EFiled: Apr 22 2014 06:58PM EDT
Transaction ID 55333755
Case No. 9318-VCN

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

IN RE KINDER MORGAN ENERGY PARTNERS, L.P. DERIVATIVE LITIGATION	)))	CONSOLIDATED CASE No. 9318-VCN

LEAD PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS KINDER MORGAN, INC., KINDER MORGAN G.P., INC. AND KINDER MORGAN ENERGY PARTNERS, L.P.'S MOTION TO DISMISS

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Mark Lebovitch
Katherine M. Sinderson
Adam Hollander
1285 Avenue of the Americas
New York, NY 10019
(212) 554-1400

GRANT & EISENHOFER P.A.
Stuart M. Grant (DE Bar 2526)
Geoffrey C. Jarvis (DE Bar 4064)
David M. Haendler (DE Bar 5899)
123 Justison Street
Wilmington, DE 19801
(302) 622-7000

Co-Lead Counsel for Plaintiffs

April 22, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This case arises from a conflict of interest between the Limited Partners ("LPs") of Kinder Morgan Energy Partners L.P. ("KMP" or the "Partnership") and Kinder Morgan Inc. ("KMI"), which acts as KMP's general partner through its 100% ownership of Kinder Morgan G.P., Inc. ("KMGP"). KMI has three separate interests in KMP that are relevant to this litigation – (i) a 2% general partner interest; (ii) an 11% limited partnership interest; and (iii) Incentive Distribution Rights ("IDRs"), a unique contractual entitlement to receive 50% of KMP's marginal distributions over a set threshold. IDR payments have accounted for the vast majority of KMI's billions of dollars in annual revenue over the past several years, greatly outweighing its general partner and LP interests.

The amount of quarterly distributions that KMP makes is dictated largely by whether its capital expenditures are classified as Maintenance Capital Expenditures ("Maintenance Capex") or Expansion Capital Expenditures ("Expansion Capex"). Each dollar that is classified as Maintenance Capex reduces the amount that is available for distribution to the general partner (KMI), and the LPs. In theory, Expansion Capex is supposed to increase future capacity and earnings, and thus can be funded through issuances of new LP units or debt. Maintenance Capex, on the other hand, represents the expenses of simply maintaining existing capacity, and therefore should generally be funded from operating revenues. Because KMI takes more than 50% of every dollar that is distributed through its IDRs and LP units, but the LPs ultimately bear 100% of the burden that arises from KMP issuing new LP units and debt, KMI has a strong incentive to misclassify Maintenance Capex expenses as Expansion Capex, reap the benefits of the increased distributions, and then take KMP back to the capital or debt markets just so it will have enough funds to pay for routine maintenance.

Recognizing the conflict that this presents, the Third Amended and Restated Agreement of Limited Partnership of Kinder Morgan Energy Partners, L.P. (the "Partnership Agreement") requires that KMGP calculate KMP's Maintenance Capex in "good faith." The Complaint details damning evidence that, for years, in violation of the requirements of the Partnership Agreement and their fiduciary duties, KMGP and KMI have acted in their own self-interests and manipulated KMP's Maintenance Capex to maximize their own payouts, to the detriment of the LPs.

As set forth below, KMI's and KMGP's breaches of contractual and fiduciary duties enrich KMI at the expense of the LPs via a quarterly transfer of wealth. Specifically, KMI's practice of improperly characterizing cash flow so it can be funneled out of KMP's coffers as distributions forces KMP's LPs to fund both its expansion and its maintenance spending, constantly looking to the capital markets to issue new debt and equity. By systemically understating KMP's maintenance expenses, KMI dilutes the interests of the LPs, who bear almost the entire burden for the Partnership's expansion and accrued debt (because these costs do not lower KMI's IDR payments), but receive only a fraction of the resulting distributions (of which KMI keeps almost 50%). Indeed, KMI's accounting machinations have meant that, quarter after quarter, hundreds of millions of dollars exit KMP and are thereafter not available for needed maintenance or other operational expenses.

KMP's over-reliance on the capital markets significantly increases the Partnership's debt burden and impermissibly magnifies the risk that additional investment in KMP will dry up suddenly, forcing KMP to cut distributions to the bone. Indeed, on February 10, 2014, ***just a few days after Plaintiff filed his Complaint***, a similar limited partnership, Boardwalk Pipeline Partners L.P. ("Boardwalk"), slashed its quarterly distributions by 80%, leaving investors reeling and causing widespread speculation that other MLPs were similarly vulnerable. The price of Boardwalk limited partnership units plummeted by 36% upon this announcement. *See* Ben Levisohn, *Boardwalk Pipeline Partners Springs a Leak*, DOW JONES FACTIVA, Feb. 10, 2014 (attached to Declaration of David M. Haendler as Exhibit A). A core purpose of this litigation and Plaintiff's requested relief is to address the significant problems at KMP *before* KMI's IDR-driven "gravy train" falls off the cliff, causing KMP's limited partnership units to crash in value as Boardwalk's did.

Rather than challenge Plaintiff's liability allegations, Defendants' only response to the detailed allegations of the Complaint is to contest Plaintiff's standing to bring these claims, asserting that Plaintiff was required to make a demand on a subcommittee of the board of KMGP before filing suit. In pressing this argument, Defendants ask this Court to reverse its own well-settled precedent.

Defendants' challenges to Plaintiff's standing should be summarily rejected. ***First***, the Complaint's allegations are, in significant part, direct claims on behalf of Plaintiff and other KMP LPs. The direct nature of these allegations is based upon the fact that by issuing additional LP units so as to make distributions, Defendants disproportionately harm KMP's LPs while steadily ***increasing*** the quarterly benefits to KMI and KMGP, such that a portion of the public LPs' interests in KMP is effectively extracted and redistributed to KMI. While Defendants contend that KMI's modest LP interest places it at the same risk of harm as KMP's LPs, the revenue KMI receives from its IDRs far exceeds any revenue KMI receives from its LP interest, putting KMI in a fundamentally different position than Plaintiff and the other LPs.

Second, even as to the Complaint's derivative claims, demand is excused under established Delaware law. Indeed, Defendants ***concede*** that their only hope for dismissal lies in asking this Court to reverse its own prior caselaw as "incorrectly decided." Specifically, Defendants acknowledge that if demand must be made only on KMP's general partner, KMGP, and not on a subcommittee of KMGP's board of directors, then demand is excused due to KMGP's undisputed conflict of interest.

In applying the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), 6 Del. C. § 17-1001, then-Vice Chancellor Steele and this Court have both expressly (and correctly) "reject[ed] the argument that a limited partner challenging a corporate general partner's act must make presuit demand to the corporate general partner's board of directors." *Gerber v. EPE Holdings, LLC*, 2013 WL 209658, at *13 (Del. Ch. Jan. 18, 2013) (quoting *Gotham P'rs. L.P. v. Hallwood Realty P'rs., L.P.*, 1998 WL 832631, at *5 (Del. Ch. Nov. 10, 1998)). Defendants have provided no grounds to distinguish this case from *Gerber* or *Gotham*, or for this Court to conclude that those decisions were "incorrectly decided." No such grounds exist. Defendants do not dispute – nor could they – that the general partner itself, on the unique facts of this case, is conflicted and demand is excused.

Accordingly, Defendants' motion to dismiss should be denied.

II. FACTS

1. Background On KMP

KMP is one of the nation's leading pipeline transportation and energy storage companies. KMP is organized as a master limited partnership and relies entirely on KMI for management of the Partnership's assets. ¶¶18, 24-26. Specifically, KMI wholly owns and controls KMGP, which acts as General Partner to KMP. ¶¶16-17. KMI alone determines the makeup and structure of KMGP's Board of Directors. *Id.* KMI was founded by Chairman and Chief Executive Richard D. Kinder, who also acts as Director, Chairman, and Chief Executive Officer of KMGP and KMI. ¶18.

KMI (through KMGP) determines the amounts of KMP's quarterly distributions to its Limited Partners, and to KMI itself. KMI's principal source of revenue comes through its ownership of Incentive Distribution Rights (defined above as "IDRs"). ¶¶40-45. Notably, at the level at which KMP has consistently issued its distributions over the past several years, KMI receives 50% of every dollar authorized as a distribution in the form of IDR payments. ¶¶2, 6, 40-45. As a result of its IDRs and other rights to distributions, KMI is among the most highly compensated MLP general partners in the nation, receiving billions of dollars annually from KMP. ¶2. Indeed, over the past six years, KMI has received over $7 billion in distributions, including over $3.2 billion just since 2010. *Id.*

KMP's distributions are based upon a non-GAAP metric called Distributable Cash Flow, which consists of KMP's "earnings before depreciation and amortization ('EBDA') minus [Maintenance Capex]." ¶¶5, 27, 28. Under this formula, for every dollar allocated to Maintenance Capex, one fewer dollar is available for distributions and IDR payments. Accordingly, KMP's distributions and IDR payments to KMI are largely dictated by whether KMI allocates KMP's capital expenditures as Maintenance Capex – expenses that serve to maintain KMP's assets and throughput – or as Expansion Capex – expenses that serve to increase KMP's capacity and potential earnings. ¶29. Since Maintenance Capex represents a dollar-for-dollar reduction in distributions, KMI effectively absorbs 50% of the cost of maintenance. On the other hand, because Expansion Capex spending is supposed to be accretive and therefore ostensibly increases future capacity and earnings, Expansion Capex does not lower distributions or IDR payments and these expenses are effectively borne solely by KMP's LPs.

This structure creates a significant conflict of interest for KMI. KMI can increase its IDR payments by either under-funding KMP's Maintenance Capex or by simply labeling all capital expenditures as Expansion Capex whether or not they actually expand future capacity and earnings. Pursuant to a distribution waterfall schedule set forth in the Partnership Agreement, KMI receives an increasingly higher percentage of KMP's incremental cash flow once the payout on the common units reaches certain predetermined targets. ¶40. Based on the Partnership Agreement, KMI is entitled to 50% of KMP's incremental distributions for every penny distributed over $0.235 per unit quarterly. *Id*. While KMI also owns 11% of KMP's LP units, KMI's economic interest in its IDR payments greatly exceeds its economic interest in its LP units. From 2010-12 KMI received $2.87 billion in IDR payments and $417 million in LP distributions, such that KMI's IDRs produced almost seven times more income than its LP interest. ¶45.

2. KMI Misallocates KMP's Capital Expenditures In Order To Maximize Its Own Profits

The Partnership Agreement recognizes that the incentive to classify capital expenditures as Expansion Capex rather than Maintenance Capex gives rise to a conflict of interest on the part of KMI, and expressly protects the LPs from this conflict by mandating that KMI allocate KMP's capital expenditures between these categories in "good faith." ¶¶33-36; 37. In breach of its contractual and fiduciary obligations, KMI has consistently and massively over-allocated KMP's capital expenditures as Expansion Capex – thereby ensuring outsized distributions to KMI.

First, there is significant evidence that when KMI replaces old pipelines – normally a maintenance expenditure aimed at sustaining production – KMI marginally expands the potential output of the new pipeline even if there is no legitimate business reason to do so and then accounts for the entire cost of the replacement pipeline as Expansion Capex. The Complaint details several capital projects where KMI replaced pipelines with slightly larger pipes, at a total cost of several hundred million dollars. ¶¶53-58. Under the "good faith" requirement of the Partnership Agreement, KMI should have allocated such capital expenditures between Maintenance and Expansion Capex to reflect the amount of expenditures that simply maintained the capacity of the previous pipelines. ¶¶7, 51. Instead, KMI allocated 100% of the costs to Expansion Capex. ¶¶53-58.

While KMI allocated all of these capital expenditures as Expansion Capex, the "throughput" for these pipelines (or the amount of product routed through KMP's pipelines) was actually <u>lower</u> after the pipeline expansions than it was before the expansions. ¶57. Indeed, notwithstanding that KMP has allocated 86% of its total capital spending to Expansion Capex (for purported "growth" investments), KMP's overall actual throughput has remained flat or <u>declined</u> over the past four years. ¶58.

Second, KMP's Maintenance Capex falls far short of KMP's reported "depreciation, depletion and amortization" ("DD&A") costs. ¶¶59-72. DD&A costs reflect the anticipated expense of maintaining an asset. ¶59. Accordingly, Maintenance Capex should roughly approximate KMP's DD&A costs. *Id*. KMP's Maintenance Capex, however, totaled a mere ***20%*** of KMP's DD&A charges during the Class Period. ¶60. Indeed, KMP's Maintenance Capex as a percentage of its DD&A charges is dramatically lower than its closest industry equivalents. ¶¶60, 66-69. For example, when KMI acquired another company and folded its assets into KMP, the acquired company's ratio of Maintenance Capex to DD&A plummeted from 120% (before the acquisition) to just 23% (after KMI took control). ¶¶61-64.

KMP's Maintenance Capex also dramatically lags that of industry peers that, by virtue of their corporate structure, were until recently more highly regulated than KMP and thus reported capitalization expenses pursuant to objective reporting criteria and with greater granularity and transparency. ¶66-69. One such peer is Spectra Energy Partners ("Spectra"), which analysts have described as KMP's "closest peer" in assets, growth goals, and general partnership structure. ¶68. For 2012, Spectra's Maintenance Capex was 68% of its DD&A charges, far exceeding KMP's 23% figure. ¶69.

It is apparent why KMI refuses to follow the model of its industry peers and increase KMP's Maintenance Capex to levels approximating KMP's DD&A expenses. If KMI did so, the ***majority*** of the Company's total capital expenditures would be allocated to Maintenance Capex rather than to Expansion Capex. ¶70. Increasing KMP's Maintenance Capex to equal its DD&A would have dramatically reduced KMP's Distributable Cash Flow ("DCF") between 2010-2012 by, on average, 55-65%. ¶71. Such a dramatically reduced DCF (based on accurate Maintenance Capex figures) would drastically cut KMI's IDR payments. ¶72. If, for example, KMI issued distributions at the same rate of DCF as it has in recent years, KMI would have been forced to cut its own IDR payments by ***more than 70%*** in 2010, by 55% in 2011, and by nearly 50% in 2012. ¶¶71-72. In total, KMI's IDR payments over the course of those three years would have been cut by nearly <u>$2 billion</u>, or over 57%. *Id*.

3. KMI's And KMGP's Conduct Causes Ongoing Harm To The Class And To KMP

Of each dollar improperly paid as a distribution, roughly 50 cents goes to KMI, principally in the form of IDRs. In turn, LPs disproportionately bear the ongoing cost of maintaining and growing KMP's asset base, both because LPs alone fund Expansion Capex and because they absorb dilution from excessive debt and equity capital raises.

KMI's and KMGP's breaches also perpetuate the LPs' dilution at a rate far exceeding any dilutive impacts to KMI's small limited partnership interest. As noted, KMI's practice of funneling as much cash flow as possible out of KMP's coffers as distributions forces KMP to look to the capital markets and issue new debt and equity in order to fund its maintenance spending. ¶¶4, 77-83. Between 2010 and 2014, Defendants caused KMP to issue nearly 100 million new limited partner units, increasing the number of limited partner units from 207.3 million to 302.8 million (not counting shares issued in connection with an acquisition). ¶4.

Thus, over the course of four years, Defendants have increased the number of LP units by 48%. *Id.* During this time, KMI's general partnership interest has remained a steady 2% pursuant to the terms of the Partnership Agreement. ¶16. Moreover, KMP's distributions have (under KMI's management) far exceeded the threshold necessary for KMI to receive 50% of all distributions through IDR payments, notwithstanding the number of new units issued. ¶80.

III. ARGUMENT

1. Plaintiff Has Asserted Both Direct And Derivative Claims

Defendants argue that Plaintiff's claims are wholly derivative, and are therefore subject to the pre-suit demand requirement. Defendants' Brief in Support of Motion to Dismiss ("Def. Br.") at 7-12. As discussed herein, the Complaint alleges both direct and derivative claims and, even as to Plaintiff's derivative claims, pre-suit demand is excused for the reasons discussed in §III.2, *infra*.

In *Carsanaro v. Bloodhound Technologies, Inc.*, this Court articulated the following framework for distinguishing between direct and derivative claims:

> To determine whether a claim is derivative or direct, th[e] Court must consider "(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)?" Although each question is framed in terms of exclusive alternatives (*either* the corporation *or* the stockholders), some injuries affect *both* the corporation *and* the stockholders. If this dual aspect is present, a plaintiff can choose to sue individually.

65 A.3d 618, 655 (Del. Ch. 2013) (citation omitted) (emphasis in original); *see also Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004) ("[A] court should look to the nature of the wrong and to whom the relief should go."); *Loral Space & Commc'ns Inc. v. Highland Crusader Offshore P'rs, L.P.*, 977 A.2d 867, 868 (Del. 2009) (holding that where facts give rise to both derivative and direct claims, "[b]oth types of claims may be litigated").

The Complaint alleges a breach of the Partnership Agreement, and any breach of that contract causes a direct harm to Plaintiff and the other counterparties to the contract, separate and apart from the harm that KMGP's conduct has caused to the Partnership itself. *See Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 152-53 (Del. Ch. 2003) ("Any recovery obtained by the Fund in a derivative action cannot provide a remedy to wronged former partners . . . . [and] [i]f additional partners are later admitted, they suffer no injury from previous reductions in the value of the fund . . . . Characterizing the plaintiffs' claims as derivative would . . . have the perverse effect of denying standing (and therefore recovery) to parties who were actually injured by the challenged transactions while granting ultimate recovery (and therefore a windfall) to parties who were not."); *In re Cencom Cable Income P'rs., L.P.*, 2000 WL 130629, *3 (Del. Ch. Jan. 27, 2000) ("A direct claim seeks relief for injuries that . . . involve the participants' contractual rights.").

Moreover, as Defendants concede (Def. Br. at 11), a shareholder action is direct if it alleges self-dealing that benefited controlling shareholders at the expense of the minority, since in such instances the minority's economic interest in the company is redistributed to the controlling shareholder. *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1277 (Del. 2007). Here, Defendants' self-dealing benefited KMI and KMGP at the expense of Plaintiff and the other Limited Partners in two distinct ways. First, Defendants used the funds raised by diluting Plaintiff's units to artificially increase the funds eligible for distribution, so Defendants – and only Defendants – could claim 50% of those incremental distributions via their IDRs. KMI's primary compensation derives from its ownership of KMP's IDRs, which entitle it to a significant portion of KMP's distributions based on the total quarterly distribution per unit. ¶¶40-41. Regardless of how many LP units are issued (or how much debt is issued to cover expenses), so long as KMP manages to distribute more than $0.23375 per LP unit on a quarterly basis, KMI is entitled to 50% of the incremental distributions above that threshold. *Id.* The payments that KMI receives on account of its IDRs dwarf the distributions that it receives on account of its LP interest in KMP. ¶45. By issuing LP units in order to fund distributions, KMP dilutes its own LP interest, but reaps a far greater benefit in the form of increased IDR payments that is in no way shared by the other LPs. Because KMI has not suffered a dilution "to the same extent and in the same proportion" as the other LPs, Plaintiff and other Class members have suffered an injury that is distinct from that suffered by the Partnership, and that can be remedied by bringing a direct claim against the controlling stockholder. *Gatz*, 925 A2d. at 1277.

The issuance of tens of millions of new LP units diluted Plaintiff's LP interest, but did not dilute Defendants' general partnership interest at all – it remained 2% at all times. As KMP's general partner, the Partnership Agreement mandates that KMGP own an effective 2% interest in the partnership that is distinct from its ownership of 11% of the limited partner units. ¶16. As noted above, between 2010 and 2014, Defendants caused KMP to issue nearly 100 million new LP units, increasing the number of LP units by 48%. *Id.* The general partner interest, however, has not been diluted. Instead, "KMGP's general partnership interest . . . remains the same as it always was – an effective 2% interest." Def. Br. at 11.

In response to these allegations, Defendants make two principal arguments. First, Defendants claim that minority shareholders suffer direct injury from unequal dilution "only where shares are issued to a controlling shareholder in a self-dealing transaction." Def. Br. at 9 (citing *Gentile v. Rossette*, 906 A.2d 91, 100 (Del. 2006)). The scenario Defendants posit – *i.e.*, the controlling shareholder receiving extra shares, while the minority's shares were diluted – was before the Supreme Court in *Gentile*. *See Gentile v. Rossette*, 906 A.2d 91, 94-95 (Del.

2006). The Court characterized that scenario as "at least one transactional paradigm . . . that Delaware case law recognizes as being both derivative and direct in character." *Id*. *Gentile* does not, however, hold that this is the only fact pattern in which a claim can be both direct and derivative, which is the proposition for which Defendants cite it. Def. Br. at 9.

Delaware law does not require that the controlling shareholder receive ***additional shares*** in order for a claim to be direct. All the complaint need allege is that the controlling shareholder "did not suffer a dilution of cash value, or of voting power, or of ownership percentage to the same extent and in the same proportion as the minority stockholders." *Gatz*, 925 A.2d at 1277.

Second, Defendants argue that their limited partnership interest was diluted by the new offerings in the same manner as Plaintiff's interest (Def. Br. at 10-11), but ignore the facts that (i) their 2% general partnership interest was not diluted at all by the new offerings, and (ii) KMI receives by far the majority of its revenue from its IDRs, not its limited partnership interest. The dispositive inquiry is whether the controlling shareholder's ownership interest was diluted to the same extent and in the same proportion as that of the minority stockholders. *See Gatz*, 925 A.2d at 1277. Because KMI's IDRs and general partner interest were not diluted to the same extent that Plaintiff's LP units were diluted, as in *Gentile*, this case involves "an improper transfer – or expropriation – of economic value . . .

from the public shareholders to the majority or controlling stockholder." 906 A.2d at 100.

Accordingly, Plaintiff's claims are in part direct, and no pre-suit demand was required to the extent that the Complaint seeks redress for harms suffered directly by Plaintiff and other Class members.

2. Demand Is Excused As To Plaintiff's Derivative Claims

Defendants' single argument in support of dismissal of Plaintiff's derivative claims is that Plaintiff should have, but did not make a pre-suit demand on the board of directors of KMGP. Def. Br. at 12-18. Defendants concede that if the general partner, KMGP – as opposed to KMGP's board of directors – is the proper entity upon which demand would be addressed, then demand is excused because demand on KMGP itself would be futile. Def. Br. at 14, *see also* ¶¶93-101. KMI is the sole owner of KMGP and exercises absolute control over the makeup of KMGP's board of directors. KMGP, in turn, owes fiduciary duties to its only stockholder, KMI. Thus, in any situation in which KMI's self-interest conflicts with the interests of KMP's LPs, KMGP is, by definition, conflicted and demand is futile.

Defendants assert that whether demand is excused "turns entirely on whether the need for demand is determined by an examination of the general partner as a corporate entity or an examination of the general partner's board of directors[.]"

Def. Br. at 14. Defendants also concede (as they must) that this Court has already decided this question, and that its rulings unambiguously look only to the general partner, not any subcommittee of its board. *See id.* They then invite this Court to overturn its own well-settled rulings (Def. Br. at 18) – an invitation the Court should decline.

The law governing this question dictates that Plaintiff tender a demand (unless excused) on KMGP, not KMGP's board of directors. Specifically, the provision of DRULPA that imposes the demand requirement speaks only of making demand on the general partner as an entity, and not on any internal decisionmaking body of the general partner. *See* 6 Del. C. § 17-1001 (a limited partner may bring a derivative action "if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed"). In *Gerber*, this Court thoroughly assessed the precise argument that Defendants raise here and unequivocally rejected it, holding that "DRULPA refers to the general partner and not specifically to the general partner's governing body." 2013 WL 209658, at *13; *see also Gotham P'rs. L.P. v. Hallwood Realty P'rs. L.P.*, 1998 WL 832631, at *5 (Del. Ch. Nov. 10, 1998) ("[T]here is nothing in DRULPA that even hints at [the] proposition that [the general partner]'s board of directors is the organizational subcomponent to which [the limited partner]'s demand should be made.").

As Defendants are forced to concede, every court to consider this issue has held that the relevant entity for demand purposes is the general partner, not the general partner's board of directors. After "consider[ing] the statutory text and the policies behind it," this Court expressly "reject[ed] the argument that a limited partner challenging a corporate general partner's act must make presuit demand to the corporate general partner's board of directors." *Gerber*, 2013 WL 209658, at *13 (quoting *Gotham*, 1998 WL 832631, at *5)). Rather, "[l]imited partnership cases dealing with demand against a corporate general partner discuss demand in relation to the corporation itself, not its internal decisionmaking apparatus." *Id*.

Defendants contend that this Court's well-reasoned opinions in *Gerber* and *Gotham* are "dated" and "without substantial discussion" of the relevant issues, and are therefore "incorrectly decided." Def. Br. at 14-15. Specifically, Defendants contend that, because KMGP's board of directors "wields control in substance," Plaintiff should make a demand on that board, rather than to KMGP. Def. Br. at 16. Defendants' argument – which was explicitly considered and rejected by this Court in *Gotham* and *Gerber* – should be rejected for several reasons.

First, Defendants' proposal that this Court assess DRULPA's demand requirement by reference to the general partner's board rather than the general partner as an entity violates the rules of statutory construction. When the plain language of the statute leads to an unambiguous result (as it does here), there is no room for judicial interpretation and the statutory text controls. *See CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011). A court may look beyond the express language of the statute only where that language is susceptible of two reasonable interpretations or would lead to an unreasonable or absurd result. *See id.* Neither of those conditions is applicable here, as this Court previously has concluded. *See Gerber*, 2013 WL 209658, at *15; *Gotham*, 1998 WL 832631, at *10.

Second, Defendants acknowledge that the only way for the Court to reach their desired result would be to overturn both *Gotham* and *Gerber*. Def. Br. at 18. Defendants have not, however, offered any valid justifications for the Court to take such a drastic step, and there are compelling reasons why it should not. "The rule of stare decisis means that when a point has been once settled by decision it forms a precedent which is not afterwards to be departed from or lightly overruled or set aside[.] . . . This rule is grounded upon public policy and should be followed except for urgent reasons and upon clear manifestation of error." *Oscar George, Inc. v. Potts*, 115 A.2d 479, 481 (Del. 1955); *see also Leonard Loventhal Account v. Hilton Hotels Corp.*, 2000 WL 1528909, at *4 (Del. Ch. Oct. 10, 2000) ("*[S]tare decisis* is founded on public policy. It forms arguably the most important tenet upon which legal reasoning rests.").

Third, Defendants' assertion that demand should be addressed to the KMGP Board "would undermine this state's established policy of respecting the legal fiction of the business entity." *See Gotham*, 1998 WL 832631, at *5 "[T]he result implied by [Defendants'] proposed rule defies logic. It would require the Court to look into the form of each entity of each general partner in order to determine whether the entity's internal decisionmaking individuals . . . were independent." *Id; see also EBG Holdings LLC v. Vredezicht's Gravenhage 109 BV*, 2008 WL 4057745, at *11 (Del. Ch. Sep. 2, 2008) ("Courts generally only disregard the corporate entity in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or equitable considerations among members of the corporation are involved."). Defendants' proposed rule would have the Court effectively ignore the existence of KMGP as an entity and instead proceed as if the individual members of the KMGP Board were the general partners of KMP. They are not. Defendants and Plaintiff entered into a contract providing for a corporate general partner, and Defendants cannot now choose a different arrangement.

Fourth, contrary to Defendants' assertions (Def. Br. at 16-17), nothing in *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch. 1991), *In re Boston Celtics Ltd. Partnership S'holders Litig.*, 1999 WL 641902 (Del. Ch. Aug. 6, 1999), or *Feeley v. NHAOCG, LLC*, 62 A.3d 649 (Del. Ch. 2012) undermines the holdings of *Gerber* or *Gotham* or otherwise suggests that this Court should disregard the structure established by DRULPA. These cases hold that the directors of a corporate general partner owe some fiduciary duties to the limited partnership and the limited partners. *See USACafes*, 600 A.2d at 48-50; *Boston Celtics*, 1999 WL 641902, at *4; *Feeley*, 62 A.3d at 670-72. They say nothing whatsoever about to whom pre-suit demand must be directed under DRULPA.

Fifth, Defendants contend that "Plaintiff alleges no reason why the demand could not be submitted to the Conflicts and Audit Committee[.]" Def. Br. at 17. Yet Defendants have provided no reason why a demand ***must*** be submitted to the Conflicts and Audit Committee. DRULPA does not require this – it refers to demand only on the "general partner," not on any particular governing body of the general partner. *See Gotham*, 1998 WL 832631, at *5. Nor does the Partnership Agreement even contemplate this. Contrary to Defendants' contention (Def. Br. at 17), it includes no procedure by which Limited Partners can petition the KMGP Board or any subcommittee thereof to enforce KMP's rights. In short, by arguing that demand must be made on a particular subcommittee of the KMGP Board, Defendants have attempted to invent a brand new procedural requirement that nowhere appears in Delaware law or in the Partnership Agreement, and now insist that Plaintiff's suit be dismissed for failure to comply with their contrivance.

Sixth, Defendants' argument that the Court's prior holdings in *Gotham* and *Gerber* that demand must be made on the general partner "excuse demand in all cases involving derivative claims against the general partner" (Def. Br. at 17) is totally unfounded. Rather, DRULPA excuses demand only where the general partner enters into a transaction presenting a conflict of interest sufficient to render demand futile, as is indisputably the case here. It is, however, quite telling that Defendants apparently cannot even envision the concept of a general partner structuring a transaction such that its own interests are not adverse to those of the partnership.

Finally, if there is any merit to Defendants' policy argument that DRULPA "discourage[s] the utilization by general partners of independent decision-making bodies" (Def. Br. at 17), then their remedy is to be found with the legislature and not this Court. This Court "cannot accept [Defendants'] invitation to become a de facto member of the General Assembly and rewrite the Delaware Code." *In re Last Will and Testament of Palecki*, 920 A.2d 413, 423 (Del. Ch. 2007).

Defendants have offered no reason for this Court to reverse itself and alter the legal framework that Plaintiff and other LPs relied upon when they entered into the Partnership Agreement.

In short, DRULPA dictates that demand is assessed in reference to the KGMP entity, the relevant cases hold that demand is assessed in reference to the KGMP entity, and Defendants concede that their argument fails if demand is assessed in reference to the KGMP entity. However, even if this Court were to reverse itself and accept Defendants' argument that demand futility should be determined by examining the KMGP Board and not the KMGP entity (Def. Br. at 14-18), pre-suit demand is excused under either scenario since both KMGP and its Board ultimately answer to KMI. In addition to the fiduciary duties that they owe to LPs such as Plaintiff, each of the members of the KMGP Board also owes fiduciary duties to KMI and its shareholders. *See Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1988) (holding that in the context of a parent and wholly-owned subsidiary, the directors of the subsidiary are obligated "to manage the affairs of the subsidiary in the best interests of the parent and its shareholders."). As such, the members of the KGMP Board are conflicted just as KGMP itself is.

IV. CONCLUSION

For the reasons discussed above, Defendants' motion to dismiss should be denied.

Dated: April 22, 2014.

GRANT & EISENHOFER P.A.

/s/ Stuart M. Grant
Stuart M. Grant (DE Bar 2526)
Geoffrey C. Jarvis (DE Bar 4064)
David M. Haendler (DE Bar 5899)
123 Justison Street
Wilmington, DE 19801
Tel: 302-622-7000
Fax: 302-622-7100

Co-Lead Counsel

Mark Lebovitch
Katherine M. Sinderson
Adam Hollander
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1285 Avenue of the Americas
New York, NY 10019
Tel: 212-554-1400
Fax: 800-554-1444

Co-Lead Counsel

Mark C. Gardy
James S. Notis
Meagan A. Farmer
GARDY & NOTIS, LLP
501 Fifth Avenue
New York, NY 10017
Tel: 212-905-0509
Fax: 212-905-0508

Additional Counsel for Plaintiff Jon Slotoroff

Brian J. Robbins
George C. Aguilar
Michael J. Nicoud
ROBBINS ARROYO LLP
600 B Street
Suite 1900
San Diego, CA 92101
Tel: 619-525-3990
Fax: 619-525-3991

Additional Counsel for Plaintiffs Darrell Burns and Terrence Zehrer

IN THE COURT OF CHANCERY IN THE STATE OF DELAWARE

IN RE KINDER MORGAN ENERGY PARTNERS, L.P. DERIVATIVE LITIGATION	)))	CONSOLIDATED CASE No. 9318-VCN

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Ct. Ch. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. This brief complies with the type-volume limitation of Ct. Ch. R. 171(f)(1) because it contains 5,552 words, which were counted by Microsoft Word 2010.

Date: April 22, 2014

/s/ Stuart M. Grant
Stuart M. Grant (Del. Bar No. 2526)

CERTIFICATE OF SERVICE

I, Stuart M. Grant, Esq., hereby certify that copies of the foregoing **LEAD PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS KINDER MORGAN, INC., KINDER MORGAN G.P., INC. AND KINDER MORGAN ENERGY PARTNERS L.P.'S MOTION TO DISMISS, TRANSMITTAL AFFIDAVIT OF DAVID M. HAENDLER WITH EXHIBIT, and CERTIFICATE OF COMPLIANCE** were served upon the following via Lexis File & Serve Xpress:

SEITZ ROSS ARONSTAM &
MORITZ LLP
Collins J. Seitz, Jr.
Bradley R. Aronstam
Anthony A. Rickey
100 S. West Street, Suite 400
Wilmington, DE 19801

Dated: April 22, 2014

<u>/s/ Stuart M. Grant</u>
Stuart M. Grant (#2526)