

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

HITE HEDGE LP, HITE MLP LP, and )  
SEALEDGE PARTNERS, LLC, )

Plaintiffs, )

v. ) *Civil Action No. 7117-VCG*

EL PASO CORPORATION, JUAN )  
CARLOS BRANIFF, DAVID W. )  
CRANE, DOUGLAS L. FOSHEE, )  
ROBERT W. GOLDMAN, ANTHONY )  
W. HALL, JR., THOMAS R. HICKS, )  
FERRELL P. McCLEAN, TIMOTHY J. )  
PROBER, STEVEN J. SHAPIRO, J. )  
MICHAEL TALBERT, ROBERT F. )  
VAGT, and JOHN L. WHITMIRE, )

Defendants, )

and )

EL PASO PIPELINE PARTNERS, L.P., )  
and EL PASO PIPELINE GP )  
COMPANY, LLC, )

Nominal Defendants. )

**MEMORANDUM OPINION**

Date Submitted: August 30, 2012

Date Decided: October 9, 2012

David A. Jenkins and Stephanie S. Habelow, of SMITH, KATZENSTEIN JENKINS LLP, Wilmington, Delaware; OF COUNSEL: Ira M. Press and Sarah G. Lopez, of KIRBY McINERNEY LLP, New York, New York; Richard L. Stone, Palm Beach, Florida, Attorneys for Plaintiffs.

Donald J. Wolfe, Jr., T. Brad Davey, Jordan Adam Braunsberg, and David B. DiDonato, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, Attorneys for El Paso Corporation, Juan Carlos Braniff, David W. Crane, Douglas L. Foshee, Robert W. Goldman, Anthony W. Hall, Jr., Thomas R. Hix, Ferrell P. McClean, Timothy J. Probert, Steven J. Shapiro, J. Michael Talbert, Robert F. Vagt and John L. Whitmire.

GLASSCOCK, Vice Chancellor

This matter is before me on a Motion to Dismiss. It involves a limited partner, also a controller of the general partner, which owned certain assets, upon purchase of which the partnership relies for its business growth. This controlling partner has, through a merger, effectively sold these assets to a third party. As a result, the assets will be unavailable for further transfer to the partnership. Other limited partners have sued the controlling partner alleging that it has breached fiduciary duties owed to the limited partners by taking an action, the merger, which has harmed the partnership. As evidence of harm, the limited partners point to a drop in the trading price of partnership units contemporaneous with the announcement of the merger. If these allegations are true, is the controlling partner liable?

Under the circumstances here, which include an explicit waiver of any fiduciary duties owed by the controlling and general partners to the limited partners, a partnership agreement that allows the controlling partner to engage in business activities “to the exclusion of the [p]artnership,”<sup>1</sup> and a prospectus that declares that the controlling partner has no contractual duty to sell any assets to the partnership, I find that the Plaintiff limited partners have failed to state a viable claim for relief.

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<sup>1</sup> First Am. Rest. Agreement of Ltd. P’ship § 7.5(c)(ii) (“LPA”).

## I. BACKGROUND

The facts below are taken from the Amended Verified Class Action and Derivative Complaint.

### A. Parties

Plaintiffs HITE Hedge LP, HITE MLP LP, and Sealedge Partners, LLC, are common unitholders of El Paso Pipeline Partners, L.P. (“EPB”), a master limited partnership (“MLP”). Limited-partnership interests in an MLP are publicly-traded “units,” and EPB’s owners are known as “unitholders.”<sup>2</sup> The Plaintiffs bring this class action and derivative complaint on behalf of themselves and all other similarly situated common unitholders.

Nominal Defendant EPB is a Delaware MLP formed in 2007 by El Paso Corporation (“El Paso”) for the purpose of owning and operating natural gas transportation pipelines, storage, and related assets.<sup>3</sup> Defendants Juan Carlos Braniff, David W. Crane, Douglas L. Foshee, Robert W. Goldman, Anthony W. Hall, Jr., Thomas R. Hix, Ferrell F. McClean, Timothy J. Prober, Steven J. Shapiro, J. Michael Talbert, Robert F. Vagt, and John L. Whitmire are members of El Paso’s Board of Directors (collectively, the “Individual Defendants”).<sup>4</sup>

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<sup>2</sup> See John Goodgame, *Master Limited Partnership Governance*, 60 Bus. Law. 471, 471 (2005).

<sup>3</sup> Am. Verified Class Action & Derivative Compl. ¶ 1 (hereinafter “Compl.”).

<sup>4</sup> Compl. ¶¶ 19–30.

## *B. EPB and the Business of Master Limited Partnerships*

Like traditional limited partnerships, MLPs have limited partners, “unitholders,” who provide capital, and a general partner, who manages the partnership’s affairs.<sup>5</sup> MLPs are distinct from traditional limited partnerships in that they are publicly traded.<sup>6</sup> U.S. law limits the application of MLP status to enterprises engaging in certain businesses.<sup>7</sup> Most MLPs engage in the transportation and storage of natural resources such as petroleum products and natural gas.<sup>8</sup>

An historic growth strategy for MLPs has been the acquisition of new energy assets through “drop down” transactions from a parent or affiliated company.<sup>9</sup> “Drop downs” are the sale, often at favorable prices, of pipeline and related assets from a sponsor or parent company to an affiliated MLP.<sup>10</sup> Dropping down assets to an MLP allows the parent company to raise immediate capital and gain tax advantages due to the pass-through tax treatment of the partnership.<sup>11</sup> Limited partners—unitholders in the MLP—receive a return through periodic

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<sup>5</sup> EPB’s ownership consists of the following: “common units representing limited partner interests in EPB . . . , Class B units representing limited partner interests in EPB . . . , subordinated units representing limited partner interests in EPB . . . , incentive distribution rights of EPB . . . , and general partner units in EPB . . . .” Compl. ¶ 57 (quoting the Agreement and Plan of Merger).

<sup>6</sup> *Id.* ¶ 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ¶ 3.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* ¶ 4.

distributions that are a function of the operations of the pipelines and other assets owned by the MLP.

EPB followed this business model as El Paso's MLP. As stated in the prospectus for the public offering of EPB and other related documents, the main business objectives for the formation of EPB was to acquire assets through drop downs from El Paso.<sup>12</sup> Thus, EPB's business growth was dependent upon continued drop downs from El Paso of pipeline and related assets.<sup>13</sup> Although EPB's revenue stream would continue in the absence of additional drop downs, its revenue and distributions to investors would not increase.<sup>14</sup> As the prospectus and the EPB's limited partnership agreement ("LPA") clearly indicate, however, El Paso has no legal obligation to continue the drop downs.<sup>15</sup>

### *C. The Kinder Morgan Merger*

On or about October 16, 2011, El Paso and Kinder Morgan, Inc. ("Kinder Morgan") announced an agreement and plan of merger.<sup>16</sup> Under this plan, Kinder Morgan merged with El Paso, leaving Kinder Morgan as the surviving entity ("New Kinder Morgan"). The merger price represented a substantial premium

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> El Paso Pipeline P'rs, L.P. Prospectus (Form 424B4) 4, 31-33, 35, 37 (Nov. 16, 2007) ("El Paso is under no obligation to make acquisition opportunities available to us."); LPA § 7.5(a)-(c) (allowing the controlling partner to engage in activities to the exclusion of the partnership and disclaiming the corporate opportunity doctrine).

<sup>16</sup> Compl. ¶ 5.

over the market price of El Paso's shares,<sup>17</sup> making the deal attractive to El Paso stockholders.<sup>18</sup> The deal was not good news, however, for EPB unitholders. Kinder Morgan possesses its own MLP, Kinder Morgan Partners, L.P. ("KMP").<sup>19</sup> At the time of the merger, El Paso indicated its expectation that, over the next several years, KMP would purchase a significant portion of New Kinder Morgan's pipeline assets.<sup>20</sup> In other words, drop downs that would have previously been offered to EPB will now be sold to KMP, instead.

By the close of trading on December 5, 2011, the market price of EPB units had declined by more than 15% since trading commenced after the announcement of the merger.<sup>21</sup> The Plaintiffs contend that this drop in market value reflects the decreased likelihood of future drop downs from New Kinder Morgan to EPB.

#### *D. Procedural History*

The Plaintiffs filed this claim asserting a direct claim for breach of fiduciary duty against El Paso, alleging that El Paso breached its duties as the controlling unitholder of EPB. The Plaintiffs allege, and I accept for purposes of this Motion, that as a result of this merger, New Kinder Morgan will cease or significantly curtail drop-downs to EPB, opting instead to transact with its own MLP.

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<sup>17</sup> The premium was 37% higher than the closing price of El Paso common stock on the previous trading date. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* ¶ 7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* ¶ 10. The decline in stock price represents an overall market loss to all EPB common unitholders of over \$1.125 billion. *Id.*

Essentially, the Plaintiffs argue that El Paso, as a controller of EPB, had a duty to represent, or at least account for, the interests of EPB's minority unitholders in its merger negotiations with Kinder Morgan. The Plaintiffs contend that in agreeing to a merger that will likely result in reduced drop downs to EPB, El Paso has extracted value from EPB at the expense of the minority unitholders and for its own benefit, namely, increased merger consideration. El Paso has moved to dismiss the Complaint.

#### Motion to Dismiss Standard

The path to dismissal is well-worn. In evaluating a motion to dismiss under Court of Chancery Rule 12(b)(6), this Court accepts as true all well-pleaded allegations in the complaint, accepts as "well-pleaded" even vague allegations so long as they put the defendant on notice of the claim, draws all reasonable inferences in the plaintiff's favor, and grants the motion only if the plaintiff would not be entitled to relief under any reasonably conceivable set of circumstances.<sup>22</sup>

#### Analysis

As a preliminary matter, I assume for purposes of this Motion, without deciding, that El Paso is a controller of EPB. Despite this assumption, I find multiple independent grounds for granting El Paso's Motion to Dismiss.

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<sup>22</sup> *Israel Discount Bank of N.Y. v. First State Depository Co., LLC*, 2012 WL 4459802, at \*10 (Del. Ch. Sept. 27, 2012).



First, the Partnership Agreement, in plain and unambiguous terms, expressly eliminates any fiduciary duties owed by El Paso to EPB's minority unitholders.<sup>23</sup>

The Delaware Revised Uniform Limited Partnership Act, DRULPA, permits the elimination of fiduciary duties by contract where the intent to do so is explicit.<sup>24</sup>

Section 7.9(e) of the Partnership Agreement does so, and the language is explicit:

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* or Assignee and the provisions of this Agreement, to the extent that they restrict, eliminate 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 replace such other duties and liabilities of the General Partner or such other Indemnitee.<sup>25</sup>

"Indemnitee" is a defined term and expressly extends to affiliates of the General Partner, which includes El Paso.<sup>26</sup>

The Plaintiffs' response to this seemingly insurmountable language is that while the Partnership Agreement modifies or eliminates fiduciary duties owed to EPB, it does not curtail those owed to minority unitholders by the controlling unitholder, El Paso, which are grounded in common law. This argument finds no support in the plain language of Section 7.9(e), which provides that an Indemnitee shall have no fiduciary duties to "any Limited Partner," and that the only duties

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<sup>23</sup> LPA § 7.5(a)-(c).

<sup>24</sup> See 6 Del C. § 17-1101(d).

<sup>25</sup> LPA § 7.9 (emphasis added).

<sup>26</sup> LPA § 1.1.

owed are those created by the Agreement itself.<sup>27</sup> The Plaintiffs have not alleged that El Paso has breached a contractual provision. Therefore, the Plaintiffs have failed to state a claim for breach of fiduciary duty.

For the purposes of this Motion to Dismiss, it is sufficient that I find that the Partnership Agreement eliminates any fiduciary duties El Paso might otherwise owe to the limited partners, the minority unitholders, whose remedies, if any, are reliant on the Partnership Agreement, not the common law. For the sake of completeness, however, I address additional grounds that support granting the Motion to Dismiss. First, a controller cannot be liable for breaching fiduciary duties owed to minority holders unless it uses its control to direct the actions of the entity it controls against the interests of that minority.<sup>28</sup> That is the key premise of controller liability. The Plaintiffs do not allege that El Paso used its control over EPB to harm the minority unitholders. Nor do the Plaintiffs allege that El Paso controlled the General Partner in a way that resulted in the approval of the Kinder Morgan merger. Rather, the Plaintiffs argue that El Paso was bound as a controller

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<sup>27</sup> LPA § 7.9.

<sup>28</sup> See *Shandler v. DLJ Merchant Banking, Inc.*, 2010 WL 2929654, at \*16 (Del. Ch. July 26, 2010) (“[T]he premise of controlling stockholder fiduciary responsibility is to hold the controller liable for actions it causes using its control of the company’s board . . . .”); *Cinerama, Inc. v. Technicolor, Inc.*, 1991 WL 111134, at \*19 (Del. Ch. June 24, 1991) (“[W]hen a shareholder, who achieves power through the ownership of stock, exercises that power by directing the actions of the corporation, he assumes the duties of care and loyalty of a director of the corporation. When, on the other hand, a majority shareholder takes no such action, generally no special duty will be imposed.”), *aff’d in part, rev’d on other grounds sub nom. Cede & Co. v. Technicolor Inc.*, 634 A.2d 345 (Del. 1993).

by fiduciary duties that prevented it from entering a merger transaction—in which EPB and the minority unitholders had no involvement—that might work a disadvantage to the minority holders. This argument finds no support under Delaware law and is directly contradicted by the Partnership Agreement itself, which expressly permits El Paso to *compete* with EPB and disclaims liability under the corporate opportunity doctrine.<sup>29</sup>

I note that the harm alleged here—New Kinder Morgan’s withholding of drop downs from EPB—is completely divorced from El Paso’s role as controlling partner; the alleged harm derives solely from El Paso’s control, not over the Partnership, but over its own assets. In other words, El Paso has the same ability to determine whether it drops down its assets regardless of whether or not it controls the General Partner. The harm here results from El Paso’s entry into a transaction that makes the drop down of its assets less likely. That transaction simply does not involve El Paso’s duties as a controller.

Moreover, even if El Paso had acted as a controller, it has not “extracted value” from the Partnership or the minority unitholders, as the Plaintiffs contend.<sup>30</sup> A predicate of the Plaintiffs’ purported right against this “extraction” is the right to the continuance of the drop-down transactions. Nothing in the Partnership Agreement grants the Plaintiffs or the minority holders this right. In fact, the

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<sup>29</sup> See LPA § 7.5(a)–(b).

<sup>30</sup> Pl.’s Ans. Br. Opp’n Def.’s Mot. Dismiss 12-14.

Prospectus itself, although stating that EPB relies on drop-down transactions from El Paso for growth, expressly informs investors that El Paso has *no obligation* to continue the drop-down transactions. At most, there has been a withholding of transactions to which EPB had no legal right, and thus no “extraction” has taken place.

### Conclusion

For the foregoing reasons, the Defendants Motion to Dismiss is granted. The Defendant should provide a form of order implementing this ruling.