IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOEL A. GERBER, Plaintiff, v. EPE HOLDINGS, LLC, n/k/a ENTERPRISE PRODUCTS HOLDINGS, LLC; ENTERPRISE PRODUCTS COMPANY f/k/a EPCO, INC.; DUNCAN FAMILY INTERESTS, INC.; DFI GP HOLDINGS, LP; RANDA DUNCAN WILLIAMS; O.S. ("DUB") ANDRAS; CHARLES E. MCMAHEN; EDWIN E. SMITH; THURMON ANDRESS; RICHARD H. BACKMANN; 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, and ENTERPRISE PRODUCTS PARTNERS, LP and ENTERPRISE ETE LLC, Successor by Merger to ENTERPRISE GP HOLDINGS, LP, Nominal Defendants.	:	**C.A. No. 3543-VCN**

MEMORANDUM OPINION

Date Submitted: September 19, 2012
Date Decided: January 18, 2013

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Richard D. Heins, Esquire, Richard L. Renck, Esquire, and Stacy L. Newman, Esquire of Ashby & Geddes, Wilmington, Delaware, Attorneys for Defendants Enterprise Products Company, Duncan Family Interests, Inc., DFI GP Holdings LP, Randa Duncan Williams, and Randa Duncan Williams, Richard H. Bachmann, and Ralph S. Cunningham, in their capacities as Executors of the Estate of Dan L. Duncan.

A. Gilchrist Sparks, III, Esquire, William M. Lafferty, Esquire, Thomas W. Briggs, Jr., Esquire, D. McKinley Measley, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Defendants Enterprise Products Holdings, LLC, Enterprise Products Partners L.P., Michael A. Creel, Richard H. Bachmann, W. Randall Fowler, O.S. ("Dub") Andras, Charles E. McMahen, Edwin E. Smith, Thurmon Andress, and Ralph H. Cunningham.

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NOBLE, Vice Chancellor

This is yet another action involving a master limited partnership agreement that established a "Special Approval" process which purports to allow the general partner to engage in an otherwise self-interested transaction without breaching any duty owed to the partnership or the limited partners.[1]

Plaintiff Joel A. Gerber ("Gerber") brought claims on behalf of Enterprise GP Holdings, L.P. ("EPE" or the "Partnership") to challenge EPE's May 7, 2007 purchase of Texas Eastern Products Partners, LLC ("Teppco GP") from affiliates of EPE's controller, Dan L. Duncan ("Duncan"). While Gerber's challenge was pending, EPE was merged into Enterprise ETE LLC ("MergerCo"), a wholly owned subsidiary of Enterprise Products Partners, L.P. ("Enterprise Products") (the "Merger"). EPE no longer exists. In light of the Merger, Gerber now brings this action directly as a class action on behalf of certain former unitholders of EPE.[2] In the alternative, Gerber brings this action derivatively on behalf of MergerCo and double derivatively on behalf of Nominal Defendant Enterprise Products.[3] The Court now considers the Defendants' Motion to Dismiss the Second Amended Supplemental Verified Complaint.

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[1] *See, e.g.*, *In re Encore Energy P'rs LP Unitholder Litig.*, 2012 WL 3792997, at *1 & n.1 (Del. Ch. Aug. 31, 2012).
[2] Pl.'s Second Am. & Supplemental Verified Compl. (the "Second Amended Complaint" or "SAC") ¶ 2.
[3] SAC ¶ 3.

I. BACKGROUND[4]

A. *The Parties*

Gerber owned EPE limited partner units continuously from October 24, 2006 until the Merger.[5] He now holds Enterprise Products limited partner units.[6] EPE was a Delaware limited partnership in the oil and gas business.[7] EPE's general partner was EPE Holdings, LLC ("EPE Holdings" or the "General Partner"), a privately held Delaware limited liability company.[8] EPE Holdings was indirectly owned by Duncan at the time of the Merger.[9] Since the Merger, EPE Holdings has been renamed Enterprise Products Holdings LLC ("Enterprise Products GP"). Enterprise Products GP is now the general partner of Enterprise Products.

EPCO, Inc. is a privately-owned Texas corporation. Duncan and his family were owners of 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 GP, Teppco GP, and, until the Merger, EPE. Duncan Family Interests, Inc. ("DFI"), a Delaware corporation, and DFI GP

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[4] Except where noted, the descriptions of the parties and the factual background are based on allegations in the SAC.
[5] SAC ¶ 18.
[6] SAC ¶ 18.
[7] SAC ¶ 19.
[8] SAC ¶ 5.
[9] Duncan died in 2010, and the executors of his estate have been substituted as defendants in this action. Stip. and Order under Rule 25(a)(1) (May 19, 2010).

Holdings LP ("DFI GP"), a Delaware limited partnership, were, until the Merger, affiliates of EPE Holdings. Now, they are affiliates of Enterprise Products GP.[10] Randa Duncan Williams, O.S. ("Dub") Andras, Charles E. McMahen, Edwin E. Smith, Thurmon Andress, Richard H. Bachmann and Ralph H. Cunningham and W. Randall Fowler (collectively, the "Board") were all directors of EPE Holdings during the relevant time.[11]

B. *The Teppco GP Transaction*

In February 2005, Duncan caused DFI GP to purchase Teppco GP for $1.1 billion. Teppco GP, as general partner of Teppco Partners, LP ("Teppco"), was entitled to receive certain distribution rights from Teppco. In December 2006, Teppco GP relinquished certain distribution rights in exchange for 14.1 million Teppco limited partnership units. On May 7, 2007, EPE announced that it had purchased Teppco GP from Duncan's affiliates for approximately $1.1 billion in EPE limited partnership units (the "Transaction"). The Teppco GP that EPE purchased, however, only came with 4.4 million of the Teppco LP units that Teppco GP had received in the December 2006 exchange. Duncan retained ownership of the other 9.7 million units. The Transaction was not presented to the unitholders for approval, but it received a "Special Approval" under EPE's Limited

[10] SAC ¶ 24.

[11] EPE Holdings/Enterprise Products GP, EPCO, DFI, DFI GP, the executors of Duncan's estate, and the Board are collectively referred to as the "Defendants."

Partnership Agreement (the "LPA").[12] EPE Holdings chose not to seek and did not obtain any expert opinion on the Transaction.[13]

Gerber complains that the Transaction was not fair to EPE and points to Section 7.6(e) of the LPA, which provides that transactions involving the sale or purchase of partnership property must be "fair and reasonable to [EPE]."[14] The $1.1 billion paid to Duncan (or his affiliates) as part of the Transaction equaled what Duncan (or his affiliates) had paid originally for Teppco GP. Duncan (or his affiliates), however, retained Teppco GP units worth in excess of $500 million. Thus, EPE bought for approximately half of what Duncan (or his affiliates) had acquired some twenty-seven months before, roughly for the same $1.1 billion figure. The Defendants observe that changes in the economic conditions might explain the valuation differences, even over a relatively short period of time.

C. *EPE's Limited Partnership Agreement*

Section 7.9(a) of the LPA provides a number of mechanisms by which the General Partner may conduct transactions involving a conflict of interest and still

[12] SAC ¶ 47. The LPA appears as Exhibit A to Defendants' Opening Brief in Support of their Motion to Dismiss the Second Amended and Supplemental Verified Complaint ("Opening Br."). The LPA is given a defined term and referred to explicitly and implicitly throughout the Complaint. SAC ¶¶ 53, 54, 64, 67. Therefore, it is "integral" to the Complaint and may be considered on a motion to dismiss under Court of Chancery Rule 12(b)(6). *See, e.g., e4e, Inc. v. Sircar*, 2003 WL 22455847, at *3 (Del. Ch. Oct. 9, 2003) (finding document "integral" to a complaint where it "was referred to extensively" and given a defined term in the complaint, and where "much of the wrongful conduct alleged . . . was taken directly from" the document).
[13] SAC ¶¶ 13, 60(b).
[14] LPA § 7.6(e).

comply with its contractually defined duties to the Partnership.[15] One such mechanism is Special Approval, or approval by a majority of EPE's Audit and Conflicts Committee (the "Conflicts Committee").[16] The Conflicts Committee is defined by the LPA as "a committee of the Board of Directors of the General Partner 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."[17] McMahen, Smith and Andress comprised the Conflicts Committee during the relevant period.[18]

The LPA purports to eliminate common law fiduciary duties and to leave the relationship among the General Partner, its affiliates, the limited partners, and the limited partnership to be governed by contractually agreed-upon standards. As Section 7.9(e) of the LPA provides:

> Except as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner and provisions of this Agreement, to the extent that they restrict or otherwise modify the duties and liabilities, including fiduciary duties, of the General Partner or any other Indemnitee otherwise existing at law or in equity, are agreed by the Partners to

[15] SAC ¶ 53.
[16] SAC ¶ 54.
[17] SAC ¶ 54; LPA Attach. I (Defined Terms) at A-2.
[18] SAC ¶ 31.

> replace such other duties and liabilities of the General Partner or such other Indemnitee.[19]

Section 7.9(a) of the LPA addresses potential conflicts of interest and how to deal with them. It provides options for resolving or excusing conflicts. A conflict of interest between the General Partner and the limited partners "shall be permitted and deemed approved by all Partners, and shall not constitute a breach of [the LPA] . . . , 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."

The LPA, at Section 7.9(b), also establishes that actions taken by the General Partner or its affiliates will be deemed taken in good faith if the persons taking the action "believe that the determination or other action is in the best interest of the Partnership."

D. *Procedural History*

On February 14, 2008, Gerber commenced this action and, on September 15, 2008, he filed his amended complaint. On September 29, 2008, the Defendants moved to dismiss Gerber's claims, and, on April 7, 2009, they submitted a brief in support of their motion. Oral argument on the Defendants' motion was scheduled for October 21, 2010, but on September 7, 2010, EPE and Enterprise Products announced a definitive agreement that would result in the Merger. Oral argument

[19] LPA § 7.9(e).

was postponed to await the Merger. The Merger was completed on November 22, 2010.

On February 8, 2011, Gerber moved for leave to amend and supplement his amended complaint. This Court granted Gerber leave to supplement in three ways: (1) to describe the Merger and the entities that emerged out of it; (2) to plead a double derivative claim on behalf of Enterprise Products; and (3) to plead direct claims on behalf of those who held limited partnership units of EPE immediately prior to the Merger. Gerber was denied leave to supplement or amend in any other way.[20]

On February 2, 2012, Gerber filed the Second Amended Complaint, which "assert[ed] two claims: the first one against all defendants, except DFI GP and DFI, for breach of fiduciary duty, and a second claim against DFI GP and DFI for aiding and abetting such breaches of fiduciary duty and acts of bad faith."[21] In turn, all of the Defendants moved to dismiss this action.

II. CONTENTIONS

The Transaction, Gerber argues, was a self-dealing one that involved EPE's purchase of Teppco GP for hundreds of millions of dollars more than its fair

[20] *Gerber v. EPE Hldgs., LLC*, 2011 WL 4538087, at *5 (Del. Ch. Sept. 29, 2011).
[21] Pl.'s Answering Br. in Opp'n to Defs.' Mot. to Dismiss the Second Am. and Suppl. Compl. ("Answering Br.") 1.

value.[22] The Second Amended Complaint asserts Gerber's grievance in two ways: as a class action with direct claims[23] and, alternatively, as a derivative and double-derivative action.[24] Count I, which is directed to all of the Defendants, except DFI and DFI GP, alleges that the Transaction was the product of breach of fiduciary duty.[25] Count II, which is directed to DFI and DFI GP, alleges the aiding and abetting the other Defendants' purported breaches of fiduciary duty and their acts of bad faith.[26]

A. *Count I: Claims Against All Defendants except DFI GP and DFI for Breach of Fiduciary Duty*

Gerber alleges that the Transaction was invalid, despite Special Approval by the Conflicts Committee under Section 7.9 of the LPA,[27] because (1) the Conflicts Committee failed to meet the independence standards provided under the LPA,[28] and (2) the Conflicts Committee failed to act in good faith in considering the Transaction on its merits.[29]

In response to the first claim—that the Conflicts Committee was not independent—the Defendants argue that the Second Amended Complaint does not allege any basis for concluding that the Conflicts Committee members were not

[22] SAC ¶ 65.
[23] SAC ¶ 2.
[24] SAC ¶ 3.
[25] SAC ¶ 66.
[26] SAC ¶¶ 69-70.
[27] SAC ¶ 53.
[28] SAC ¶¶ 54-59.
[29] SAC ¶¶ 60-61.

independent under the standards adopted by the LPA.[30] In response to the second claim—that the Conflicts Committee allegedly did not act in good faith—the Defendants argue that Gerber erroneously cites common law fiduciary duties while the LPA, instead, eliminates such duties and sets forth a contractual governance scheme.[31]

With regard to the actions of the Conflicts Committee, the Defendants emphasize the following LPA provisions: (1) Section 7.9(e) waives all duties other than those expressly provided for in the LPA;[32] (2) Section 7.9(a) allows for the use of Special Approval to immunize conflicted transactions from judicial challenge;[33] and (3) Section 7.9(b) defines "good faith" as merely requiring a subjective belief that a "determination or other action is in the best interests of the Partnership."[34]

B. *Count II: Claims Against DFI and DFI GP Holding, L.P. for Aiding and Abetting Breaches of Fiduciary Duty and Acts of Bad Faith*

Gerber claims that DFI and DFI GP knew that they were aiding and abetting the alleged breaches of fiduciary duties and acts of bad faith of the other Defendants.[35] He also argues that the Transaction could not have been effected without the participation of DFI and DFI GP, and, therefore, DFI and DFI GP are

[30] Opening Br. 32-33.
[31] Opening Br. 33.
[32] Opening Br. 35-36.
[33] Opening Br. 36.
[34] Opening Br. 43.
[35] SAC ¶ 69.

liable as aiders and abettors of any wrongdoing by the other Defendants relating to the Transaction.[36] The Defendants, on the other hand, assert that there is no underlying breach of duty.[37] They, therefore, argue that there can be no corresponding aiding and abetting claim.[38]

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[36] SAC ¶ 69.

[37] Opening Br. 44-45.

[38] The Second Amended Complaint's claims are focused. The claims against all Defendants except DFI and DFI GP are for breach of fiduciary duty, with a challenge to the selection process of the Conflicts Committee and an attack on that committee for not "conduct[ing] itself loyally, diligently and in good faith in giving 'Special Approval.'" SAC ¶ 65. Gerber calls upon the Defendants to justify the entire fairness of the Transaction. SAC ¶ 66. The claims against DFI and DFI GP may be slightly broader—they are accused of aiding and abetting not only breaches of fiduciary duty but also "acts of bad faith" attributed to the other Defendants.

The breadth of Gerber's claims grew significantly with the filing of the Answering Brief. Answering Br. 19-23. An answering brief, however, is not the ideal forum for expanding claims. *See* Ct. Ch. R. 15(aaa). It is worth noting that the Second Amended Complaint is the outgrowth of a contested motion to amend which Gerber lost in part. *See supra* note 20. Indeed, claims based on facts first presented in an answering brief may be summarily rejected. *Zucker v. Andreessen*, 2012 WL 2366448, at *2 (Del. Ch. June 21, 2012) (citing *MCG Capital Corp. v. Maginn*, 2010 WL 1782271, at *5 (Del. Ch. May 5, 2010) (Under Court of Chancery Rule 15(aaa), when a plaintiff is confronted with a motion to dismiss under Rules 12(b)(6) or 23.1, he or she must either "seek leave to amend [the] complaint or stand on [the] complaint and answer the motion to dismiss . . . . [The plaintiff] cannot supplement the complaint through [his or her] brief.") (alterations in original)); *Orman v. Cullman*, 794 A.2d 5, 28 n.59 (Del. Ch. 2002) ("Briefs relating to a motion to dismiss are not part of the record and any attempt contained within such documents to plead new facts or expand those contained in the complaint will not be considered."). Although, on a motion to dismiss, the Court generally may consider only facts pleaded in the complaint, the Court may not be similarly constrained with respect to the assertion of a new legal theory set forth in a party's brief. *See Marshall v. Penn Twp., Pa.*, 458 F. App'x 178, 180 (3d Cir. 2012) ("It is one thing to set forth theories in a brief; it is quite another to make proper allegations in a complaint. Indeed, legal theories set forth in [the Plaintiff's brief] are helpful only to the extent that they find support in the allegations set forth in the Complaint.") (internal quotations and citations omitted); *Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974) ("[A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."); *M & Z Cab Corp. v. City of Chicago*, 18 F. Supp. 2d 941, 952 (N.D. Ill. 1998) ("While plaintiffs' amended complaint does not specifically identify a violation of the takings clause, this omission is not necessarily fatal because a plaintiff can plead the right legal theory, the wrong legal theory or even no legal theory at all without impacting on the complaint's sufficiency. Rather, our focus on a motion to dismiss

III. ANALYSIS

The Court starts with the substantive question of whether the Second Amended Complaint states a viable claim for breach of fiduciary duty against all of the Defendants, except for DFI and DFI GP.

A. *Standard Under Rule 12(b)(6)*

Gerber's claims, when reviewed on a motion to dismiss brought under Court of Chancery Rule 12(b)(6), are subject to the "reasonable conceivability" standard.[39]

> When considering a defendant's motion to dismiss, a trial court should 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.[40]

Although the Court "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving

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is whether relief is possible under any set of facts that could be established consistent with the allegations.") (internal quotations and citations omitted); *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 923 (Del. Ch. 1999) ("Perhaps [the plaintiff] is not required to plead her legal theory with supporting argument, but unfortunately, a court forced to review the sufficiency of a pleading must address whether or not a legal basis for the claim in fact exists."); *Scarborough v. Mayor & Council of Town of Cheswold*, 303 A.2d 701, 708 (Del. Ch. 1973) ("But they have not articulated the legal theory upon which that allegation is based, nor have they pursued it in their briefs."). Out of an abundance of caution and, perhaps in recognition that the new claims—perhaps based on contract and especially those based on the covenant of good faith and fair dealing—may be Gerber's relatively more viable claims, the Court will nonetheless address them, although briefly.

[39] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (citation omitted).

[40] *Id.* at 536 (citation omitted).

party,'"[41] a motion to dismiss will be denied under Delaware's pleading standard as long as there is a reasonable possibility that a plaintiff could recover.[42]

B. *Whether the Conflicts Committee met the Independence Requirements set out in the LPA.*

Gerber argues that the Transaction was not properly given Special Approval because the Conflicts Committee was not independent under the standards established by the LPA.[43]

The LPA requires that the Conflicts Committee be "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 ("NYSE")."[44] Gerber relies upon the NYSE's rules and regulations.[45]

Section 303A.02 of the NYSE Listed Company Manual (the "Manual") provides a two-step test for determining the independence of directors.[46] First, a

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[41] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011) (citing *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).

[42] *See id.* ("Delaware's reasonable 'conceivability' standard asks whether there is a 'possibility' of recovery.").

[43] SAC ¶¶ 54-59.

[44] LPA Attach. 1 at A-2 (definition of Audit and Conflicts Committee).

[45] SAC ¶¶ 54-59. Gerber did not challenge other aspects of the contractual independence standard either in his Answering Brief or at oral argument.

[46] NYSE Listed Company Manual § 303A.02, *available at* http://nysemanual.nyse.com/lcm/Help/mapContent.asp?sec=lcm-sections&title=sx-ruling-nyse-policymanual_303A.02&id=chp_1_4_3_3. The May 2007 version of the Manual required listed companies to "identify which directors are independent and disclose the basis for that determination." The current version of the text requires that listed companies "comply with the disclosure requirements set forth in Item 407(a) of Regulation S-K." Item 407(a) of Regulation S-K requires, similarly, that

director only qualifies as "independent" if the board "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)."[47] Second, Section 303A.02(b) then sets out five disqualifying conditions that would preclude a director from being independent.[48]

1. The Board affirmatively determined that the members of the Conflicts Committee had no material relationship with EPE.

Gerber alleges that the Board failed to "certify the independence and financial literacy" of the Conflicts Committee.[49] Section 303A.02(a), however, only required the Board affirmatively to determine that directors on the Conflicts

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companies identify which directors are independent and disclose the basis for that determination. 17 C.F.R. § 229.407.

[47] Manual § 303A.02(a).

[48] "[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; (iv) The director or an immediate family member is, or has been with 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." Manual § 303A.02(b).

[49] SAC ¶ 66.

Committee have "no material relationship with the listed company."[50] The company must "identify which directors are independent and disclose the basis for that determination."[51] EPE stated in its February 28, 2007 10-K that it had affirmatively determined that the members of the Conflicts Committee were independent directors under the NYSE rules and disclosed the basis for that determination.[52] Therefore, the Board made the affirmative determination required by the Section 303A.02(a) standards which had been incorporated into the LPA.

2. The Second Amended Complaint failed to allege any basis for concluding that the Conflicts Committee was not independent under Section 303A.02(b).

To challenge the independence of the members of the Conflicts Committee, Gerber first alleges that McMahen, Smith, and Andress each owned units in oil and gas limited partnerships controlled by Duncan.[53] However, the Manual explicitly states that "as the concern is independence from management, the Exchange does

[50] Manual § 303A.02(a)
[51] *Id.* *See supra* note 46.
[52] Opening Br. Ex. D 105. On a motion to dismiss, the Court may take notice of SEC filings "to the extent that the facts put forth in those filings are *not* subject to reasonable dispute." *Fleischman v. Huang*, 2007 WL 2410386, at *3 (Del. Ch. Aug. 22, 2007); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (holding that a trial court may take notice of the result of a shareholder vote disclosed in a 10-Q when there are no allegations challenging the results of the vote). Here, there are no allegations challenging that the Board made the affirmative determination, in the February 28, 2007 10-K, that the members of the Conflicts Committee were independent directors under the NYSE requirements. In addition, the 10-K (Opening Br. Ex. D 106, 109-10) affirmatively states that the members of the Conflicts Committee met the standards regarding knowledge of accounting and financing.
[53] SAC ¶ 58.

not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding."[54]

Gerber then alleges that the Conflicts Committee and members of the Duncan family had common ties to certain other entities, including charitable institutions,[55] and that the members of the Conflicts Committee were all appointed by Duncan.[56] However, these types of relationships are not prohibited by Section 303A.02(b). Therefore, Gerber does not assert with reasonable conceivability that the Conflicts Committee failed to meet the LPA's standard of independence.[57]

C. *Whether Special Approval of the Transaction was Properly Granted by the Conflicts Committee*

Gerber next assails the Special Approval of the Transaction by contending that the Conflicts Committee failed to act in good faith in considering the Transaction on its merits.[58]

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[54] Manual § 303A.02(a).
[55] SAC ¶ 57(a)-(g).
[56] SAC ¶ 57.
[57] In the Answering Brief and at oral argument, Gerber seemingly no longer argues against the independence of the Conflicts Committee under the standards established in the Manual and incorporated into the LPA. Answering Br. 13-19; Oral Arg. Tr. ("Tr.") Sept. 19, 2012, at 29-30. Instead, Gerber himself admits that he has pled and argued "more in the nature of common law independence." Tr. 30. However, the common law independence standards are of little importance in the context of the LPA, because under Delaware law limited partnerships may "establish [ ] a contractual standard of review that supplants fiduciary duty analysis." *Lonergan v. EPE Hldgs., LLC*, 5 A.3d 1008, 1020 (Del. Ch. 2010).
[58] SAC ¶¶ 60-61.

1. The scope of Defendants' duties to Gerber and EPE.

When dealing with the internal affairs of a limited partnership, the reviewing court's first task is to determine what duties the defendants owe.[59] Although a general partner and its affiliates may owe fiduciary duties to a limited partnership and its limited partners,[60] a limited partnership agreement may "establish[ ] a contractual standard of review that supplants fiduciary duty analysis."[61]

The Delaware Revised Uniform Limited Partnership Act ("DRULPA") permits a limited partnership agreement to eliminate all duties, other than the implied contractual covenant of good faith and fair dealing, that a person acting under that agreement may owe to a limited partnership and its limited partners.[62] "Only 'if the partners have not expressly made provisions in their partnership agreement . . . will [a court] look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence.'"[63]

The LPA, at Section 7.9(c), provides, in pertinent part: "Except as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or

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[59] *In re K-Sea Transp. P'rs L.P. Unitholders Litig.*, 2012 WL 1142351, at *5 (Del. Ch. Apr. 4, 2012) ("[T]he Court's first task is to determine the nature of any duty that is owed under the LPA.").

[60] *Brinckerhoff v. Enbridge Energy Co.*, 2011 WL 4599654, at *7 (Del. Ch. Sept. 30, 2011); *In re USACafes, L.P. Litig.*, 600 A.2d 43, 49 (Del. Ch. 1991).

[61] *Lonergan*, 5 A.3d at 1020.

[62] 6 *Del. C.* § 17-1101(d).

[63] *In re LJM2 Co-Inv., L.P.*, 866 A.2d 762, 777 (Del. Ch. 2004) (second alteration in original) (quoting *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 817 A.2d 160, 170 (Del. 2002)).

any Limited Partner. . . ." "Indemnitee" is defined to mean, among other things, "the General Partner and any . . . Affiliate of the General Partner."[64] The definitional trail thus reaches "Affiliate" which 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. As used herein, the term "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.[65]

The Board possessed the power to direct the management of EPE Holdings. Both the literal definition of "Affiliate"[66] and consistent, past precedents interpreting substantially similar language[67] lead to the conclusion that members of the Board are Affiliates of EPE Holdings and, thus, Indemnitees under the LPA. As a result, the Defendants, other than DFI GP and DFI, may assert the protection afforded by Section 7.9(c).[68] By the plain meaning of Section 7.9(e), they owe Gerber (and EPE) only those duties "expressly set forth in" the LPA along with

[64] LPA Attach. 1 at A-4.
[65] LPA Attach. 1 at A-1.
[66] *See In re Nantucket Island Assocs. P'ship Unitholders Litig*., 810 A.2d 351, 361 (Del. Ch. 2002) (requiring limited partnership agreements to be construed literally).
[67] *See Gerber v. Enter. Prods. Hldgs., LLC*, 2012 WL 3442, at *9 (Del. Ch. Jan. 6, 2012).
[68] The definition of "Indemnitee" also includes "any Person who is or was a . . . director . . . [of] the General Partner," LPA A-4, which is a more direct basis for concluding that Section 7.9(e) applies to the Board. Other relevant provisions of the LPA, however, refer only to the General Partner and its affiliates. Concluding here that the members of the Board also are Affiliates, therefore, facilitates the analysis *infra*.

"whatever nonwaiveable default obligations the implied covenant of good faith and fair dealing imposes."[69]

2. Express duties under the LPA.

Section 7.9(b) of the LPA, which imposes a contractual duty of good faith upon the General Partner and Affiliates whenever their determinations or actions are undertaken in their capacity of general partner of the Partnership, provides in part:

> Whenever the General Partner makes a determination or takes or declines to take any other action, or any of its Affiliates causes it to do so, in its capacity as the general partner of the Partnership . . . then, unless another express standard is provided for in this Agreement, the General Partner, or such Affiliates causing it to do so, shall make such determination or take or decline to take such other action in good faith . . . .[70]

Section 7.9(a) establishes another "express standard"—a specific mechanism for resolving conflicts of interest. It provides, in pertinent part, as follows:

> Unless otherwise expressly provided in this Agreement, whenever a potential conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership or any Partner, on the other hand, any resolution or course of action by the General Partner 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 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 . . . . The General Partner shall be authorized but not

[69] *In re Encore Energy P'rs*, 2012 WL 3792997, at *8. The analysis here is guided by the approach in *Encore Energy P'rs* which involved comparable provisions.
[70] LPA § 7.9(b).

> required in connection with its resolution of such conflict of interest to seek Special Approval . . . .[71]

When a potential conflict of interest arises between the General Partner or Affiliates and the Partnership or any Partner, the LPA authorizes the General Partner to seek Special Approval.

"Special Approval" is defined by the LPA to mean "approval by a majority of the members of the [Conflicts Committee]."[72] There is no express requirement in the definition of "Special Approval" that the Conflicts Committee act in good faith.[73] Because Section 7.9(e) provides that only duties "expressly set forth in" the LPA apply, and because the definition of "Special Approval" does not reference good faith, the Conflicts Committee has no express duty to act in good faith.

Gerber may argue that Section 7.9(b) extends to the actions of the Conflicts Committee. This interpretation would arguably apply because members of the Conflicts Committee are Affiliates under the LPA, and because Special Approval causes the General Partner to take action in its capacity as general partner to the Partnership, Section 7.9(b) requires that "unless another express standard is provided for in this Agreement, the General Partner, or such Affiliates causing it to

[71] LPA § 7.9(b).
[72] LPA Attach. I at A-8.
[73] This is different from the agreement interpreted in *In re Encore Energy P'rs*, where the definition of "Special Approval" only allowed the Conflicts Committee to grant approval of a conflicted transaction if it was "in good faith."

[take action], shall make such determination or take or decline to take such other action in good faith." Even if this interpretation is correct, however, the Conflicts Committee did not violate any express duties under the Section 7.9(b) threshold of "good faith".

The LPA, at Section 7.9(b), defines "good faith":

> In order for a determination or other action to be in "good faith" for purposes of this Agreement, the Person or Persons making such determination or taking or declining to take such other action must believe that the determination or other action is in the best interests of the Partnership.[74]

Similar language has been read to establish, as a matter of contract, that "an act is in good faith if the actor *subjectively believes* that it is in the best interests of [the limited partnership]"[75] and that "to state a claim for breach of the contractually defined fiduciary duty," a complaint must allege that defendants have acted "in a manner they subjectively believed was *not* in the best interests of [the limited partnership] and its unitholders."[76] Accordingly, Gerber must allege facts from which the Court can reasonably infer that the members of the Conflicts Committee subjectively believed that they were acting against EPE's interests in granting Special Approval.[77]

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[74] LPA § 7.9(b).
[75] *In re Atlas Energy Resources, LLC*, 2010 WL 4273122, at *12 (Del. Ch. Oct. 28, 2010) (emphasis added).
[76] *Id.* at *14 (emphasis added).
[77] In *re Encore Energy P'rs*, 2012 WL 3792997, at *9.

Gerber finds bad faith in the Conflicts Committee's inadequate analysis of the Transaction and its alleged failure to act loyally and diligently when it gave Special Approval to the Transaction.[78] The LPA provides that any "course of action by the General Partner or its Affiliates in respect of such conflict of interest [*i.e.*, the Transaction] . . . shall not constitute a breach of [the LPA] . . . or of any duty stated or implied by law or equity" if there is Special Approval.[79] Thus, if the Transaction received contractually valid Special Approval, a finding that no Defendant breached the LPA would result. That brings the Court to the critical question: did the Conflicts Committee properly give its Special Approval?

Gerber alleges that the Conflicts Committee failed to:

> (a) Consult any independent financial or legal advisor; (b) Seek to obtain or obtain any fairness opinion; (c) Consider the amount of Duncan's purchase price for Teppco GP 27 months prior to the sale or consider Duncan's profit on the sale; (d) Consider that Duncan's purchase price for Teppco GP included the purchase of control of Teppco GP, while his sale to EPE allowed Duncan to maintain control; (e) Negotiate in any respect the purchase price for Teppco GP and the 4.4 million Teppco units; or (f) Consider the value of the assets to be acquired in comparison to the consideration paid by EPE.[80]

The standard prescribed by the LPA is whether the Conflicts Committee approved the Transaction with the subjective belief that it was in the best interests of EPE.

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[78] SAC ¶ 65.

[79] LPA § 7.9(a). The Conflicts Committee's conduct frames the issues to be resolved; it is not a question of whether EPE Holdings acted in bad faith when it selected Special Approval by the committee as the means for addressing the conflicts question.

[80] SAC ¶¶ 60, 65.

The proper inquiry, as a matter of contract, is not whether granting Special Approval was objectively reasonable.[81] Although the Second Amended Complaint may place the Conflicts Committee's decision in a very bad light, Gerber has not alleged facts from which one may infer that its decision was made in bad faith, *i.e.*, with the subjective belief that its approval was contrary to EPE's best interests.

What did the drafters intend when they imposed a standard tied to a director's subjective belief that an action under consideration would be in the company's best interest? Their intent is fairly obvious. With, for example, the elimination of fiduciary duties and an exculpation clause for money damages limited essentially only by bad faith, fraud, and willful misconduct,[82] restricting the opportunities of potential plaintiff limited partners seems to have been the primary objective. That goal cannot be absolutely achieved simply by imposing an almost inherently unknowable standard. No director is likely to confess—ever—that his conduct was not in the company's best interest and he knew it at the time.[83] There must be some way—especially under the light of a "reasonable conceivability"

[81] *See Atlas Energy*, 2010 WL 4273122, at *12. There is the related question of whether the discretion conferred by the LPA was exercised so unreasonably or arbitrarily that any of the Defendants breached the implied covenant of good faith and fair dealing; that will be addressed separately.

[82] *See* LPA § 7.8.

[83] There may be other more fundamental ways to allege a subjective belief. For example, if a director takes an action separate from the one under scrutiny and the two actions cannot be reconciled, then perhaps that inconsistency would be an indication of the director's subjective view.

test—for a plaintiff, who was "not there when the facts were made," to have a chance to meet the challenging liability standards established by the LPA.

The test must focus on whether the challenged conduct evidences an intent to harm the company. The knowing authorization of a payment well in excess of the value of what was acquired might be an example. It is difficult to avoid drifting toward some sort of objective good faith standard—but that is not what the agreement specifies. The answer—however unpalatable—seems to be that the subjective best interest standard approximates the obverse of the more familiar bad faith test.[84] That a director is flat-out wrong is too close to a traditional due care analysis to be what the drafters should be deemed to have intended as a matter of contract. The shortcoming with this approach—an obvious one and already identified—is that it interprets a subjective standard as based, more or less, on a traditional definition of good faith—if one views that as the opposite of bad faith—which is what the drafters sought to replace. In short, the standard written into the limited partnership agreement must be accorded some meaning, and it must be accorded a meaning that can be met with reasonable and responsible pleading efforts.

[84] *See, e.g.*, *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (bad faith shown by acts with a purpose other than advancing the best interests of the company); *In re Alloy, Inc.*, 2011 WL 4863716, at *12 (conduct inexplicable on grounds other than bad faith).

The critical set of facts alleged in the Second Amended Complaint includes the sale price of Teppco GP in 2005 and the repurchase price some twenty-seven months later in 2007, but after the "stripping" of certain assets worth almost half of the same $1.1 billion transaction price. At its core, Gerber's contention is that the exchanged enterprise could not have doubled in value during that relatively short period. One fact also stressed by Gerber is that no expert (*e.g.*, financial advisor) opinion was obtained to guide the Conflicts Committee. Expert opinion, however, is not required, and the members of the Conflicts Committee were experienced in the relevant industry.

Without more,[85] relying upon a run-up in price over a period in excess of two years does not trigger a reasonable inference as to a lack of a subjective belief that the ensuing purchase was in the Partnership's best interests. Price fluctuations—sometimes significant ones—do occur, and it is not for the Court to speculate or guess as to whether the price paid was appropriate under market conditions at the time. Even under a "reasonable conceivability" standard, the allegations of the Second Amended Complaint do not support a reasonable

[85] The words, "without more," are perhaps an all-too-convenient qualifying phrase. Gerber, however, supplied, Answering Brief 21 n.17, what, at least arguably, might have achieved his pleading objective. There, he noted that, for example, the United States natural gas well head price rose only 13.45 percent during a comparable period and the rate of the United States gross domestic product growth declined by more than thirty percent. In addition, he observed that various sources, including work by Morgan Stanley, demonstrated that at the time of the Transaction, Teppco GP was worth approximately $700 million, roughly $400 million less than the amount EPE paid to Duncan and his affiliates.

inference—not necessarily the best inference—that the Conflicts Committee members were not acting in a manner consistent with their subjective beliefs as to the Partnership's best interests.

The Conflicts Committee's actions were therefore, as a matter of contract, appropriate regardless of whether the Section 7.9(b) good faith requirement applies. The express definition of Special Approval does not include a good faith requirement, and even if Section 7.9(b) applies to Special Approval, Gerber has not alleged any facts indicating that the members of the Conflicts Committee subjectively believed that they were granting Special Approval against "the best interests of the Partnership."

Because the Transaction was granted Special Approval under the LPA, the Transaction is "deemed approved by all Partners, and shall not constitute a breach of [the LPA] . . . or of any duty stated or implied by law or equity."[86] Therefore, Defendants have satisfied their express obligations under the LPA, and Gerber has not yet stated a claim.

In sum, the LPA prescribed procedures for dealing with transactions involving conflicts of interest. In light of Duncan's holdings in the oil and gas business, conflicts likely were inevitable. The mechanism chosen was approval by a committee of independent directors of EPE's General Partner. The metric for

[86] LPA § 7.9(a).

assessing (or confirming) independence was established as a matter of contract: the standards promulgated by the NYSE. The independent directors had experience in, and knowledge about, the industry in which EPE operated. No specific steps were required of the independent directors. Thus, the procedures for each instance in which a conflict was to be reviewed were left to the discretion of those directors.

It is easy to look at the Conflicts Committee after-the-fact and contend that other steps should have been taken. That, however, is not what the LPA requires. The Conflicts Committee performed the function assigned to it. Perhaps it should not be a surprise that it blessed the partial buy-back of Teppco GP, but all that Gerber has left—in the contractual framework to which he assented—is a complaint about the price discrepancy over a span of more than two years. The period at issue—from 2005 until 2007—was one of general prosperity. Maybe this explains all of the price differential; maybe it does not. All that matters is that, given the role of the Conflicts Committee, a simple difference in price over such a period does not alone implicate any of Gerber's remaining rights under the LPA. It is not difficult to understand Gerber's skepticism and frustration, but his real problem is the contract that binds him and his fellow limited partners.

That leaves the implied covenant.

3. Duties under the implied covenant.

The Second Amended Complaint does not purport to allege a claim for breach of the implied covenant of good faith and fair dealing.[87] Gerber argues for the first time in the Answering Brief that "the act of Special Approval, taken in bad faith, violated the implied covenant of good faith and fair dealing."[88] Although, for purposes of Defendants' Motion to Dismiss, the Court may need to consider only the claims fairly asserted in the Second Amended Complaint, it, nonetheless, will briefly address Gerber's arguments based on the implied covenant.[89]

Receipt of the contractually authorized Special Approval does not necessarily immunize the actions of the Defendants because "even the most carefully drafted agreement will harbor residual nooks and crannies for the implied covenant [of good faith and fair dealing] to fill."[90] The implied covenant provides a limited gap-filling tool that allows a court to impose contractual terms to which

[87] Gerber asserts that the LPA did not delineate the standards of fiduciary conduct the Conflicts Committee must abide by in determining whether to grant Special Approval for a conflict of interest transaction. SAC ¶ 64. Gerber also has not satisfied his obligation to "allege a specific implied contractual obligation." *See JPMorgan Chase & Co. v. Am. Century Cos., Inc.*, 2012 WL 1524981, at *7 (Del. Ch. Apr. 26, 2012) (quoting *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998)).
[88] Answering Br. 23.
[89] *See supra* note 38.
[90] *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 441 (Del. Ch. July 9, 2012).

the parties would have agreed had they anticipated a situation they failed to address.[91]

> "[F]air dealing" is not akin to the fair process component of entire fairness, *i.e.*, whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care . . . . It is rather a commitment to deal "fairly" in the sense of consistently with the terms of the parties' agreement and its purpose. Likewise "good faith" does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.[92]

If a party is entitled to exercise its discretion, that discretion is subject to the implied covenant's requirement that it be exercised reasonably.[93]

> And what is arbitrary or unreasonable—or conversely reasonable—depends on the parties' original contractual obligations and reasonable expectations at the time of contracting. Fundamentally, therefore, [t]he implied covenant cannot be invoked to override the express terms of the contract.[94]

Although Defendants' discretionary use of the Special Approval implicates the implied covenant, care must be taken that it not evolve into a "free-floating

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[91] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) ("The implied covenant of good faith and fair dealing involves . . . inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated."); *Lonergan*, 5 A.3d at 1017 (the implied covenant is not "a substitute for fiduciary duty analysis").

[92] *ASB Allegiance*, 50 A.3d at 440-41.

[93] *Id.* at 441 n.2; *see also Policemen's Annuity & Benefit Fund of Chicago v. DV Realty Advisors LLC*, 2012 WL 3548206, at *12 (Del. Ch. Aug. 16, 2012) ("[W]hen a contract provides discretion to one party *and* the scope of that discretion is not specified 'the implied covenant requires that the discretion be used reasonably and in good faith.'" (emphasis added) (quoting *Airborne Health, Inc. v. Squid Soap, L.P.*, 984 A.2d 126, 146-47 (Del. Ch. 2009))).

[94] *In re Encore Energy P'rs*, 2012 WL 3792997, at *12 (quotations and citations omitted).

duty" of objective fairness, which would not be consistent with either Delaware common law or Section 7.9(e) of the LPA.[95] However, tempting it may be in a particular case, the implied covenant is not generally a placeholder to facilitate full fiduciary analysis.[96] Gerber bears the burden of showing—to the reasonable conceivability standard—how the Special Approval "frustrate[d] the fruits of the bargain that the [parties] reasonably expected."[97] That, Gerber has not done.

Gerber has offered no interpretation of the LPA that would support the inference that its drafters would have anticipated (or provided if they had thought of it) an implied condition of objectively fair value to be read into the provision governing Special Approval. For example, the LPA (1) neither requires nor prohibits the consideration of any particular factors by the Conflicts Committee in granting Special Approval;[98] (2) exculpates Defendants from monetary liability unless they "acted in bad faith or engaged in fraud, willful misconduct or, in the case of a criminal matter, acted with knowledge that the . . . conduct was criminal";[99] and (3) expressly and unambiguously waives common law fiduciary

[95] In *re Encore Energy P'rs*, 2012 WL 3792997, at *12.
[96] *Lonergan*, 5 A.3d at 1019 (quoting *Nemec*, 991 A.2d at 1128).
[97] *Nemec*, 991 A.2d at 1126.
[98] LPA Attach. I at A-8 (definition of "Special Approval"). Section 7.9(b) and Section 7.9(c) make numerous references to the concept of good faith. The suggestion that the drafters would have written a separate good faith standard for the Conflicts Committee into the definition of Special Approval, if only they had thought of it, seems unlikely.
[99] LPA § 7.8(a).

duties.[100] This contractual framework cannot be reconciled with a judicially-imposed requirement, based on the implied covenant, that a Special Approval be objectively fair and reasonable.[101]

The words of *In re Encore Energy Partners* are particularly appropriate here:

> The parties to the partnership agreement at issue here plainly intended to give the General Partner and its Affiliates maximum flexibility. Under these circumstances, an inference that the concededly modest protections afforded to Plaintiffs by the LPA frustrated their legitimate expectations would be unreasonable even on a motion to dismiss. Accordingly, in this case, there does not appear to be any reasonably conceivable set of circumstances susceptible of proof under which Plaintiffs could recover on a claim to that effect. Therefore, Plaintiffs have not stated a claim for breach of the implied covenant.[102]

Accordingly, Gerber's contentions regarding an implied covenant fail.

D. *Aiding and Abetting*

To succeed on a claim for aiding and abetting a breach of fiduciary duty, Gerber must show (i) the existence of a fiduciary relationship, (ii) an underlying breach; (iii) knowing participation by the aider and abettor in the breach; and (iv)

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[100] LPA § 7.9(e).

[101] *In re Encore Energy P'rs*, 2012 WL 3792997, at *13. Indeed, by § 7.9(a) of the LPA, a conflict of interest may be excused by Special Approval or if the course of action is "fair and reasonable to [EPE]." "Fair and reasonable" under the LPA is a separate and distinct standard. Thus, to the extent that Gerber has sought to plead a violation of § 7.6(e), that effort is negated by the Special Approval.

[102] *In re Encore Energy P'rs*, 2012 WL 3792997, at *13. With this conclusion, it is not necessary to resolve the debate over whether Gerber is asserting direct or derivative (or double-derivative) claims.

damages resulting from the breach.[103] Gerber has not stated a claim for breach of fiduciary duty. Accordingly, his claim for aiding and abetting a breach of fiduciary duty must also fail.[104]

Gerber's claims have evolved to matters of contract. Even if described with words typically associated with fiduciary duty claims, they are nonetheless grounded in contract and not common law fiduciary duty. Delaware law does not recognize a claim for aiding and abetting a breach of contract.[105] Accordingly, his claims—if they are asserted—for aiding and abetting a breach of the LPA, or a covenant implied through the LPA, must also fail.

E. *Whether Gerber's Claims are Derivative and, if so, Whether Demand is Excused*

The Court started with a substantive dispute about conflicts of interest arising under the LPA. That is the most important and far-reaching concern raised in this action. The Defendants, however, have challenged Gerber's standing to bring the claims that the Court has addressed, and standing is properly a threshold question that the Court may not avoid. If there is no standing, there is no

[103] *See Kelly v. Blum*, 2010 WL 629850, at *15 (Del. Ch. Feb. 24, 2010); *Louisiana Mun. Police Employees' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *7 n.27 (Del. Ch. July 28, 2009).

[104] *See In re Alloy, Inc.*, 2011 WL 4863716, at *14 ("As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability."); *Vichi v. Koninklijke Philips Electronics N.V.*, 2009 WL 4345724, at *21 (Del. Ch. Dec. 1, 2009) ("One cannot aid and abet a breach of fiduciary duty, however, where no duty has been breached in the first place."); *Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *8 (Del. Ch. July 23, 2010) (dismissing aiding and abetting claim because underlying breach of fiduciary duty claim had been dismissed).

[105] *Zimmerman v. Crothall*, 2012 WL 707238, at *19 (Del. Ch. Mar. 12, 2012).

justiciable substantive controversy.[106] The question of standing depends upon whether Gerber's action is derivative (or double derivative) and, if so, whether his conceded failure to make demand upon the General Partner and its board of directors may be excused because that demand would have been futile.[107] Distinctions between derivative and direct claims involving master limited partnerships—and the relatively frequent confluence of both fiduciary and contractual aspects—present interesting and difficult issues. The question of board independence under Delaware law is not an easy one in this instance, and it is made more difficult because of the stature and power fairly attributed to Duncan.[108]

By 6 *Del. C.* § 17-1003, "[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 that effort." Gerber did not make the effort. Thus, if this is only a derivative action (*i.e.*, Gerber brings no direct claims) and if Gerber lacks proper grounds for not having made the effort to

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[106] Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 9.02[c][1], at 9-128 (2012). ("[I]n a limited partnership context, it has been held that absent either a demand on the general partner to institute action or allegations in the complaint explaining with particularity why a demand was not made on the general partners, a limited partner is without standing to prosecute a derivative action on behalf of the limited partnership.").

[107] If Gerber's claims may be properly characterized as direct, all agree that he has the requisite standing.

[108] This action was filed before Duncan's death, and when the action was filed is likely the better point for assessing independence of the board directing the general partner. Even if the filing of the Second Amended Complaint is the proper time for assessing futility, it is a reasonable inference that Duncan's authority—much of which had passed on to others involved with the business—continued to have its effects.

induce the General Partner to bring an action on behalf of the Partnership, dismissal of this action must follow.

Gerber complains that EPE paid too much to Duncan's affiliates when it purchased Teppco GP. If successful, any recovery obtained by Gerber would be paid to EPE—or, MergerCo—EPE's successor after the Merger. In the analogous corporate context, classification of the alleged injury as direct or derivative depends "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)?"[109] Gerber has not identified any independent harm suffered by the limited partners. Instead, EPE suffered all the harm at issue—it paid too much.

Even if Gerber's claims could be viewed as based on the LPA, in addition to, or apart from, traditional fiduciary duties, that a claim is based on contract does not necessarily make it a direct claim. Regardless of the source of the claim—fiduciary duty or contract—the *Tooley* analysis still provides the basic analytical approach to the direct-derivative question.[110] It is, of course, possible for a claim to be both derivative and direct,[111] but, unless *Tooley* does not apply to limited

[109] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004).
[110] *See, e.g., TIFD III-X LLC v. Fruehauf Prod. Co.*, 883 A.2d 854, 859-60 (Del. Ch. 2004).
[111] *See, e.g., Brinckerhoff*, 986 A.2d at 383.

partnerships, it is difficult to see how Gerber's claims are anything other than derivative.

Applying derivative rules to partnership-related claims can be troubling. The source of the frustration may come from the impact that those rules have upon the enforcement of contractual rights, especially where, as a matter of contract, fiduciary duties have been eliminated. If the contractual rights of the limited partners are "independent" of the partnership's rights, then the claims will be considered direct.[112] In this case, however, there is no separation; the effect of EPE's payment of too much was immediately and discretely upon EPE. Also, if the partnership is in liquidation—and not surviving in a post-merger form as EPE is here—the reason for a derivative action's demand requirement is difficult to justify.[113] There are exceptions to the rules defining derivative claims, but Gerber has not put forward an applicable exception. The policy arguments in favor of allowing direct actions in the partnership context—especially when based on contract—are persuasive, but the direct-derivative split is a fundamental part of our law, and it is not for a trial court to overlook established principles.[114]

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[112] *See Anglo Am. Sec. Fund, LP v. S.R. Global Int'l Fund, LP*, 829 A.2d 143, 150 (Del. Ch. 2003).

[113] *See, e.g.*, *Cencom Cable Income P'rs LP Litig.*, 2000 WL 130629, at *3 (Del. Ch. Jan. 27, 2000).

[114] *See Schultz v. Ginsburg*, 965 A.2d 661, 668 (Del. 2009) (direct claim based on certificate of incorporation for damage done to the shares as distinct from damage done to the entity).

Gerber was required either to "secure initiation of the action by a general partner" or to provide "the reasons for not making that effort."[115] Enterprise Products GP was the general partner when the Second Amended Complaint was filed. Enterprise Products GP is governed by a board of directors; Defendants argue that a majority of the board was independent, disinterested, and, thus, capable of deciding of whether to pursue an action. Gerber questions the independence of Enterprise Products GP's board, but he also doubts the need to assess the independence of the members. He argues, instead, that the Court should look to Enterprise Products GP and the Duncan entities' control and domination of it.[116] The action that Gerber would have sought, had he made demand, would have been directed at Duncan's entities. Thus, Gerber contends that Enterprise Products GP, as an entity controlled by Duncan's interests, could not have independently and fairly assessed whether to pursue an action.

An entity, such as Enterprise Products GP, can only make decisions or take actions through the individuals who govern or manage it. In this case, Enterprise Products GP is managed by its board of directors. However, the DRULPA refers to the general partner and not specifically to the general partner's governing body. This Court has considered the statutory text and the policies behind it and

[115] 6 *Del. C.* § 17-1003.
[116] EPE Holdings was the general partner of EPE when this action was first brought. It also was fully controlled by Duncan or his affiliates.

addressed the question of whether the independence of the governing board or of the corporate (or entity) general partner must be assessed.

> . . . I reject the argument that a limited partner challenging a corporate general partner's acts must make presuit demand to the corporate general partner's board of directors. Although the presence of a majority of interested directors within a corporate general partner might be one way of demonstrating demand futility as to the corporate general partners, there is nothing in DRULPA that even hints at [Defendants'] proposition that [Nominal Defendant's] board of directors is the organizational subcomponent to which [Plaintiff's] demand should be made. Limited partnership cases dealing with demand against a corporate general partner discussed demand in relation to the corporation itself, not its internal decisionmaking apparatus.[117]

Thus, an independent board directing the affairs of Enterprise Products GP would not, for these purposes, overcome the consequences to the general partner entity of domination and control by Duncan's interests.[118] Demand is, therefore, excused,

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[117] *Gotham P'rs, LP v. Hallwood Realty P'rs, LP*, 1998 WL 832631, at *5 (Del. Ch. Nov. 10, 1998) (footnotes omitted). Whether the general partner is a limited liability company, such as Enterprise Products GP, or a corporation would not seem to impact the analysis.

[118] This is not an instance in which it does not matter whether one considers the general partner's governing board or the interests of the parties that own and control the general partner. *See, e.g.*, *Brinckerhoff v. Enbridge Energy Co., Inc.*, 2011 WL 4599654, at *7 (Del. Ch. Sept. 30, 2011). Briefly, the board of Enterprise Products GP consisted of thirteen directors. Although Gerber argues for fourteen directors, one, whose status as a director is questioned, was only an "honorary" director. Six of the directors were conflicted; three were trustees of Duncan's estate; and three were employees of Enterprise Products GP. The seven remaining directors have close personal and long-term business relationships with Duncan and his entities. Perhaps those relationships cause apprehension that there might be other facts that, if alleged with particularity, would create doubt about those directors' independence. Gerber's allegations, as a general matter, suffer because they were not pled with the particularity necessary to rebut the presumption that a director is disinterested and independent. For example, two of the directors were lawyers who provided legal services to Duncan or his entities, but no information is provided with respect to whether those services and the income generated from those services were material to the two directors or their firms.

and dismissal of this action, because of Gerber's failure to make demand upon Enterprise Products GP, is not required.[119]

IV. CONCLUSION

As set forth above, the Conflicts Committee satisfied its express and implied duties when it gave the Transaction its Special Approval. Section 7.9(a) protects the Defendants, other than DFI and DFI GP, from the claims that Gerber has sought to assert against them for breach of the LPA or of any duty stated or implied by law or equity. This outcome is consistent with the policy of DRULPA "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."[120] Similarly, no claim has been stated against DFI or DFI GP. Therefore, Defendants' motion to dismiss is granted.

An implementing order will be entered.

[119] If the issue of demand excusal should have been assessed when EPE Holdings was the general partner, the result would not have changed because Duncan, or his entities, were fully in control.

[120] 6 *Del. C.* § 17-1101(c).