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Case No. 5989-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOEL A. GERBER,	:	
	:	
Plaintiff,	:	
v.	:	**C.A. No. 5989-VCN**
	:	
ENTERPRISE PRODUCTS HOLDINGS, LLC; ENTERPRISE PRODUCTS COMPANY; ENTERPRISE PRODUCTS PARTNERS, L.P.; RANDA DUNCAN WILLIAMS; O.S. ("DUB") ANDRAS; CHARLES E. MCMAHEN; EDWIN E. SMITH; THURMON ANDRESS; RICHARD H. BACHMANN, B.W. WAYCASTER, RALPH H. CUNNINGHAM, W. RANDALL FOWLER; AND RANDA DUNCAN WILLIAMS, RICHARD H. BACHMANN, AND RALPH H. CUNNINGHAM, IN THEIR CAPACITY AS EXECUTORS OF THE ESTATE OF DAN L. DUNCAN, DECEASED,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: October 7, 2011
Date Decided: January 6, 2012

Joseph A. Rosenthal, Esquire and Jessica Zeldin, Esquire of Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, and Jeffrey H. Squire, Esquire, Lawrence P. Eagel, Esquire, and Paul D. Wexler, Esquire of Bragar Wexler Eagel & Squire, PC, New York, New York, Attorneys for Plaintiff.

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A. Gilchrist Sparks, III, Esquire, Thomas W. Briggs, Jr., Esquire, and D. McKinley Measley, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Defendant Enterprise Products Partners, L.P.

Richard D. Heins, Esquire, Richard L. Renck, Esquire, and Stacy L. Newman, Esquire of Ashby & Geddes, Wilmington, Delaware, Attorneys for Defendants Enterprise Products Company, Randa Duncan Williams, in her individual capacity, and Randa Duncan Williams, Richard H. Bachmann and Ralph S. Cunningham in their capacity as Executors of the Estate of Dan L. Duncan, deceased.

NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Joel A. Gerber challenges two transactions in this purported class action brought on behalf of the former public holders of limited partnership units ("LP units") of Enterprise GP Holdings, L.P. ("EPE"). On behalf of the first of the two purported classes ("Class I"), Gerber has challenged EPE's sale of Texas Eastern Products Pipeline Company, LLC ("Teppco GP") to Enterprise Products Partners, L.P. ("Enterprise Products") (the "2009 Sale"). On behalf of the second purported class ("Class II"), Gerber has challenged the merger of EPE into a wholly-owned subsidiary of Enterprise Products (the "Merger"). Gerber has defined Class I to include all public holders of EPE LP units who continuously held their units from the date of the 2009 Sale through the date of the Merger. Gerber has defined Class II to include all public holders of EPE LP units as of the effective date of the Merger. On behalf of each purported class, Gerber has asserted claims against Enterprise Products, Enterprise Products Holdings, LLC ("Enterprise Products GP"), which was EPE's general partner before the Merger, certain members of Enterprise Products GP's board of directors (the "Director Defendants"), the estate of the person who controlled EPE, Enterprise Products, and Enterprise Products GP—Dan L. Duncan

("Duncan's Estate"),[1] and an affiliate of Enterprise Products—Enterprise Products Company ("EPCO") (collectively, with Enterprise Products, Enterprise Products GP, the Director Defendants, and Duncan's Estate, the "Defendants"). The Defendants have moved to dismiss all of the claims, or, in the alternative, to stay this action pending the resolution of a related case.[2] This is the Court's decision on that motion.

II. BACKGROUND[3]

A. *The Parties*

Gerber owned EPE LP units continuously from October 24, 2006 until the Merger, at which point his EPE LP units were converted into Enterprise Products LP units.

Enterprise Products is a Delaware limited partnership in the oil and gas business. At all relevant times before the Merger, EPE and Enterprise Products were in a two-tier limited partnership structure. EPE was the 100% owner of Enterprise Products' general partner, and EPE had no independent operations outside those of Enterprise Products. Thus, the assets of Enterprise Products provided both it and EPE with their cash flows.

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[1] Duncan died on March 28, 2010. He died after the 2009 Sale, but before the Merger.
[2] The related case is *Gerber v. EPE Holdings, LLC*, C.A. No. 3543-VCN ("*Gerber I*").
[3] Except in three noted instances, the factual background is based on the allegations in the Amended Verified Class Action Complaint (the "Complaint" or "Compl.").

Enterprise Products GP is a privately-held Delaware limited liability company owned by Dan Duncan LLC ("DDLLC"). Before the Merger, Enterprise Products GP was named EPE Holdings, LLC ("EPE Holdings"). EPE Holdings was EPE's general partner. When the Merger occurred, EPE Holdings was renamed Enterprise Products Holdings, LLC (referred to here as "Enterprise Products GP"), and became the general partner of Enterprise Products.

EPCO is a privately-held Texas corporation. At the time of the 2009 Sale, Duncan and his family owned all or virtually all of EPCO's stock. EPCO's principal business is to provide employees, management, and administrative services to all of Duncan's companies including Enterprise Products, Enterprise Products GP, and, until the Merger, EPE.

Randa Duncan Williams, O.S. ("Dub") Andras, Charles E. McMahen, Edwin E. Smith, Thurman Andress, Ralph S. Cunningham, Richard H. Bachmann and W. Randall Fowler are the Director Defendants. They were all members of Enterprise Products GP's board of directors (the "Board") during the relevant times. McMahen, Smith, and Andress comprised the Board's Audit, Conflict, and Governance Committee (the "ACG Committee") until late July 2010. In late July 2010, the ACG Committee and Smith determined that Smith should recuse himself from all of the ACG

Committee's deliberations and actions in connection with any merger proposal from Enterprise Products because Smith owned more Enterprise Products LP units than EPE LP units. On August 2, 2010, B.W. Waycaster was appointed to the Board and became a member of the ACG Committee. Williams, Cunningham, and Bachmann are also named as defendants in their capacity as the executors of Duncan's Estate.

B. *Factual Background and Procedural History*

In May 2007, EPE purchased Teppco GP from Duncan's affiliates for $1.1 billion in EPE LP units.[4] In April 2009, the Defendants proposed the 2009 Sale. Under the terms of that sale, Enterprise Products acquired Teppco GP from EPE, and EPE, in return, received $39.95 million in Enterprise Products LP units, and Enterprise Products' general partner, which EPE owned, received an increase in its general partner interest in Enterprise Products worth $60 million. Thus, when EPE transferred Teppco GP to Enterprise Products, EPE only received about $100 million in compensation. Because of EPE and Enterprise Products' two-tier limited partnership structure, however, even after the 2009 Sale, EPE continued to receive cash flows that had originated with Teppco GP. Before the 2009 Sale, EPE received approximately $60 million annually from Teppco GP;

[4] Gerber has challenged that transaction in *Gerber I*. *See Gerber v. EPE Holdings, LLC*, 2011 WL 4538087 (Del. Ch. Sept. 29, 2011).

the Complaint does not state how much money, originating with Teppco GP, was received by EPE after the 2009 Sale.

The 2009 Sale was put to the ACG Committee, and the ACG Committee hired Morgan Stanley & Co. ("Morgan Stanley") to render an opinion as to whether the sale was fair from a financial point of view to EPE and the public holders of EPE's LP units. Morgan Stanley opined that "the Consideration to be paid pursuant to the [2009 Sale] is fair from a financial point of view to EPE and accordingly, to the limited partners of EPE (other than Dan Duncan and his affiliates)."[5] Morgan Stanley, however, also stated that it expressed "no opinion with respect to . . . the fairness to EPE or its limited partners of any particular component of the Consideration (as opposed to the Consideration, taken as a whole) . . . ."[6] The ACG Committee approved the 2009 Sale and recommended that the Board undertake it. On June 28, 2009, the Board approved the 2009 Sale.

Beginning in July 2010, Enterprise Products and the Board discussed a possible merger of EPE and Enterprise Products. Between July 2010 and August 23, 2010, Enterprise Products made two offers to the Board. The Board rejected both offers as inadequate and did not make any counter

[5] Letter from Paul J. Loughman, Esq. to the Court, dated October 11, 2011, Ex. 1 ("The 2009 Morgan Stanley Fairness Opinion") at 00000075.
[6] The 2009 Morgan Stanley Fairness Opinion at 00000074.

offers. On August 23, 2010, Enterprise Products made a third offer. Two days later, on August 25, 2010, the ACG Committee met with Morgan Stanley and its legal advisors and discussed the actions that led to the claims that would be asserted in *Gerber I*, as well as any possible claims arising out of the 2009 Sale (the "2007 and 2009 Claims"). The Complaint alleges that the ACG Committee's legal advisors were representing or recently had represented entities that either had been affiliates of Duncan or were controlled by Duncan's Estate.

On August 30, 2010, following the ACG Committee's consideration, with its advisors, of the 2007 and 2009 Claims, EPE made a counteroffer. That same day, the ACG Committee met with Enterprise Products' Audit, Conflict, and Governance Committee. The two committees exchanged views regarding the various financial and strategic considerations relevant to arriving at a mutually acceptable exchange ratio. Later that day, Enterprise Products made its final offer—each EPE LP unit would be converted into the right to receive 1.5 Enterprise Products LP units.

"[O]n September 3, 2010, Morgan Stanley rendered to the . . . ACG Committee its oral opinion, subsequently confirmed in writing, that, as of such date . . . the [Merger] exchange ratio . . . was fair from a financial point

of view to the holders of . . . [EPE's LP] units . . . ."[7] EPE, however, never obtained any independent valuation of the 2007 and 2009 Claims.

On September 7, 2010, EPE and Enterprise Products announced that they had entered into a merger agreement by which Enterprise Products would acquire all of EPE's outstanding LP units. The proxy statement sent to the holders of EPE's LP units in connection with the Merger (the "Proxy") did not disclose that fair values had not been assigned to the 2007 and 2009 Claims. Moreover, before the Merger, Enterprise Products and several privately held entities controlled by Duncan's Estate (one of which was EPCO) entered into a support agreement. Pursuant to that agreement, entities controlled by Duncan's Estate, which together owned 76% of EPE's LP units, agreed to vote their EPE LP units in favor of the Merger. As the holders of 76% of EPE's LP units, those entities held a sufficient number of EPE LP units to approve the Merger, and they did vote in favor of the Merger. On November 22, 2010, EPE merged into a wholly-owned subsidiary of Enterprise Products.

III. CONTENTIONS

Gerber initially filed a complaint on November 15, 2010. The Complaint, as now amended, consists of six counts. Counts I, III and V are

[7] Transmittal Affidavit of D. McKinley Measley, Esq. ("Measley Aff."), Ex. D ("Enterprise Products' 2010 Form S-4/A") at 51.

asserted on behalf of Class I, and Counts II, IV, and VI are asserted on behalf of Class II. Count I alleges that the Defendants breached their express and implied duties under EPE's limited partnership agreement (the "LPA" or "Agreement") by causing EPE to undertake the 2009 Sale. Count II alleges that the Defendants breached their express and implied duties under the LPA by causing EPE to enter into the Merger without valuing the 2007 and 2009 Claims. Count III alleges that Duncan, EPCO, and Enterprise Products tortiously interfered with the LPA by causing EPE to undertake the 2009 Sale and that, through the 2009 Sale, those Defendants were unjustly enriched. Count IV alleges that Duncan's Estate, EPCO, and Enterprise Products tortiously interfered with the LPA by causing EPE to enter into the Merger without valuing the 2007 and 2009 Claims and that, through the Merger, those Defendants were unjustly enriched. Count V alleges that all of the Defendants, except Enterprise Products GP, aided and abetted the breaches of express and implied duties Enterprise Products GP committed by causing EPE to undertake the 2009 Sale. Count VI alleges that all of the Defendants, except Enterprise Products GP, aided and abetted the breaches of express and implied duties Enterprise Products GP committed by causing EPE to enter into the Merger without valuing the 2007 and 2009 Claims. On behalf of both purported classes (the "Classes"),

Gerber seeks: (1) damages for the harm the Classes have sustained as a result of the Defendants' breaches of fiduciary duty; (2) recovery of any profits or special benefits the Defendants received as a result of their breaches of fiduciary duty; (3) disgorgement of any money or other things of value that have unjustly enriched the Defendants; and (4) recovery of the costs of this action, including reasonable attorneys' fees. As an alternative to (1), (2) and (3), Gerber seeks rescissory damages.

The Defendants have moved to dismiss the Complaint. The Defendants argue that Counts I and III are derivative, and that, under Court of Chancery Rule 23.1, a plaintiff may only assert a derivative claim on behalf of a company if that plaintiff retains an ownership stake in the company's equity from the time of the challenged event through the ensuing litigation, and makes a presuit demand on the company's board of directors. Gerber has failed to comply with either of those requirements and, thus, the Defendants contend that Counts I and III should be dismissed.

Even if Count I were a direct claim, the Defendants argue that it fails to state a claim, and that it should be dismissed under Court of Chancery Rule 12(b)(6). The Defendants contend that the LPA specifically addresses transactions, such as the 2009 Sale, which present a potential conflict of interest. Under the terms of the LPA, Enterprise Products GP may cause

EPE to enter into a transaction presenting a potential conflict of interest if the transaction meets certain requirements, and the Defendants contend that the 2009 Sale satisfied those requirements.

The Defendants also argue that Count II should be dismissed under Rule 12(b)(6). The Defendants again explain that the LPA specifically allows EPE to enter into transactions which present a conflict of interest, if certain requirements are met, and the Defendants contend that the Merger satisfied those requirements. The Defendants further state that they had no express or implied duty to disclose any value assigned to the 2007 and 2009 Claims in the Proxy. Thus, the Defendants argue that, to the extent the Complaint asserts a claim against any of them for failing to determine and disclose the value of the 2007 and 2009 Claims, that claim must fail.

With regard to Counts III and IV, the Defendants argue that the Complaint fails to plead any facts suggesting that the Defendants named in those counts tortiously interfered with the LPA, or were unjustly enriched. The Defendants also contend that, because Gerber has failed to state a claim that any of the Defendants breached their fiduciary duties in connection with the 2009 Sale or the Merger, Gerber necessarily cannot state a claim for tortious interference in connection with either of those transactions. The Defendants further suggest that a contract governs the relevant rights

between the Classes and the Defendants and, thus, that it would not make sense to allow Gerber, on behalf of the Classes, to plead unjust enrichment claims.

Moving to Counts V and VI, the Defendants contend that these counts must be construed as asserting claims for aiding and abetting a breach of the LPA. Those claims must fail, the Defendants argue, because Delaware does not recognize a cause of action for aiding and abetting a breach of contract. Even if the Court were to recognize that cause of action, the Defendants argue that "[t]he elements of a claim for aiding and abetting a breach of contract . . . would necessarily be the same elements needed for an aiding and abetting a breach of fiduciary duty claim—most notably, an underlying breach . . . ."[8] Because the Complaint fails to state a claim for breach of fiduciary duty in connection with the 2009 Sale or the Merger, the Defendants contend that there was no underlying breach for any of the Defendants to aid or abet.

The Defendants also argue that, except where and to the extent that they have acted in bad faith or engaged in fraud, the LPA exculpates them from monetary liability to EPE or the holders of EPE LP units. The Complaint, according to the Defendants, fails to allege any particularized

[8] Opening Br. in Supp. of Defs.' Mot. to Dismiss or, in the Alternative, to Stay ("Defs.' Opening Br.") at 43.

facts supporting an inference that the Defendants acted in bad faith or engaged in fraud and, thus, all of the claims asserted in the Complaint should be dismissed.

In opposing the Defendants' motion to dismiss, Gerber argues that none of the claims asserted in the Complaint is derivative. Gerber suggests that because a purpose of the Merger was to extinguish the 2007 and 2009 Claims, any claims arising out of the 2009 Sale became direct at the effective time of the Merger. Gerber then argues that the LPA does not immunize the 2009 Sale from judicial scrutiny. Gerber contends that, even assuming the LPA allows EPE, if certain requirements are met, to enter into transactions that present a potential conflict of interest, the 2009 Sale did not satisfy those requirements. Moreover, Gerber argues that the LPA may not eliminate the implied covenant of good faith and fair dealing, and that the Defendants breached that covenant by causing EPE to undertake the 2009 Sale.

As for the claims arising out of the Merger, Gerber contends that the Complaint states a valid claim that the Defendants breached their fiduciary duties by causing EPE to enter into the Merger without valuing the 2007 and 2009 Claims. According to Gerber, those claims have a significant, albeit

contingent, value, and it is not possible to determine the degree to which the terms of the Merger compensated EPE for those claims.

Finally, Gerber argues that all of the secondary liability claims asserted in the Complaint state claims upon which relief may be granted. With regard to the tortious interference and unjust enrichment claims in Counts III and IV, Gerber contends that the Complaint pleads facts which suggest that Duncan (or Duncan's Estate), EPCO, and Enterprise Products were all aware that the 2009 Sale and the Merger constituted breaches of the LPA. Gerber continues his argument by explaining that Duncan (or Duncan's Estate), EPCO, and Enterprise Products participated in the 2009 Sale and the Merger, and that, as a result of those transactions, they received huge benefits, which they willingly accepted. As for the aiding and abetting claims in Counts V and VI, Gerber explains that the "Complaint alleges the existence of contractually defined duties, a breach of those duties by Enterprise Products GP, the knowing participation in that breach by Duncan [or Duncan's Estate], EPCO, Enterprise Products, and the Director Defendants and damages from the concerted action. Nothing more is required."[9]

[9] Pl.'s Answering Br. in Opp. to Defs.' Mot. to Dismiss ("Pl.'s Answering Br.") at 44.

IV. ANALYSIS

The Court will first address whether the claims pled in Counts I and III may be brought as direct claims. It will then address whether any count in the Complaint states a claim.

A. *Whether the Claims Pled in Counts I and III May Be Brought as Direct Claims*

Whether the claims of LP unit holders are "derivative or direct generally depends on '(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).'"[10] Counts I and III essentially allege that the Defendants, who controlled EPE, caused EPE to enter into a transaction that was, for EPE, a bad deal, and that the Defendants benefited from that transaction. As a general rule, those types of claims would be derivative—EPE suffered the alleged harm (it got a bad deal), and any recovery would go to EPE (EPE needs to be made whole as a result of that bad deal).[11] Moreover, a merger

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[10] *Brinckerhoff v. Enbridge Energy Co., Inc.* ("*Enbridge Energy*"), 2011 WL 4599654, at *5 (Del. Ch. Sept. 30, 2011) (quoting *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)).

[11] *See Enbridge Energy,* 2011 WL 4599654, at *6. At least in the corporate context, however, if

> (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

will typically deprive the merged entity's former equity holders of standing to pursue derivative claims.[12]

One recognized exception to that general rule, however, deserves careful attention. Namely, when a principal purpose of a merger is the inequitable termination of derivative claims, those claims may be brought as direct claims following the consummation of the merger.[13] For at least three reasons, however, there will be very few situations in which a plaintiff will be able to plead that a principal purpose of a merger was the inequitable termination of derivative claims. First, in a "typical" merger, Company A merges into Company B, and Company B succeeds to all of Company A's rights and responsibilities. Thus, if Company A had claims against Defendant X before the merger, Company B would possess those claims after the merger, and usually there would not be any reason for the Court to question Company B's decision to pursue or not pursue those claims. In a

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> owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders, . . . [then the public shareholders suffer] an injury that [i]s unique to them individually and that [may] be remedied in a direct claim against the controlling stockholder and any other fiduciary responsible for the harm.

Gentile v. Rossette, 906 A.2d 91, 100-01 (Del. 2006) (citations omitted).

[12] *See, e.g.*, *Kelly v. Blum*, 2010 WL 629850, at *9 n.57 (Del. Ch. Feb. 24, 2010) ("[A] merger that eliminates a plaintiff's membership in an LLC must also negate her standing to bring a derivative claim.") (citation omitted). *See* Ct. Ch. R. 23.1.

[13] *Brinckerhoff v. Tex. E. Prods. Pipeline Co., LLC*, 986 A.2d 370, 383 (Del. Ch. 2010) ("Delaware law recognizes an exception to the continuous ownership requirement when 'a principal purpose of [a] merger [i]s the termination of . . . then pending derivative claims.'") (quoting *Merritt v. Colonial Foods, Inc.*, 505 A.2d 757, 763 (Del. Ch. 1986)).

few situations, however, there will be reason for the Court to pause. One of these situations is where the disappearing company in a merger possesses claims against the surviving company or its affiliate. In that very specific situation, the company that obtains ownership of the claims is the same company against which claims had been asserted. It is unlikely that a company would sue itself. There could well be other specific situations where the Court would have reason to question the decision of a merger's surviving company not to pursue the claims of the merger's disappearing company, but those situations will be rare.

Second, above, in describing when claims that are originally derivative may be brought directly, the Court emphasized that it is only the *inequitable* termination of derivative claims that gives rise to a direct cause of action. In other words, there are situations where the general partner of a limited partnership may validly choose to extinguish derivative claims through a merger. Specifically, the general partner may enter into a merger, a principal purpose of which is to terminate claims belonging to the limited partnership, so long as the general partner considers the value of those claims in determining whether to enter into the merger.[14]

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[14] *See In re Brae Corp. S'holders Litig.*, 1991 WL 80213, at *5 (Del. Ch. May 15, 1991) ("One of the holdings in *Merritt*, in essence, stands for the unremarkable proposition that a derivative suit, being an asset of the corporation, must be taken into consideration, as

Third, the plaintiff's burden to plead facts from which the Court may infer that a principal purpose of a merger was the termination of derivative claims may not be satisfied with conclusory allegations. Merely because a merger extinguishes claims does not demonstrate that a principal purpose of the merger was to bring about that result. A complaint must provide the Court with a basis to infer that a principal purpose for a merger—likely the biggest event a company ever undertakes—is the termination of derivative claims. A complaint will only be able to do that in a few situations.

This, however, is one of those situations. The 2007 and 2009 Claims are claims against Enterprise Products and its affiliates, and the Merger resulted in Enterprise Products' acquisition of EPE. Thus, through the Merger, Enterprise Products obtained ownership of claims that were asserted against it and its affiliates. Furthermore, the Complaint alleges that "[i]n pursuing the Merger, [the D]efendants failed to obtain any independent analysis or valuation of the . . . [2007 and 2009 Claims]."[15] This was not a situation where Enterprise Products GP (EPE's general partner) considered

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must other assets, in determining whether the price received by shareholders in connection with the merger was fair."). Whether a general partner's consideration of to-be-extinguished claims is subject to rationality, reasonableness, or entire fairness review is an issue that could well depend on circumstances, and is not one that the Court need now address.

[15] Compl. ¶ 83.

the value of the claims being extinguished in deciding whether to enter into a transaction.

The Complaint also alleges facts from which the Court may infer that a principal purpose of the Merger was the termination of the 2007 and 2009 Claims. According to the Complaint, Enterprise Products pursued EPE for two months, and the Board was not the least bit interested. Then, the ACG Committee discussed the 2007 and 2009 Claims with its allegedly conflicted legal advisors. Five days later, the Merger consideration was set. Moreover, entities controlled by Duncan's Estate held 76% of EPE's LP units, and those entities voted in favor of the Merger. Those facts provide the Court with a basis to infer that a principal purpose of the Merger was the termination of the 2007 and 2009 Claims. Although the claims arising out of the 2009 Sale had only been threatened at the effective time of the Merger, the non-conclusory facts pled in the Complaint suggest that a principal purpose of the Merger was to terminate those claims. At least in the limited partnership context, if a principal purpose of a merger is the inequitable termination of derivative claims, then those claims may be brought as direct claims following the consummation of the merger regardless of whether the claims had been asserted before the merger. Thus, Counts I and III, which are claims arising out of the 2009 Sale, may be

brought as direct claims, and Court of Chancery Rule 23.1 is inapplicable to those claims.

Gerber has asserted Counts I and III (as well as Count V) on behalf of Class I. Gerber has defined Class I as "all former public shareholders of EPE units as of the date of the 2009 Sale Transaction, October 26, 2009, and/or their transferees and successors in interest, immediate and remote, through the Merger date, November 22, 2010. . . ."[16] By including those persons who acquired their LP units after the 2009 Sale, Gerber appears to have defined Class I too broadly.

The claims arising out of the 2009 Sale were originally derivative. In order for an EPE LP unit holder to have brought those claims as derivative claims, she would have needed to satisfy the continuous ownership rule.[17] Even though the claims asserted in Counts I, III, and V may now be brought directly, persons asserting those claims are still required to show that they

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[16] Compl. ¶ 28.

[17] *See* 6 *Del. C.* § 17-1002 ("In a derivative action, the plaintiff must be a partner or an assignee of a partnership interest at the time of bringing the action and: (1) At the time of the transaction of which the plaintiff complains; or (2) The plaintiff's status as a partner or an assignee of a partnership interest had devolved upon the plaintiff by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner or an assignee of a partnership interest at the time of the transaction."); Ct. Ch. R. 23.1 ("(a) In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law.").

continuously held their EPE LP units from the time of the 2009 Sale through the effective date of the Merger. Only the EPE LP unit holders who satisfy that requirement can show both (1) that they were harmed at the time of the 2009 Sale, and (2) that they were never compensated for that harm. EPE LP unit holders who held EPE LP units at the time of the 2009 Sale, but sold their units before the effective date of the Merger, received, in exchange for their units, compensation for an EPE that owned the claims arising out of the 2009 Sale. EPE LP unit holders who purchased their units after the 2009 Sale were not harmed by the 2009 Sale itself; rather, they were harmed, if at all, at the time of the Merger, when they were not compensated for claims that EPE owned.[18] Thus, Gerber has standing to bring the claims asserted in Counts I, III, and V on behalf of the public holders of EPE LP units who continuously held their units from the date of the 2009 Sale through the effective date of the Merger.

B. *Whether Any Count in the Complaint Fails to State a Claim*

The Defendants have moved to dismiss all six of the Complaint's counts on the basis that none states a claim. Under Court of Chancery Rule 12(b)(6), a motion to dismiss for failure to state a claim will only be granted if the "plaintiff would not be entitled to recover under any

[18] This separate harm is addressed below in Subsection B.4.

reasonably conceivable set of circumstances susceptible of proof."[19] In deciding a motion to dismiss, the Court must "accept even vague allegations as 'well pleaded' if they give the opposing party notice of the claim."[20] But, "a trial court is required to accept only those 'reasonable inferences that logically flow from the face of the complaint' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff.'"[21]

1. Which Defendants Owed Fiduciary Duties to EPE or the Holders of EPE LP Units

Absent contractual modification, a general partner, and certain persons affiliated with a general partner, such as the general partner's board of directors and controller, each "owe fiduciary duties to the limited partnership that the general partner manages."[22] Enterprise Products GP, as EPE's general partner, the Director Defendants, as members of the Board, and Duncan, as the controller of Enterprise Products GP, each owed

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[19] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).
[20] *Central Mtg. Co. v. Morgan Stanley Mtg. Capital Holdings, LLC*, 27 A.3d 531, 535 (Del. 2011).
[21] *Gen. Motors (Hughes)*, 897 A.2d at 168 (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).
[22] *Enbridge Energy*, 2011 WL 4599654, at *7 (citing *Wallace v. Wood*, 752 A.2d 1175, 1178 (Del. Ch. 1999)).

fiduciary duties to EPE. Moreover, the Complaint contains allegations, suggesting that EPCO was part of a group that controlled EPE.[23]

"In delineating the entities, besides the general partner, who owe fiduciary duties to a limited partnership, however, this Court has been careful to tether duties to control."[24] The Complaint does not allege that Enterprise Products exercised any control over EPE in connection with the 2009 Sale. Enterprise Products and EPE are alleged to have been under common control,[25] but there is no allegation that Enterprise Products had any control over whether EPE undertook the 2009 Sale or any other actions. Therefore, Enterprise Products did not owe common law fiduciary duties to EPE or its LP unit holders.[26]

2. The Fiduciary Duties EPE and the Holders of EPE LP Units Were Owed in Connection with the 2009 Sale and Whether Count I Fails to State a Claim

Under Delaware law, a limited partnership agreement may expand, restrict, or eliminate the duties (including fiduciary duties) that any person may owe to either the limited partnership or any other party to the limited partnership agreement, "provided that the partnership agreement may not

[23] *See* Compl. ¶ 13 ("EPCO and DDLLC together beneficially owned approximately 76% of the outstanding EPE [LP] units.").
[24] *Enbridge Energy*, 2011 WL 4599654, at *7.
[25] Compl. ¶ 55.
[26] Moreover, Enterprise Products did not sign the LPA, and thus, it did not owe "contractual fiduciary duties" to EPE or its LP unit holders.

eliminate the implied contractual covenant of good faith and fair dealing."[27] Although "[t]he complaint generally defines the universe of facts that the trial court may consider in ruling on a Rule 12(b)(6) motion to dismiss,"[28] "the Court may rely upon exhibits attached to a motion to dismiss if the plaintiff's claims are based upon them."[29] The LPA forms the basis for several of the counts listed in the Complaint and, thus, the Court may consider the LPA.

The LPA directly addresses transactions, such as the 2009 Sale, which present a potential conflict of interest. Section 7.9(a) of the LPA provides, in relevant part:

> Unless otherwise expressly provided in this Agreement, whenever a potential conflict of interest exists or arises between [Enterprise Products GP] or any of its Affiliates, on the one hand, and [EPE] or any Partner, on the other hand, any resolution or course of action by [Enterprise Products GP] or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement or of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval, (ii) approved by the vote of a majority of the Units excluding Units owned by [Enterprise Products GP] and its Affiliates, (iii) on terms no less favorable to [EPE] than those generally being

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[27] 6 *Del. C.* § 17-1101(d).
[28] *Gen. Motors (Hughes)*, 897 A.2d at 168 (citations omitted).
[29] *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *6 (Del. Ch. Jan. 14, 2011) (citing *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 1997 WL 525873, at *3 n.12 (Del. Ch. Aug. 13, 1997), *aff'd*, 708 A.2d 989 (Del. 1998)).

> provided to or available from unrelated third parties or (iv) fair and reasonable to [EPE], taking into account the totality of the relationships between the parties involved (including other transactions that may be particularly favorable or advantageous to [EPE]).[30]

Attachment I to the LPA, which is incorporated into the LPA by reference,[31] provides that "'Affiliate' means, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with, the Person in question."[32] The Director Defendants, as members of the Board, directly controlled Enterprise Products GP. Moreover, the Complaint alleges that, Duncan controlled both EPCO and Enterprise Products GP. Thus, for the purposes of a Rule 12(b)(6) motion, the Director Defendants, EPCO, and Duncan were Affiliates of Enterprise Products GP.

Section 7.9(a) potentially limits the duties that Enterprise Products GP, the Director Defendants, EPCO, and Duncan owed to EPE and the holders of EPE LP units in a conflict of interest transaction.[33] The 2009 Sale

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[30] The LPA may be found at Measley Aff., Ex. A.
[31] LPA § 1.1.
[32] *Id.* at Attachment I, A-1.
[33] Although "[a] limited partnership agreement cannot impose duties on a person that neither owes common law duties to the partners nor signed the limited partnership agreement," *Enbridge Energy*, 2011 WL 4599654, at *8 n.32, 6 *Del. C.* § 17-1101(d) provides that:

> [t]o the extent that . . . a partner or other person has duties (including fiduciary duties) to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by the partnership

was a conflict of interest transaction. The 2009 Sale consisted of an entity with the same controller as EPE contracting with EPE for the purchase and sale of a limited liability company.

As this Court has already explained:

> By using the term "or," Section 7.9(a) establishes four alternative standards of review. If the [2009 Sale] meets any of the four, then it "shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement or of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity."[34]

The first standard of review listed in Section 7.9(a) is Special Approval. The LPA states that "'Special Approval' means approval by a majority of the members of the Audit and Conflicts Committee."[35] The "Audit and Conflicts Committee," in turn, is defined as "a committee of the Board . . . composed entirely of three or more directors who meet the independence, qualification and experience requirements established by the Securities Exchange Act and the rules and regulations of the Commission thereunder and by the New York Stock Exchange."[36] The independence requirements of the New York Stock Exchange ("NYSE") are laid out in NYSE Corporate

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> agreement, the partner's or other person's duties may be expanded or restricted or eliminated . . . .

Thus, under Delaware law, a limited partnership agreement may limit the duties that a non-signatory owes to the limited partnership or the holders of the partnership's LP units.

[34] *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1020 (Del. Ch. 2010) (quoting LPA § 7.9(a)).

[35] LPA at Attachment I, A-8.

[36] *Id.* at Attachment I, A-2.

Governance Rule 303A.02. Currently, subsection (a) of that rule provides that in order for a director to be considered independent the board of directors must determine that the director has no material relationship with the company. Subsection (b), in turn, provides that certain disqualifying relationships necessarily prevent a director from being considered independent.[37]

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[37] The parties did not point to any differences between the current version of NYSE Corporate Governance Rule 303A.02 and the version in effect at the time of either the 2009 Sale or the execution of the LPA. Currently, NYSE Corporate Governance Rule 303A.02 provides, in its entirety:

> (a) No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company).
>
> (b) In addition, a director is not independent if:
>
> (i) The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer, of the listed company.
>
> (ii) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).
>
> (iii) (A) The director is a current partner or employee of a firm that is the listed company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.

The Complaint alleges that, at the time of the 2009 Sale, the ACG Committee consisted of three members of the Board.[38] Moreover, in EPE's Form 10-K for 2009, the year in which the 2009 Sale occurred, the Board stated that "[t]he members of the ACG Committee are independent directors, free from any relationship with us or any of our affiliates or subsidiaries that would interfere with the exercise of independent judgment."[39] Therefore, at the time of the 2009 Sale, the members of the ACG Committee met the requirements of Rule 303A.02(a). Moreover, although the Complaint lists a host of connections between the ACG Committee members and Duncan, none of the connections is a disqualifying relationship that necessarily prevents a director from being considered independent under Rule 303A.02(b). Thus, the ACG Committee was a valid "Audit and Conflicts Committee," as that term is defined in the LPA.

> (iv) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee.
>
> (v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues.

[38] Compl. ¶ 23.

[39] Measley Aff., Ex. E at 119. The Court may look to EPE's 2009 Form 10-K because the Complaint, at paragraph 74, relies upon it. *See supra* notes 28-29 and accompanying text.

As a valid Audit and Conflicts Committee, the ACG Committee could provide the 2009 Sale with "Special Approval." The Complaint admits that all of the members of the ACG Committee approved the 2009 Sale.[40] Because the ACG Committee provided Special Approval for the 2009 Sale, the 2009 Sale "shall be permitted and deemed approved by all Partners, and shall not constitute a breach of th[e LPA] or of any agreement contemplated . . . therein, or of any duty stated or implied by law or equity. . . ."[41] Therefore, Count I does not state a claim for breach of an express fiduciary duty against any defendant.[42]

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[40] Compl. ¶ 51(e).

[41] LPA § 7.9(a). Gerber argues that Section 7.6(e) of the LPA also applies to the 2009 Sale. That section, however, states that "[n]either [Enterprise Products GP] nor any of its Affiliates shall sell, transfer or convey any property to, or purchase any property from, [EPE], directly or indirectly, except pursuant to transactions that are fair and reasonable to [EPE] . . . ." The only entity alleged to have transferred property to or purchased property from EPE in the 2009 Sale is Enterprise Products. Thus, the only entity that Section 7.6(e) could impose a duty on, with regard to the 2009 Sale, is Enterprise Products. Enterprise Products, however, did not sign the LPA, and the Court has already determined that Enterprise Products does not owe common law fiduciary duties to EPE. *See supra* notes 25-26 and accompanying text. Thus, Section 7.6(e) of the LPA does not apply to the 2009 Sale. Even if Section 7.6(e) could be viewed as imposing a duty on Duncan on the basis that he caused Enterprise Products and EPE to enter into the 2009 Sale, Duncan satisfied that duty. Section 7.6(e) of the LPA provides "that the requirements of this Section 7.6(e) shall be deemed satisfied as to . . . any transaction approved by Special Approval." As discussed above, the 2009 Sale received Special Approval, and therefore, even if Section 7.6(e) did impose a duty on Duncan, that duty was satisfied.

[42] This result may seem odd in light of the Complaint's well-pled facts that EPE purchased Teppco GP for $1.1 billion in 2007, and that the 2009 Sale consisted of the Defendants, in a self-dealing transaction, causing EPE to sell Teppco GP for $100 million. Compl. ¶ 6. The Defendants highlight that, at the time of the 2009 Sale, EPE and Enterprise Products were in a two-tier limited partnership structure and, thus, even after the 2009 Sale, EPE continued to receive cash flows that had originated with Teppco

The Defendants argue that that is where the Court's inquiry should end. They contend that because the 2009 Sale received Special Approval it is *conclusively* "deemed approved by all Partners. . . ."[43] This Court, however, has already determined that "the implied covenant [of good faith and fair dealing] constrains the Special Approval process."[44] "The implied covenant, however, only potentially binds the parties to an agreement."[45]

GP. Moreover, at oral argument, counsel for the Defendants argued that the 2009 Sale was "cash flow neutral" from EPE's point of view; EPE continued to receive equal cash flows both before and after the 2009 Sale. Oral Arg. Tr. at 19. The reason for undertaking this cash flow neutral transaction was, according to Defendants' counsel, "to simplify this whole structure." *Id.* at 15.

Although there is much to commend simplifying complex business structures, it is also possible that a lot more was going on in this transaction than just simplification. For example, as to the claim that the transaction was cash flow neutral, it may be that at the time the respective cash flows were comparable, but that leaves open the possibility that the future of one cash flow stream was considered rosier (and, hence, more valuable) than the other cash flow stream. Our General Assembly, however, has determined that, with a very limited exception, a limited partnership agreement may eliminate the duties that any person may owe to the limited partnership or the holders of the partnership's LP units. *See* 6 *Del*. *C.* § 17-1101(d). That means that a limited partnership agreement may, with the imprimatur of Delaware law, permit self-dealing transactions between a limited partnership and its controller with almost no oversight by this Court. This raises the issue of just what protection Delaware law affords the public investors of limited partnerships that take full advantage of 6 *Del. C.* § 17-1101(d). If the protection provided by Delaware law is scant, then the LP units of these partnerships might trade at a discount or another governmental entity might step in and provide more protection to the public investors in these partnerships. Those issues, however, are not ones that this Court need or should address. The General Assembly has decided that this Court has only a limited role in protecting the investors of publicly traded limited partnerships that take full advantage of 6 *Del. C.* § 17-1101(d), and that is a role this Court must accept.

[43] LPA § 7.9(a). *See* Defs.' Opening Br. at 27 ("[I]f a transaction has been approved by Special Approval pursuant to Section 7.9(a)(i), the transaction is deemed to be fair and reasonable and the inquiry ends.").

[44] *Lonergan*, 5 A.3d at 1021.

[45] *See Enbridge Energy*, 2011 WL 4599654, at *11 (citing *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010); Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in*

The only parties to the LPA were Enterprise Products GP and the holders of EPE LP units. Thus, the only defendant potentially liable under the implied covenant is Enterprise Products GP.[46]

Delaware Limited Partnerships and Limited Liability Companies, 32 DEL. J. CORP. L. 1, 17 (2007)).

[46] It may seem surprising that Duncan, EPCO, and the Director Defendants can take full advantage of the benefits of 6 *Del. C.* § 17-1101(d), and yet the implied covenant is not imposed on them. After all, absent a statutorily authorized contractual modification, those Defendants would owe fulsome duties to EPE and the holders of EPE's LP units. *See supra* note 22 and accompanying text; *Wallace*, 752 A.2d at 1178 ("Officers, affiliates and parents of a general partner, *may* owe fiduciary duties to limited partners if those entities control the partnership's property."). Our General Assembly, however, has determined that a limited partnership agreement may eliminate nearly all the duties that a person may owe to the limited partnership or the holders of the partnership's LP units. *See supra* note 33. The one limit that the General Assembly has placed on the ability of a limited partnership agreement to eliminate duties is "the implied contractual covenant of good faith and fair dealing." 6 *Del. C.* § 17-1101(d).

The General Assembly did not define the term "implied contractual covenant." Although it is conceivable that, by using the term "implied contractual covenant," the General Assembly intended to create a concept out of whole cloth that would constrict any person who, absent 6 *Del. C.* § 17-1101(d), would owe duties to a limited partnership, that seems unlikely because the implied covenant existed as a creature of common law long before the General Assembly adopted it as part of 6 *Del. C.* § 17-1101(d) in 2004. *See Chamison v. HealthTrust, Inc.—The Hospital Co.*, 735 A.2d 912, 920 (Del. Ch. 1999) ("Under Delaware law, an implied covenant of good faith and fair dealing inheres in every contract.") (citing *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)). Therefore, the more reasonable inference is that because the General Assembly did not define the term "implied covenant" in 6 *Del. C.* § 17-1101, it intended to adopt the common law definition of that term that existed when the term was imported into 6 *Del. C.* § 17-1101. *See, e.g.*, *Richards v. Ashcroft*, 400 F.3d 125, 128 (2d Cir. 2005) ("In general, when a federal statute uses, but does not define, a term of art that carries an established common law meaning, we will give that term its common law definition. . . .") (citations omitted); *Commonwealth v. Wynton*, 947 N.E.2d 561, 564 (Mass. 2011) ("Where the Legislature does not define a term, we presume that its intent is to incorporate the common-law definition of that term, unless the intent to alter it is clearly expressed.") (citation and internal quotations omitted); 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 50:3 (7th ed. 2008) ("The interpretation of well-defined words and phrases in the common law carries over to statutes dealing with the same or similar subject matter.") (citations omitted). Both before and after the General Assembly adopted the implied covenant as part of 6 *Del. C.* § 17-1101(d), Delaware Courts have held that the implied covenant only

Under the implied covenant, Enterprise Products GP was required to act in good faith if it used the Special Approval process to take advantage of the contractual duty limitations provided by Section 7.9(a). "When a contract confers discretion on one party, the implied covenant requires that the discretion be used reasonably and in good faith."[47] Enterprise Products GP had discretion as to whether it would use the Special Approval process to take advantage of the contractual duty limitations provided by Section 7.9(a). Thus, Enterprise Products GP had a duty, under the implied covenant, to act in good faith if it took advantage of the Special Approval process.

The Complaint can fairly be read to allege that Enterprise Products GP acted in bad faith when it chose to use the Special Approval process. As

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binds the parties to a contract. *See Castetter v. Del. Dep't of Labor*, 2002 WL 819244, at *5 (Del. Super. Apr. 30, 2002) ("Only a party to a contract can breach the implied covenant of good faith and fair dealing.") (citation omitted); *Enbridge Energy*, 2011 WL 4599654, at *11 (same) (citations omitted). Thus, although many entities that do not sign a limited partnership agreement will, absent contractual modification, owe unremitting duties to the limited partnership and the holders of the partnership's LP units, those entities may, through contract, be fully absolved of any duties they would have owed the limited partnership at common law, and still not be subject to the implied covenant.

The Court recognizes, however, that Enterprise Products GP is an artificial entity, and, thus, the actions that are deemed attributable to it are undertaken by the people who have authority to act on its behalf. Often the people acting on Enterprise Products GP's behalf will be the Director Defendants. Therefore, although the Director Defendants are not themselves bound by the implied covenant, the actions they take on behalf of Enterprise Products GP could lead to a determination that Enterprise Products GP has breached the implied covenant.

[47] *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146-47 (Del. Ch. 2009) (citations omitted).

stated above, Section 7.9(a) establishes four alternative standards of review. If a potential conflict of interest transaction satisfies any one standard, then the transaction shall not constitute a breach of the LPA "or of any duty stated or implied by law or equity."[48] According to the Complaint, the 2009 Sale was a grossly unfair transaction that involved EPE selling an asset for $100 million that two years previously it had purchased for $1.1 billion.[49] The Complaint can fairly be read to allege that because the terms of the 2009 Sale were so unfair to EPE, the 2009 Sale would not be able to meet the second, third or fourth standard established by Section 7.9(a).[50] Thus, if Enterprise Products GP was going to be able to get EPE to undertake the 2009 Sale free from challenge, Enterprise Products GP would have to obtain Special Approval of the 2009 Sale. According to the Complaint, Enterprise Products GP decided that the 2009 Sale benefited its controller and, then, Enterprise Products GP found a way to use one of Section 7.9(a)'s standards to prevent this Court or anyone else from reviewing it. That is an allegation that Enterprise Products GP exercised, in bad faith, the discretion it had to use the Special Approval process to take advantage of the LPA's duty limitations.

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[48] LPA § 7.9(a).
[49] Compl. ¶ 6.
[50] *Id.* at ¶¶ 50, 54, 60 & 62.

Section 7.10(b) of the LPA, however, directly addresses good faith, providing that:

> [Enterprise Products GP] may consult with legal counsel, accountants, appraisers, management consultants, investment bankers and other consultants and advisors selected by it, and any act taken or omitted to be taken in reliance upon the opinion (including an Opinion of Counsel) of such Persons as to matters that [Enterprise Products GP] reasonably believes to be within such Person's professional or expert competence shall be conclusively presumed to have been done or omitted in good faith and in accordance with such opinion.

The ACG Committee received The 2009 Morgan Stanley Fairness Opinion, which provided, in part, that "the Consideration to be paid pursuant to the [2009 Sale] is fair from a financial point of view to EPE and accordingly, to the limited partners of EPE (other than Dan Duncan and his affiliates)."[51] "The complaint does not allege (and a plaintiff could not colorably contend) that rendering a fairness opinion was not within Morgan Stanley's professional expert competence."[52] Although the ACG Committee is not Enterprise Products GP, it would be unreasonable, even on a motion to dismiss, for the Court to infer that although an independent subset of the Board relied upon a fairness opinion, the entity that the Board manages did not rely upon that opinion. Thus, the only reasonable interpretation of the

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[51] The 2009 Morgan Stanley Fairness Opinion at 00000075. The Court may look to The 2009 Morgan Stanley Fairness Opinion because the Complaint, at paragraph 69, relies upon it. *See supra* notes 28-29 and accompanying text.

[52] *Lonergan*, 5 A.3d at 1022.

well-pled facts is that Enterprise Products GP relied upon The 2009 Morgan Stanley Fairness Opinion in deciding whether to use the Special Approval process to take advantage of the contractual duty limitations provided by Section 7.9(a).

Because Enterprise Products GP relied upon The 2009 Morgan Stanley Fairness Opinion, Enterprise Products GP is conclusively presumed to have acted in good faith in deciding to use the Special Approval process. In *Enbridge Energy*, the Court suggested that "[t]he good faith referred to in the [limited partnership agreement at issue there, which was very similar to the good faith discussed in the LPA,] would appear to impose a duty as broad, and likely broader, than the duty imposed by the implied covenant of good faith and fair dealing."[53] The disposition of that issue, however, was not critical in *Enbridge Energy* because the Court determined that even "[a]ssuming it would be possible for [a plaintiff] to plead an implied covenant claim where he is not able to plead a bad faith claim, [the plaintiff] has failed to do so here."[54] But the issue is important here. Absent contractual modifications, Gerber could plead a breach of the implied covenant. Therefore, the question squarely before the Court is: can a plaintiff plead that a defendant breached the implied covenant when the

[53] 2011 WL 4599654, at *11.
[54] *Id.*

defendant is conclusively presumed by the terms of a contract to have acted in good faith?

The answer is, no. Section 7.10(b) of the LPA contains a broad pronouncement that an act undertaken by Enterprise Products GP in reliance upon the advice of someone whom Enterprise Products reasonably believes to be an expert "shall be conclusively presumed to have been done . . . in good faith . . . ." Under the plain terms of the LPA, if Section 7.10(b) applies to an action taken by Enterprise Products GP, then Enterprise Products GP is protected from any claims asserting that the action was taken other than in good faith. That would include good faith claims arising under the duty of loyalty, the implied covenant, and any other doctrine. In contrast to Section 7.10(b)'s broad pronouncement, our Supreme Court has determined that the implied covenant is a "limited and extraordinary legal remedy."[55] It is a gap-filler, and may not be used to "infer language that contradicts a clear exercise of an express contractual right."[56] Moreover, our Supreme Court has repeatedly stated that "one generally cannot base a claim

[55] *Nemec*, 991 A.2d at 1128.
[56] *Id.* at 1127.

for breach of the implied covenant on conduct authorized by the agreement."[57]

The drafters of the LPA foresaw that claims against Enterprise Products GP asserting a failure to act in good faith could arise in a number of circumstances. The drafters decided that none of those claims could be asserted if Enterprise Products GP acted in reliance upon the opinion of an expert. Under the LPA, Enterprise Products GP has an "express contractual right" to rely upon the opinion of an expert and thereby be conclusively presumed to have acted in good faith. The Court may not "infer language that contradicts a clear exercise" of that right. Although the well-pled facts of the Complaint may suggest that Enterprise Products GP breached the implied covenant, that claim is precluded by Section 7.10(b) of the LPA.[58]

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[57] *Id.* at 1125-26 (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)).

[58] This conclusion raises the question: how can a section of the LPA preclude a claim for breach of the implied covenant when 6 *Del. C.* § 17-1101(d) provides that a "partnership agreement may not eliminate the implied contractual covenant of good faith and fair dealing?" The answer is that although the covenant of good faith and fair dealing may sound like some grandiose principle, it is a gap-filler. As discussed in note 46 the General Assembly did not define the term "implied contractual covenant" in 6 *Del. C.* § 17-1101(d) and, thus, our Legislature is assumed to have adopted the common law definition of that term that existed when the term was imported into 6 *Del. C.* § 17-1101(d). *See* 2B SINGER & SINGER, *supra* note 46, § 50:2 ("The meaning and effect of legislation whose operation is conditioned by common-law principles are not changed by subsequent judicial decisions modifying the common-law principles") (citations omitted).

In *Nemec*, the Supreme Court explained that the implied covenant is a limited remedy meant to address gaps in a contract. 991 A.2d at 1126 n.17 (citing *Dunlap*, 878 A.2d at 441). The Supreme Court rejected the notion that "where [a contracting party is] expressly empowered to act . . . [it] can breach the implied covenant if it exercises that

Thus, Count I does not state a claim for a breach of the implied covenant. The Court previously determined that Count I did not state a claim for breach of an express fiduciary duty. Count I is therefore dismissed in its entirety.

The facts of this case take the reader *and* the writer to the outer reaches of conduct allowable under 6 *Del. C.* § 17-1101. It is easy to be troubled by the allegations. Alternate entity legislation reflects the Legislature's decision to allow such ventures to be governed without the traditional fiduciary duties, if that is what the partnership agreement or other governing document provides for, and allows conduct that, in a different context, would be sanctioned. Ultimately, the investor, who is charged with having assessed and accepted the risks of putting his money in an entity

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contractual power arbitrarily or unreasonably." *Nemec*, 991 A.2d at 1131 (Jacobs, J., dissenting) (citing *Dunlap*, 878 A.2d at 442). Although *Nemec* was decided after the General Assembly imported the term "implied covenant" into 6 *Del. C.* § 17-1101(d), in *Nemec*, the Supreme Court did not purport to modify Delaware's definition of the implied covenant. Thus, under Delaware law, the implied covenant does not, as Gerber suggests, "prohibit defendants from acting beyond the outer bounds of reasonableness . . . ." Pl.'s Answering Br. at 41. Rather, as the Supreme Court has explained, if a contract has no gaps, then the implied covenant is not applicable to that contract. A limited partnership agreement may not validly state that "the implied covenant is not part of this agreement," but if a limited partnership agreement simply has no gaps, then the implied covenant will never apply to that agreement.

The LPA provides that if Enterprise Products GP follows a specific procedure, then any gaps that may appear in the LPA will be filled with a conclusive presumption of good faith. When Enterprise Products GP caused EPE to undertake the 2009 Sale, it followed that specific procedure in deciding whether to take advantage of the Special Approval process. Thus, any possible gap that Gerber might be able to find in the use of the Special Approval process will be filled with a conclusive presumption of good faith. There can be no claim that Enterprise Products GP breached the implied covenant.

without the comfort afforded by fiduciary duties, is left with contractual protections, either those that are expressed or those that are within the implied covenant of good faith and fair dealing. Here, those protections were minimal and did not provide EPE's public investors with anything resembling the protections available at common law.

3. Whether Count III or V Fails to State a Claim

Count III alleges that Duncan, EPCO, and Enterprise Products tortiously interfered with the LPA by causing EPE to undertake the 2009 Sale and were thereby unjustly enriched. Count V alleges that all of the defendants except Enterprise Products GP aided and abetted the breach of express and implied duties Enterprise Products GP committed by causing EPE to undertake the 2009 Sale. A claim for tortious interference with a contract, as well as a claim for aiding and abetting a breach of duties, requires an underlying breach.[59] As explained above in Subsection B.2, none of the Defendants breached an express or implied duty owed to EPE or the holders of EPE's LP units. Thus, Counts III and V are dismissed for failure to state a claim.

[59] *See Goldman v. Pogo.com, Inc.*, 2002 WL 1358760, at *8 (Del. Ch. June 14, 2002) ("A claim of tortious interference with contractual rights requires, *inter alia,* a contract, a breach of that contract, and an injury."); *Madison Realty Partners 7, LLC v. AG ISA, LLC*, 2001 WL 406268, at *6 n.19 (Del. Ch. Apr. 17, 2001) ("The plaintiffs' claim . . . for aiding and abetting . . . breaches of fiduciary duty must also be dismissed because there is no legally sufficient underlying claim for breach of fiduciary duty. . . .").

4. Whether Count II, IV or VI Fail to State a Claim

The claims pled in Counts II, IV, and VI are very similar to the claims pled in Counts I, III, and V. As discussed above in Subsection A, Counts I, III, and V are claims that the 2009 Sale was a bad deal for EPE. Those claims have been asserted on behalf of the public holders of EPE LP units who continuously held their units from the date of the 2009 Sale through the effective date of the Merger. Counts II, IV, and VI alleged that the Merger was a bad deal for the public holders of EPE LP units because the Defendants failed to value the 2007 and 2009 Claims when setting the Merger consideration. In other words, Counts II, IV, and VI state that because the 2007 and 2009 Claims were never valued, those who held EPE LP units at the time of the Merger were inequitably deprived of part of the value of their LP units. Therefore, Counts I, III, and V sought redress for a wrong (the inadequate consideration received by EPE in the 2009 Sale) that is also addressed in Counts II, IV, and VI. All of the counts alleged in the Complaint are claims that the public holders of EPE LP units failed to receive value for certain of EPE's unliquidated claims.

At least in the corporate context, this Court has suggested that those types of claims—claims that the owners of the disappearing company in a merger failed to receive value for their company's unliquidated claims—

should be brought as direct claims arising out of the merger, not as derivative claims that have transformed into direct claims.[60] Were the Court to follow that reasoning, Gerber would only be allowed to assert Claims II, IV, and VI. The Court's explanation that, in the corporate context, these types of claims should be brought as direct claims was based, at least in part, on the fact that one claim would provide shareholders an adequate remedy.[61] A limited partnership agreement, however, can expand or restrict duties,[62] and it could do so in a way that eliminates some claims, but allows others. Thus, at this stage, the Court will not require that these types of claims—claims that the owners of the disappearing company in a merger failed to receive value for their company's unliquidated claims—be brought only one way.[63]

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[60] *Merritt*, 505 A.2d at 763 n.3 ("[T]he general rule in Delaware is that a cash-out merger will terminate the standing of a plaintiff to continue to maintain derivative claims on behalf of the corporation of which he was (but no longer is) a shareholder. *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984). Despite contrary dicta in some Delaware cases . . . it seems apparent to me that the rule of *Anderson* should apply even where the purpose of the cash-out merger is to cause a premature termination of derivative litigation. The logic of the derivative form of action compels that result. . . .").

[61] *Id.* ("The logic of the derivative form of action compels the result [that a cash-out merger will terminate the standing of a plaintiff to continue to maintain derivative claims on behalf of the corporation of which he was (but no longer is) a shareholder] and to recognize that fact judicially does not—as the holding in this case illustrates—permit self-dealing fiduciaries inappropriately to avoid their duty to account to minority shareholders.").

[62] *See* 6 *Del. C.* § 17-1101(d).

[63] Although the Court will not require that these claims be brought only one way, a defendant, at most, would have to pay one recovery. No plaintiff may achieve a double recovery by seeking redress for the same wrong in multiple and different ways.

Although Gerber may bring all six counts, the claims asserted in Counts II, IV, and VI ultimately fail for the same reasons that the claims in Counts I, III, and V failed.[64] With regard to the claims in Count II, the Merger received Special Approval.[65] Therefore, any claim that the Defendants breached express duties by causing EPE to enter into the Merger fails, as a matter of law, under Section 7.9(a) of the LPA.[66] Turning to the implied covenant, even if Gerber could, absent the LPA, plead a breach of it, that claim would be precluded by Section 7.10(b). Enterprise Products GP is conclusively presumed to have acted in good faith in entering into the Merger because "Morgan Stanley rendered to the . . . ACG Committee its oral opinion, subsequently confirmed in writing, that, as of such date . . . the [Merger] exchange ratio . . . was fair from a financial point of view to the holders of . . . [EPE's LP] units . . . ."[67] With regard to Counts IV and VI, claims for tortious interference and aiding and abetting require an underlying

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[64] Moreover, as with Class I, Gerber appears to have defined Class II too broadly by including, within the class, persons who acquired their LP units after the Merger. *See* Compl. ¶ 28 (Class II consists of "all former public holders of EPE units as of the date of the Merger . . . , and their successors in interest, immediate and remote.").

[65] *See* Compl. ¶ 82.

[66] Assuming the Complaint asserts a claim that the Proxy failed to adequately disclose the value of the 2007 and 2009 Claims, that claim also fails as a matter of law. *See Lonergan*, 5 A.3d at 1024 (The LPA "eliminates all fiduciary duties, which therefore cannot support a disclosure obligation.").

[67] Enterprise Products' 2010 Form S-4/A at 51. The Court may look to the opinion Morgan Stanley rendered in connection with the Merger because the Complaint, at paragraph 81, discusses that opinion. *See supra* notes 28-29 and accompanying text.

breach,[68] and none of the Defendants breached an express or implied duty owed to EPE or the holders of its LP units in connection with the Merger. Thus, Gerber cannot state a claim for secondary liability in connection with the Merger. Counts II, IV and VI are dismissed for failure to state a claim.[69]

V. CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss the Complaint is granted. An implementing order will be entered.

[68] *See supra* note 59 and accompanying text.

[69] Because the Court has dismissed the Complaint in its entirety, the Court need not address the Defendants' motion, made in the alternative, seeking a stay of this case pending resolution of *Gerber I*.