a period of time without Board oversight would give rise to a *per se* breach of the LPA.

DiRienzo also has not alleged facts that would support a reasonable inference that the General Partner's actions during this time, regardless of the presence of Board oversight, violated the LPA. All the General Partner's conduct during the period in question was directed at effectuating the Merger and Exchange Agreements. This conduct was exculpated by Sections 7.1(c) and 7.9(a) of the LPA.

There is, therefore, no credible basis for the contention that the Independent Directors faced a substantial likelihood of personal liability for the General Partner's conduct between January 1, 2009 and October 2009. As the General Partner did not breach the LPA, the Independent Directors cannot be liable for acquiescing to or ratifying the General Partner's challenged conduct. Because DiRienzo has not shown that demand

[147] Special Comm. Defs.' Op. Br. Ex. B, § 13.4(c)(i).

for this claim would be excused under *Rales*, the claim is dismissed for failure to make demand.

b. The General Partner did not breach Section 7.3 of the LPA

Regardless of whether DiRienzo's claim against the General Partner for breaching Section 7.3 of the LPA is direct or derivative, it fails because there is no underlying breach. Section 7.3 states, "[e]xcept as provided in Articles XII and XIV, the General Partner may not . . . dispose of all or any substantial part of the Partnership Group's assets . . . without Special LP Approval."[148] The LPA defines "Special LP Approval" as "approval by the vote of the holders of a majority of the voting power of Outstanding Voting Units (excluding Voting Units owned by the Partnership, the General Partner and Persons they control)."[149] Even assuming the Partial Unwind involved "all or any substantial part" of SPH's assets, Section 7.3 is explicitly subject to Article XIV of the LPA. Section 14.3(d) states, "Notwithstanding anything else contained in this Article XIV or in this Agreement, the General Partner is permitted, without Limited Partner approval, to (i) effect the Merger, the Exchange and all transactions contemplated by the Exchange Agreement."[150] The Partial Unwind is expressly contemplated by Section 5.2 of the Amended and Restated Exchange Agreement; therefore, under Section 14.3(d), the General Partner was authorized to execute it without limited partner approval.

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148 Defs.' Op. Br. Ex. 1, § 7.3.

149 *Id.* at 9.

150 *Id.* § 14.3.

Accordingly, DiRienzo's breach of contract claim predicated on a breach of Section 7.3 of the LPA is dismissed.

c. Demand is not excused for the claim regarding the General Partner Board's failure to stop the Partial Unwind

DiRienzo alleges that the General Partner Board breached the LPA by failing to prevent the Partial Unwind. DiRienzo bases his claim on the notion that such a failure constituted either gross negligence or bad faith.

There are no allegations in the Complaint that the General Partner Board expressly ratified the Partial Unwind. Therefore, any "ratification" that occurred was a result of the General Partner Board's failure to act, and not a consequence of a business decision that the board made. In these situations, *Rales* is the appropriate test for assessing demand futility.

Under the facts of this case, the only relevant question under *Rales* is whether the General Partner Board faces a substantial likelihood of liability for having acted with gross negligence or in bad faith. As to this claim, the issue is whether the General Partner Board faces a substantial likelihood of liability for failing to prohibit the Partial Unwind. I conclude that the Complaint does not allege sufficient particularized facts to indicate that such a substantial likelihood exists.

As discussed, the General Partner's execution of the Partial Unwind was expressly permitted and broadly exculpated by the LPA. The fact that the General Partner's actions were expressly permitted under the terms of the LPA does not make the General Partner Board's failure to enjoin that action *per se* reasonable or in good faith, but it does support at least an inference that the General Partner Board did not act improperly. That inference is particularly reasonable in this case where the Partial Unwind was one of the foundational transactions associated with the establishment of SPH. Had the General Partner Board elected to prevent the Partial Unwind, the consequences for SPH could have been dramatic. In these circumstances, even assuming the Partial Unwind was flawed, that would not indicate a substantial likelihood that the General Partner Board was grossly negligent or acted in bad faith by failing to stop the Partial Unwind, especially where, as here, there are no allegations that, had the Board done so, the limited partners likely would have been better off. Because the Complaint does not allege particularized facts that support a conclusion that the General Partner Board was grossly negligent or acted in bad faith in failing to stop the Partial Unwind, the General Partner Board does not face a substantial likelihood of personal liability with respect to this claim. Accordingly, demand for this claim was not excused and it must be dismissed.

2. Implied breaches

DiRienzo has alleged that each express breach of contract claim in Count VI alternatively also presents a claim for breach of the implied covenant of good faith and fair dealing (the "implied covenant"). The Delaware Supreme Court in *Gerber v. Enterprise Products Holdings, LLC* recently affirmed that the implied covenant only applies to the parties of a contract.[151] When a corporation is a party to a contract, the corporation's directors do not become parties to that agreement by virtue of their position with the corporation.[152] In this case, only the General Partner, and not the General Partner Board, is a party to the relevant agreements. Accordingly, the directors of the General Partner Board cannot be liable for a breach of the implied covenant. For DiRienzo to demonstrate that the General Partner Board faces a substantial likelihood of personal liability for his implied covenant claims, DiRienzo must establish both that the General Partner breached the implied covenant and that the General Partner Board breached its duties under the LPA in allowing or facilitating that breach.

DiRienzo has asserted the General Partner breached the implied covenant by: (1) acting without General Partner Board oversight from January 1, 2009 to October 2009 in violation of the LPA; (2) causing the Partial Unwind and distributing 62.5% of the Partnership's NAV to Option B Investors in violation of Section 7.3 of the LPA; (3) ratifying the Partial Unwind based solely on SP II's internal management valuations; (4) causing SPH to assume, and authorizing the payment of, the Deferred Fee Liability; and (5) issuing SPH common units to Option B Investors. I already have concluded that

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151 *Gerber v. Enter. Products Hldgs., LLC*, 67 A.3d 400, 421 n.53 (Del. 2013) ("We reject Gerber's argument that the implied covenant applies to nonparties to the contract.").

152 *Id.* at 412 (affirming Court of Chancery's determination that "only Enterprise Products GP—but not its Affiliates (Duncan, EPCO, and the Director Defendants) —signed the LPA and became subject to the implied covenant") (citation and internal quotation omitted).

DiRienzo has failed to allege facts that would support a reasonable inference that the General Partner Board either acted in bad faith or was grossly negligent with respect to the actions that serve as a basis for the third, fourth, and fifth implied covenant claims. Thus, even if the General Partner breached the implied covenant in those cases, the Board would not face a substantial likelihood of liability, and demand would not be excused under either *Aronson* or *Rales.* I next address whether demand is excused for either the first or the second implied covenant claims.

a. Demand is not excused for the first implied covenant claim

The conduct underlying DiRienzo's first implied covenant claim occurred when there was no General Partner Board, and thus, *Rales* is the appropriate standard for demand futility. Even assuming that the General Partner breached the implied covenant by acting without board oversight, however, the General Partner Board would not face a substantial likelihood of personal liability. The General Partner Board could not have been grossly negligent or have acted in bad faith by allowing the General Partner to operate without supervision because the General Partner Board, according to DiRienzo's own allegations, did not exist during this time period. As there is no substantial likelihood of personal liability for the General Partner Board, demand is not excused, and this claim must be dismissed.

b. Demand is not excused for the second implied covenant claim

DiRienzo's implied covenant claim regarding the distribution of $750 million in SPH assets to Option B Investors fails for the same reasons as his first claim did. The Partial Unwind was implemented on July 15, 2009. There was no General Partner Board on July 15, 2009. Therefore, even assuming the General Partner breached the implied covenant of the LPA by executing the Partial Unwind, the General Partner Board cannot be said to have acted in bad faith or with gross negligence at a time when it did not exist. Because DiRienzo has failed to establish that demand is excused for any of his breach of the implied covenant claims, I dismiss Count VI in its entirety.

G. Count VIII of the Amended Complaint[153]

In his final derivative claim, DiRienzo alleges that Lichtenstein (as Managing Member of the General Partner), the General Partner Board, and the Manager aided and abetted the General Partner's breach of its common law and contractual fiduciary duties to SPH. A claim for aiding and abetting a breach of fiduciary duty or contractual fiduciary duty requires an underlying breach that was aided or abetted.[154] As Counts IV, V, VI, and VII have been dismissed, there are no valid claims that the General Partner breached any fiduciary duty or contractual fiduciary duty to SPH. It follows, therefore,

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153 The claims in Count VII of the Complaint are essentially identical to, and duplicative of, DiRienzo's implied covenant claims in Count VI. Therefore, for the reasons I stated in my discussion of implied contractual duties in Count VI, Count VII is dismissed.

154 *See Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 172 (Del. 2002) ("The elements of a claim for aiding and abetting a breach of a fiduciary duty are: (1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non-fiduciary") (quoting *Fitzgerald v. Cantor*, 1999 WL 182573, at *1 (Del. Ch. Mar. 25, 1999)).

that there cannot be a valid aiding and abetting claim premised on such breaches. Accordingly, Count VIII is dismissed.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss derivative Counts IV, V, VI, VII, and VIII is granted. The Special Committee's motion to dismiss direct Counts I and III against Defendants Mullen and Schwarz is also granted.

IT IS SO ORDERED.