EFiled: Apr 09 2018 08:00AM EDT
Transaction ID 61862775
Case No. 2017-0841-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BRAGAR EAGEL & SQUIRE, P.C., ROSENTHAL, MONHAIT & GODDESS, P.A. and INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP,	)	
Plaintiffs,	)	
v.	)	C.A. No. 2017-0841-JTL
KINDER MORGAN ENERGY PARTNERS, L.P. and KINDER MORGAN, INC.,	)	
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS

1. The plaintiffs are three law firms who represented Peter Brinckerhoff in *In re El Paso Pipeline Partners, LP Derivative Litigation*, C.A. No. 7141-VCL (the "Derivative Action"). They filed this lawsuit to recover fees and expenses based on their efforts in the Derivative Action. The defendants moved to dismiss the complaint as barred by the doctrine of *res judicata* and for failure to state a claim under Court of Chancery Rule 12(b)(6). The defendants' motion is granted.

2. In 2011, Brinckerhoff filed the Derivative Action on behalf of El Paso Pipeline Partners, L.P. (the "Partnership"). It challenged two related-party transactions in which the Partnership's general partner, El Paso Pipeline GP Company, L.L.C. (the "General Partner"), caused the Partnership to purchase assets from the General Partner's controller, El Paso Corporation. During the pendency of the litigation, Kinder Morgan, Inc. acquired El Paso Corporation.

3. Trial took place in November 2014. Shortly before trial, Kinder Morgan announced that it intended to cause the Partnership to engage in a merger by which Kinder Morgan would acquire all outstanding units of the Partnership that Kinder Morgan did not already own (the "Merger"). The Merger was a related-party transaction: Kinder Morgan controlled the Partnership by virtue of its control over the General Partner.

4. The General Partner sought to defer the trial on the grounds that the Merger would deprive Brinckerhoff of standing to pursue the Derivative Action. *See* Dkt. 181. At the time, I believed that determining whether the Merger would deprive Brinckerhoff of standing would require considering complex issues, including (i) the distinctions among derivative, direct, and dual-natured claims, (ii) the related-party status of the Merger, and (iii) the timing of the transaction relative to the upcoming trial. I thought that these issues posed particularly tricky problems for a contractual entity like the Partnership, because claims to enforce the governing documents of an entity frequently had been considered direct. At the same time, I believed it was unlikely that Brinckerhoff could prevail at trial, because he needed to prove that the members of a special committee of the board of directors of the General Partner had acted in bad faith when approving the challenged transactions. Because a ruling in favor of the General Partner would render moot any need to consider the complex legal issues that I believed would be involved in determining standing, I declined to defer the trial, and the litigation went forward. *See* Dkt. 185.

5. After trial, the Merger closed. *See* Dkt. 209. In a post-trial opinion, I determined that the General Partner was liable for breach of the Partnership's limited partnership agreement and awarded $171 million in damages to the Partnership. *In re El*

Paso Pipeline P'rs, L. P. Deriv. Litig. (*El Paso I*), 2015 WL 1815846, at *27 (Del. Ch. April 20, 2015). The General Partner had renewed its motion to dismiss for lack of standing, and after briefing and argument, I determined that Brinckerhoff's claims for breach of the limited partnership agreement were dual-natured claims that survived the Merger. *In re El Paso Pipeline P'rs, L. P. Deriv. Litig.* (*El Paso II*), 132 A.3d 67, 103-04 (Del. Ch. 2015). I held that the court had the power to re-characterize the entity-level damages award to provide an investor-level remedy in which the limited partners unaffiliated with the General Partner would receive a *pro rata* share of the judgment. *See id.* at 132. I entered judgment against the General Partner in the amount of $100,206,000, plus pre- and post-judgment interest, and directed that this amount (net of attorneys' fees, costs, and expenses) be allocated *pro rata* to the limited partners of the Partnership that were not affiliated with the defendants as of the closing of the Merger. Dkt. 258.

6. The General Partner appealed. In an opinion dated December 20, 2016, the Delaware Supreme Court held that the Merger deprived Brinckerhoff of standing when the Merger eliminated his ownership interest in the Partnership. *See El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff* (*El Paso III*), 152 A.3d 1248, 1265 (Del. 2016). This meant that Kinder Morgan became the sole beneficiary of the claim possessed by the Partnership against the General Partner. *Id.* As a result of its ruling on standing, the high court declined to reach the merits. *Id.* at 1252.

7. The proceedings then returned to this court for entry of a final order and judgment. *See* Dkt. 274. Brinckerhoff submitted a proposed form of order that contemplated further proceedings to determine whether Brinckerhoff's counsel was

entitled to an award of award of attorneys' fees and expenses, notwithstanding the outcome in *El Paso III.* Dkt. 276. Brinckerhoff filed contemporaneously a motion for an award of attorneys' fees and expenses. Dkt. 277 (the "Fee Application").

8. I regarded the Fee Application as meritless in light of the Delaware Supreme Court's opinion in *El Paso III*. To my knowledge, no Delaware court had ever awarded fees and expenses to a plaintiff who had lost standing as a result of a merger based on the work the plaintiff had performed in the litigation up to that point. I could not recall hearing of any instance in which such an application had been made.

9. The General Partner opposed the Fee Application and submitted a competing final order and judgment. Dkt. 278. The General Partner observed that the Fee Application had no basis because the plaintiff's "litigation efforts failed to create any compensable benefit." *Id.* at 2. Under the General Partner's form of order, each side would "bear its own attorneys' fees and litigation expenses." *Id.* (proposed form of order). Shortly after receiving and reviewing the General Partner's response, I entered the General Partner's proposed order. Dkt. 279 (the "Final Judgment"). Brinckerhoff did not appeal.

10. On November 22, 2017, the plaintiffs filed this lawsuit in which they seek to recover an award of fees and expenses for the Derivative Action.

11. The defendants have shown that this action is barred by *res judicata*. To invoke *res judicata* successfully, a party must satisfy five requirements, which this decision considers in turn.

a. The first requirement for *res judicata* is whether "the court making the prior adjudication had jurisdiction." *Bailey v. City of Wilmington*, 766 A.2d 477, 481

(Del. 2001). When entering the Final Judgment, this court had jurisdiction over Brinckerhoff, the Partnership, and the entire dispute, which had been remanded to this court. Brinckerhoff's Fee Application was properly before this court. The plaintiffs now argue that by entering the Final Judgment, this court declined to retain jurisdiction over the Fee Application. That is inaccurate. By entering the Final Judgment, this court rejected the Fee Application. The court did so summarily, but it nevertheless rejected it.

b. The second requirement for *res judicata* is that the parties to the current litigation be "either the same parties or in privity with the parties from the prior adjudication." *Id.*

> Two parties are in privity where "the relationship between two or more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit." A critical factor for the privity analysis is whether the interests of a party to the first suit and the party in question in the second suit are aligned.

Levinhar v. MDG Med., Inc., 2009 WL 4263211, at *8 (Del. Ch. Nov. 24, 2009) (Strine, V.C.) (footnote omitted) (quoting *Higgins v. Walls*, 901 A.2d 122, 138 (Del. Super. 2005)). The plaintiffs served as Brinckerhoff's counsel in the Derivative Action and therefore were in privity with Brinckerhoff for purposes of making the Fee Application. Their interests were not just aligned; the Fee Application was made for the benefit of the current plaintiffs.

c. The third requirement for *res judicata* is that "the cause of action must be the same in both cases or the issues decided in the prior action must be the same as those raised in the present case." *Bailey*, 766 A.2d at 481. The precise legal theory does not have to be the same. "*[R]es judicata* precludes a plaintiff from splitting its claim and seeking

the same relief in subsequent litigation under a different substantive theory." *LaPoint v. AmerisourceBergen Co.*, 970 A.2d 185, 196 (Del. 2009). *Res judicata* applies when

> the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action.

Ezzes v. Ackerman, 234 A.2d 444, 445 (Del. 1967). "*Res judicata* bars 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the actions arose.'" *Levinhar*, 2009 WL 4263211, at *10 (quoting *Restatement (Second) of Judgments* § 24(1) (Am. Inst. Law 1982)). The Fee Application in the Derivative Action arose out of the same transaction (the underlying litigation challenging the transactions in 2010), sought the same relief (recovery of attorneys' fees and expenses), and invoked the same basic idea (that an award could still be obtained despite the Delaware Supreme Court's opinion in *El Paso III*). The complaint in the current case fleshes out the theories, but the claim is the same.

d. The fourth requirement for *res judicata* is that "the issues in the prior action must be decided adversely to the plaintiff's contentions in the instant case." *Bailey*, 766 A.2d at 481. The Final Judgment ruled against Brinckerhoff by stating, "Each party shall bear its own attorneys' fees and litigation expenses." Given the nature of the Fee Application and the points the General Partner had raised, I believed that a summary disposition was sufficient.

e. The fifth requirement for *res judicata* is that "the prior adjudication must be final." *Id.* The Final Judgment was a final order that resolved matters at the trial level. Brinckerhoff did not appeal.

f. *Res judicata* bars this action. The defendants' motion is granted on that basis.

12. Assuming for the sake of discussion that *res judicata* is not applicable, the plaintiffs have not pled that their litigation efforts conferred a cognizable benefit on the Partnership that could support a fee award. Lacking a cognizable benefit, their complaint is dismissed for failure to state a claim on which relief can be granted.

a. The defendants argue that no possible benefit could have been created because to pursue the claims asserted in the Derivative Action, Kinder Morgan would have to cause one of its subsidiaries (the Partnership) to sue another one of its subsidiaries (the General Partner). Kinder Morgan effectively would be suing and trying to recover from itself, which is nonsensical. But under principles of entity separateness, the claims litigated in the Derivative Action belonged to the Partnership, not to Kinder Morgan. Realistically, Brinckerhoff litigated those claims for the benefit of the Partnership's investors, but the defendants argued successfully on appeal that the claims had to be viewed exclusively as belonging to the Partnership. It seems to me that once our legal system has adopted that view and enforced it for purposes of standing, it would be inconsistent for the same legal system now to view the claims as functionally belonging to Kinder Morgan for purposes of assessing the benefit. I therefore approach the analysis of the benefit with the understanding that the claims belonged to the Partnership and based on the assumption

(counterfactual though it may be) that the Partnership conceivably could litigate the claims and receive value for them after the Merger.

b. Taking these premises as true, the plaintiffs did not confer a compensable benefit on the Partnership. The plaintiffs rely on the decision in *El Paso I* as establishing the Partnership's entitlement to recover a significant monetary judgment, but the Delaware Supreme Court's decision that Brinckerhoff lost standing nullified the decisions in *El Paso I* and *El Paso II.* The high court explained that standing is "properly viewed as a threshold issue to ensure that the litigation before the tribunal is a case or controversy that is appropriate for the exercise of the court's judicial powers." *El Paso III*, 152 A.3d at 1256 (internal quotation marks and citation omitted). When an appellate court "reverses a lower court's decision on a threshold question, such as prudential standing, it effectively holds the lower court erred by reaching the merits of the case." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041 (9th Cir. 2010). This means that when a case is dismissed on standing grounds, there is "not a final judgment on the merits." *Smith v. Guest*, 16 A.3d 920, 934 (Del. 2011); *see also Warth v. Seldin*, 422 U.S. 490, 517-18 (1975) ("The rules of standing . . . are threshold determinants of the propriety of judicial intervention."). When the Delaware Supreme Court issued its decision in *El Paso III*, it "terminate[d] the litigation" without reaching "the other issues raised by the parties." 152 A.3d at 1252.

c. The decision in *El Paso III* returned the Partnership to the same position it occupied before the Derivative Action was filed. As was the case then, the Partnership has unliquidated claims that potentially might be pursued. The plaintiffs

obtained some favorable discovery that might be used in a future lawsuit, including deposition and trial testimony from various witnesses, but it is not possible to predict how a future factfinder might judge the defendants' credibility a second time around and resolve the factual disputes presented by the case. Moreover, the defendants acquired additional defenses that might be raised, such as the amount of time that has now passed since the underlying transactions took place. The plaintiffs did not generate or contribute to any monetary recovery for the Partnership, nor did they generate or contribute to any tangible or intangible benefits, other than the discovery materials. In my view, generating discovery is not a compensable benefit. The discovery must contribute causally to some other tangible or intangible benefit. *Compare Crothall v. Zimmerman*, 94 A.3d 733, 738 (Del. 2014) (holding that mooted trial court ruling did not constitute a compensable corporate benefit); *with In re First Interstate Bancorp. Consol. S'holder Litig.*, 75 A.2d 353, 363 (Del. Ch. 1999) (awarding fees in mooted litigation where lawsuit contributed causally to higher bid, thereby creating compensable benefit), *aff'd sub nom First Interstate Bancorp. v. Williamson*, 755 A.2d 388 (Del. 2000); *cf. Chrysler Corp. v. Dann*, 223 A.2d 384, 387 (Del. 1966) (observing that the termination of the underlying litigation itself cannot be a compensable benefit).

d. Alternatively, the plaintiffs contend that in lieu of a fee based on the benefit conferred, they should be permitted to recover the value of their time and their out-of-pocket costs under the doctrine of *quantum meruit*. New York has a line of cases which permits a lawyer who litigates on contingency to recover fees under a theory of *quantum meruit* if the client terminates the lawyer and then declines to pursue the claim. *See, e.g.*,

D'Jamoos v. Griffith, 2006 WL 2086033 (E.D.N.Y. July 25, 2006); *Tillman v. Komar*, 181 N.E. 75 (N.Y. 1932). There is an analogy that can be drawn to this case. Although the plaintiffs' client was Brinckerhoff, the defendants successfully argued on appeal that this was at all times exclusively a derivative action in which the Partnership was the real holder of the claim. *El Paso III*, 152 A.3d at 1265. Viewed from this perspective, the Partnership was the real client and the actual party in interest whom Brinckerhoff and his counsel represented. The Merger was a related-party transaction that Kinder Morgan effectuated. The defendants successfully argued on appeal that the legal consequence of the Merger was to terminate Brinckerhoff's standing, effectively terminating his counsel's representation of the Partnership. Kinder Morgan has made clear that it has no interest in causing the Partnership to pursue the Derivative Action. That decision is understandable, but it means that the Partnership has abandoned its claims.

e. Although the resulting scenario bears high-level similarities to the situation that the New York rule addresses, the termination of derivative standing by merger does not literally involve the client firing the lawyer. Furthermore, the extension of the New York doctrine to derivative actions and its application to this proceeding would work a substantial change in Delaware law. The standing doctrine that the Delaware Supreme Court applied in *El Paso III* traces its origins to *Lewis v. Anderson*, 477 A.2d 1040 (Del. 1984). For nearly thirty-five years, lawyers have not been entitled to fees following a merger-based loss of standing unless they could point to tangible monetary or non-monetary benefits that the litigation played some causal role in generating. Moreover, the defendants argued, and I agree, that the Delaware Supreme Court appears to regard the

ability of an acquirer to move forward free and clear of pre-transaction derivative claims after a merger closes as a significant policy rationale supporting the *Lewis v. Anderson* rule. The claim to a fee that the plaintiffs seek to create would run contrary to that policy by imposing a continuing liability on the acquirer, albeit one for attorneys' fees rather than for the underlying merits. It also would result in a situation in which plaintiffs' lawyers could get paid even though the sell-side investors, for whose indirect benefit they originally brought the derivative action, recover nothing. This could create a scenario similar to the pattern of disclosure-only settlements in which cases got dismissed, the defendants paid their own lawyers, and even the plaintiffs' lawyers got paid, even though the class received nothing meaningful. The resulting regime created perverse incentives, because everyone directly involved in the litigation machine enjoyed benefits, while the costs were externalized on public investors. This court has taken steps to address the disclosure-only settlement problem. *See In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016). In my view, it would be unwise to create a new scenario involving similar risks. *Cf. Crothall*, 94 A.3d at 735 n.6 (calling into question whether lawyer should be permitted to intervene and pursue fee application when client sold shares and abandoned claim, thereby losing standing; noting that do so "creates incentives of a troubling nature, in an area of the law already fraud with potential conflict").

f. Consequently, assuming *res judicata* does not apply, the complaint is dismissed pursuant to Rule 12(b)(6) for failure to state a claim on which relief can be granted.

13. The defendants ask the court to award them the fees and expenses they incurred in making this motion. That request is denied.

a. Delaware follows the American Rule, which generally requires that, "regardless of the outcome of litigation, each party is responsible for paying his or her own attorneys' fees." *In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1149 (Del. Ch. 2008). "The bad faith exception to the American Rule applies in cases where the court finds litigation to have been brought in bad faith or finds that a party conducted the litigation process itself in bad faith, thereby unjustifiably increasing the costs of litigation." *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850-51 (Del. Ch. 2005). A trial court may grant a bad faith fee award during the pendency of ongoing litigation "as a sanction for making frivolous legal arguments or engaging in bad-faith litigation tactics." *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *6 (Del. Ch. June 27, 2011).

b. In my view, the plaintiffs' complaint was not filed in bad faith. The plaintiffs' arguments against *res judicata* were non-frivolous. The grounds on which they requested a fee were creative and unprecedented, but they represented good faith arguments for extending the law. They did not engage in any abusive litigation tactics or try to run up the defendants' costs.

/s/ J. Travis Laster
Vice Chancellor Laster
April 9, 2018