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IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE HAYNES FAMILY TRUST and WILLIAM BRYCE ARENDT, Plaintiffs-Below/Appellants, v. KINDER MORGAN G.P., INC., TED A. GARDNER, GARY L. HULTQUIST, and PERRY M. WAUGHTAL, Defendants-Below/Appellees.	)	No. 515, 2015 Court Below: Court of Chancery of the State of Delaware The Honorable J. Travis Laster Cons. C.A. No. 10093-VCL

APPELLANTS' OPENING BRIEF

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Dated: November 5, 2015

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NATURE OF PROCEEDINGS

Plaintiffs-appellants ("Plaintiffs") were limited partners of Kinder Morgan Energy, L.P., a publicly traded master limited partnership (the "Partnership"). Plaintiffs challenged the merger of the Partnership into a wholly owned subsidiary of its general partner, Kinder Morgan G.P., Inc. (the "General Partner" and the "MLP Merger"). The MLP Merger was part of a larger reorganization in which the General Partner's parent corporation, Kinder Morgan, Inc. (the "Parent"), rolled up the Partnership and two other, publicly traded affiliates—Kinder Morgan Management LLC (the "GP Delegate") and El Paso Pipeline Partners, L.P. ("El Paso")—into the Parent.

The General Partner delegated review of the MLP Merger to an *ad hoc* Conflicts and Audit Committee comprised of three of its directors, Ted A. Gardner, Gary L. Hulquist and Perry M. Waughtal (the "Conflicts Committee"). Each member of the Conflicts Committee was also a director of GP Delegate, a separate publicly traded entity with separate public shareholders. Although they now deny that they had any obligation running to the Partnership's limited partners, the Conflicts Committee and the General Partner affirmatively represented to the limited partners that they had determined that the MLP Merger was "fair and reasonable to, and in the best interests of, the Public Unitholders [*i.e.*, the limited partners]." The General Partner incorporated this determination and representation into the merger agreement and

inserted it into the proxy materials soliciting votes for the MLP Merger from the limited partners.

Plaintiffs challenged the MLP Merger, alleging among other things, that the MLP Merger was not fair and reasonable to or in the best interests of the limited partners. Plaintiffs alleged that—even if they had no contractual obligation to do so—the General Partner and Conflicts Committee had voluntarily assumed a duty to determine that the MLP Merger was in the best interests of the limited partners and had breached that duty.

In a memorandum opinion dated August 20, 2015 (Exhibit A) and followed by an Order dated August 24, 2015 (Exhibit B), the Court of Chancery dismissed Plaintiffs' claims. The court below held that it was reasonably conceivable that the Conflicts Committee approved the terms of the MLP Merger "***to accommodate Parent, rather than because they believed they were in the best interests of the limited partners***." Ex. A at 16 (emphasis added). Nevertheless, the trial court dismissed Plaintiffs' claims, concluding that the Conflicts Committee and the General Partner had no obligation to determine in good faith that the MLP Merger was fair and reasonable to and in the best interests of the limited partners despite their having claimed to have affirmatively made that determination. *Id.* at 17.

This appeal followed. The appeal is limited to a single issue: whether by undertaking to determine the fairness of the MLP Merger to the limited partners—and

soliciting votes from the limited partners on the basis of that determination—the General Partner and members of the Conflicts Committee assumed the duty to ensure the MLP Merger was fair and reasonable and in the best interests of the limited partners. Accordingly, the only appellees are the General Partner and Gardner, Hulquist and Waughtal, the three directors of the General Partner who comprised the Conflicts Committee.

SUMMARY OF ARGUMENT

1. The Court of Chancery correctly found that Plaintiffs sufficiently alleged that the Conflicts Committee approved the terms of the MLP Merger "to accommodate Parent, rather than because they believed they were in the best interests of the limited partners." Ex. A at 16. The Court of Chancery erred, however, when it held that the General Partner and Conflicts Committee had not assumed a duty to ensure the MLP Merger was fair and reasonable to and in the best interests of the limited partners. *Id.* at 17. Because the governing partnership agreement contained a broad waiver of fiduciary protections, the limited partners' primary source of protection was the vote. In order to overcome substantial opposition from, and secure the necessary votes of the limited partners, the General Partner and Conflicts Committee undertook to determine whether the MLP Merger was fair and in the best interests of the limited partners and determined that it was. Then, they solicited votes by trumpeting that determination. Fairness, equity, and Court of Chancery precedent dictate that they be held to account for their words and promises.

STATEMENT OF FACTS

A. The Parties

1. The Plaintiffs

At the closing of the MLP Merger on November 26, 2014, Plaintiffs The Haynes Family Trust and William Bryce Arendt collectively owned 26,524 common units of the Partnership. A40, ¶¶ 10-11.[1]

2. The Partnership and its Related Entities

Prior to the MLP Merger, the Partnership was a master limited partnership that offered investors the tax benefits of a limited partnership combined with the liquidity of a publicly traded security. A49, ¶ 36. Kinder Morgan Management LLC (*i.e.* GP Delegate), a limited liability company controlled by the General Partner, managed the Partnership pursuant to a delegation of authority from the General Partner. A45, ¶¶ 23-24. GP Delegate owned approximately 28.4% of the Partnership in the form of Class I units (which were issued only to the GP Delegate). A44-A45, ¶¶ 22, 24.

Parent owned and controlled General Partner. In addition to its general partner interest, Parent owned an 11% limited partner interest in the Partnership. A43-A44, ¶ 19. Parent owned a 50% economic interest in the Partnership and through its direct ownership of General Partner and indirect ownership of GP Delegate, controlled a significant share of Partnership votes. A41-A45 ¶¶ 12-22; A65, ¶ 77; A827-A828.

[1] Citations to "A__" refer to the Appendix filed herewith. Citations to the Appendix followed by "¶" refer to specific paragraphs in Plaintiffs' Verified Second Consolidated Amended Class Action Complaint (A33-A148).

Parent, in turn, was controlled by Richard Kinder, its founder and 24% equity owner. Mr. Kinder was also the founder, chairman of the board of directors and chief executive officer of the Partnership and the chairman and chief executive officer of General Partner and GP Delegate. A40-A41, ¶ 12.

General Partner and GP Delegate shared a common board of directors. In addition to Mr. Kinder, the other directors of both General Partner and GP Delegate were Steven J. Kean, Ted A. Gardner, Gary L. Hulquist and Perry M. Waughtal. Mr. Kean was also a director and officer of Parent and Mr. Gardner formerly served on the board of Parent's predecessor. A40-A43, ¶¶ 13-17.

B. The Partnership Agreement

The Partnership was subject to the Third Amended and Restated Agreement of Limited Partnership (the "Partnership Agreement"). A150-A254. While the Partnership Agreement contained a provision waiving the General Partner's common law fiduciary duties, it still required General Partner to act in good faith to advance the best interests of the Partnership. A71, ¶¶ 95-96; Ex. A at 11. The Partnership Agreement does not exclude the possibility of the subsequent assumption of fiduciary obligations by the General Partner, the Conflicts Committee, or their members. *See* A150-A254.

Under § 6.09(a) of the Partnership Agreement, the Partnership could engage in conflict of interest transactions if the resolution of the conflict was fair and reasonable

to the Partnership. A74, ¶ 106. One way by which General Partner could establish the fairness of a conflicted transaction was to obtain "Special Approval" of the transaction by the Conflicts Committee. A74, ¶¶ 106-107.

C. Mr. Kinder Proposes a Reorganization of the Kinder Morgan Empire

Before the MLP Merger, the Partnership, GP Delegate and Parent were all publicly traded entities, as was El Paso, another master limited partnership controlled by Parent. A43-A45, ¶¶ 18-24. On July 17, 2014, Parent and Mr. Kinder proposed a reorganization, pursuant to which the Partnership, GP Delegate and El Paso would each merge into three separate wholly owned subsidiaries of Parent, leaving Parent as the only public entity. A79, ¶ 118.

Mr. Kinder initially proposed to acquire the Partnership in a taxable transaction in which limited partners would receive $10.77 in cash and 2.1624 shares of Parent stock for each Partnership common unit. *Id*. At the same time, Mr. Kinder proposed that each share of GP Delegate stock receive 2.4543 shares of Parent stock in a tax-free exchange. *Id*. These exchange ratios represented a pre-tax 10% premium for the Partnership units and a pre-tax 18.31% premium for GP Delegate stock. *Id*. The ratios were based on Mr. Kinder's arbitrary and incorrect assumption that the Partnership and GP Delegate were of equal value. A92-A93, ¶¶ 146-147. At the time of the proposal, shares of the GP Delegate stock were trading at a 7% discount to the Partnership's common units. A92-A93, ¶¶ 146, 148; Ex. A at 3. Historically, GP

Delegate's stock traded at an average discount of more than 6% to the Partnership's common units. *Id*. Moreover, the arbitrary equalization of the Partnership and GP Delegate ignored the significant tax burden to limited partners, a burden avoided by GP Delegate's stockholders. A94, ¶ 149.

D. The Conflicts Committee's Limited Review, Conflicts and Ultimate Approval of Kinder's Proposal

Following Mr. Kinder's offer, General Partner appointed three of its directors, Messrs. Gardner, Hultquist and Waughtal, to serve on the Conflicts Committee to review Mr. Kinder's proposal. A43, ¶ 17. The Conflicts Committee's authority was limited to evaluating Mr. Kinder's proposal or alternatives that involved the Parent. Ex. A. at 5. The Conflicts Committee was not authorized to, and did not explore, transactions with third parties. *Id*.

While serving as the Partnership's Conflicts Committee, Messrs. Gardner, Hultquist and Waughtal, who served as directors of GP Delegate, were also serving as the Special Committee of the GP Delegate. GP Delegate's Special Committee was charged with considering whether Mr. Kinder's proposal was fair to GP Delegate's stockholders. A43, A81, ¶¶ 17, 125. Thus, members of the Partnership's Conflicts Committee were doubly conflicted from the start. First, because of their roles as directors of General Partner, the members of the Conflicts Committee faced structural conflicts between their duties to Mr. Kinder and the Parent and the Partnership. A81, ¶ 125. Second, the members of the Conflicts Committee were simultaneously

representing both the Partnership and GP Delegate—entities competing with each other for their respective share of the aggregate consideration paid in the reorganization. *Id*. Moreover, two members of the Conflicts Committee, Messrs. Gardner and Hultquist, had a conflicting financial interest because they owned substantially more equity in Parent and GP Delegate relative to their ownership of Partnership units. A42, A82, ¶¶ 14, 16, 126.[2]

The Conflicts Committee compounded these conflicts by hiring the same financial and legal advisors to represent the competing interests of the Partnership and GP Delegate. A83, ¶ 129. Halfway through the process, the Conflicts Committee belatedly considered the problems caused by having the same individuals serve on the Partnership's Conflicts Committee and GP Delegate's Special Committee and sharing the same advisors. A84, ¶ 131. Yet, they decided to proceed without making any changes. A84-A85, ¶¶ 131-132.

The Partnership Agreement required only that the General Partner and Conflicts Committee determine that the MLP Merger was fair and reasonable to and in the best interests of the Partnership. Despite this limited duty under the Partnership Agreement, the General Partner and the Conflicts Committee voluntarily expanded their roles by affirmatively determining that the MLP Merger was fair and reasonable

[2] According to Parent's Chief Financial Officer, "Insiders prefer[red] [GP Delegate]" relative to [the Partnership], meaning that "management ha[d] purchased [GP Delegate] at a rate of ~2.3:1 vs. [the Partnership], or ~4.2:1 excluding one transaction." A82, ¶ 127.

to and in the best interests of the limited partners unaffiliated with the General Partner. A77-A78, ¶¶ 113, 115.

On August 9, 2014, the General Partner and Conflicts Committee approved and executed an Agreement and Plan of Merger between the Partnership, General Partner, the GP Delegate and Parent (the "Merger Agreement"). As represented and warranted in the Merger Agreement, in addition to their contractual duty to determine whether the MLP Merger was fair and reasonable to the Partnership, the Conflicts Committee affirmatively determined "***that the Merger is fair and reasonable to, and in the best interests of, the Public Unitholders*** [*i.e.*, the limited partners]." A77-A78, ¶¶ 113, 115; A632; A643; A742 (emphasis added).

E. The MLP Merger Was Neither Fair and Reasonable to, Nor in the Best Interests of, the Limited Partners

Even though the Conflicts Committee undertook and purported to determine that the MLP Merger was fair and reasonable to, and in the best interests of, the limited partners, the terms of the MLP Merger were, in fact, neither fair and reasonable to, nor in the best interests of, the limited partners. A87-A88, ¶ 138.

1. The MLP Merger Favored the GP Delegate's Interests Over Those of the Limited Partners

As approved by the Conflicts Committee and General Partner, the MLP Merger terms provided that each publicly held Partnership unit received the right to elect (i) $91.72 in cash or (ii) 2.4849 shares of Parent stock, or (iii) 2.1931 shares of Parent

stock and $10.77 in cash. A70, ¶ 92 n.10. The consideration was taxable regardless of the form of the election. Under the terms of the GP Delegate merger, GP Delegate's shares were converted into the right to receive 2.4849 shares of Parent stock. A55, ¶ 55. As Mr. Kinder had decided at the outset, stockholders of GP Delegate received consideration for their shares as if they were equal in value to the units held by the limited partner, and further received their consideration in a tax free exchange. A92-A95, ¶¶ 146-152.

The Conflicts Committee never attempted to increase the consideration paid to the limited partners relative to what was paid to GP Delegate's stockholders. A92-A95, ¶¶ 146-147, 150-151. Instead, it accepted Mr. Kinder's view that the value of GP Delegate should be "at the same level as [the Partnership]" notwithstanding the manifest disparity in the current and historical trading prices of the two securities. A92-A93, ¶¶ 146-147.

2. The MLP Merger Consideration Represented a Negative Premium to the Partnership's Trading Price

Mr. Kinder's original proposal was that the MLP Merger would be a taxable transaction. Because the Partnership's limited partners were being forced out of a master limited partnership, all deferred accrued tax payments would become immediately due and taxable to them as ordinary income. A96, ¶¶ 154-155. On a real world, after-tax basis, the MLP Merger that was ultimately approved represented a negative premium to the Partnership's trading price for its limited partners. A97-A98,

¶ 157. Despite their awareness of this problem, the Conflicts Committee and the General Partner never proposed an alternative transaction structure that would avoid these consequences to the limited partners. By agreeing to a taxable transaction for the Partnership, the Conflicts Committee effectively transferred a deferred tax benefit from the limited partners to the Parent. A39, ¶ 8; A69, ¶ 90; Ex. A at 7. As a result, after taxes, limited partners lost 4% of the value of their units as a result of the MLP Merger, while stockholders of GP Delegate realized a 21% gain. A85-A86, ¶¶ 133-135.

Notably, the fairness opinion of the financial advisor stated that it was delivering an opinion only "as to … whether the KMP Consideration to be paid pursuant to the KMP Merger is fair, from a financial point of view, to the holders of KMP Common Units." A99, ¶ 162. Yet the financial advisor went on to state that "in preparing this opinion, *we have not taken into account*, and *express no view with regards to, any tax consequences* of the transactions to any KMP Unit holders." *Id.* The financial advisor reached this conclusion in spite of the fact that it was aware of possible alternative transaction structures that would reduce or eliminate the tax burden on KMP unitholders. A99-A100, ¶ 164.

3. Expected Distributions to Limited Partners Dropped Precipitously Due to the MLP Merger

As a result of the MLP Merger, limited partners faced a significant drop in their annual distributed income. A98, ¶¶ 158-160. Even though Parent planned to increase

its dividend following the MLP Merger, limited partners still were to suffer more than a twenty percent decrease in distributions. A98, ¶ 158. In addition, the already reduced distributions were to be subject to immediate rather than deferred taxation. *Id.* As a result, limited partners' post-tax income for the five years following the transaction was projected to be 61% lower than pre-merger projections. Net-net, limited partners were to receive 54% less income over the next five years including the impact of taxes. A98, ¶ 160.

F. The Proxy and the Vote

Although Parent controlled a significant percentage of the Partnership's votes, to secure approval of the MLP Merger, Parent needed at least some votes from unaffiliated limited partners. A40-A45, ¶¶ 12-24; A827-A828.

Parent set a meeting date of November 20, 2014, to seek limited partner approval of the MLP Merger and the related GP Delegate and El Paso mergers. Parent solicited approval for the MLP Merger from the Partnership's limited partners pursuant to a Definitive Proxy Statement, dated October 22, 2014 (the "Proxy Statement"). A421-A700. In the Notice of Special Meeting incorporated as part of the Proxy Statement, Mr. Kinder told the limited partners that General Partner and the Conflicts Committee (as well as the board of GP Delegate) had each:

> **determined that the [MLP Merger] is fair and reasonable to, and in the best interests of [the Partnership], after determining that the [MLP Merger] is fair and reasonable to, and in the best interests of, the [Partnership's] unitholders (other than [Parent] and its**

> **affiliates), and recommend that [Partnership] unitholders vote FOR the [MLP Merger]**….

A423 (emphasis in original). That statement was repeated in Mr. Kinder's letter to unitholders accompanying the Proxy Statement and substantially similar statements were repeated numerous additional times throughout the Proxy Statement. A77, ¶ 113; A433; A447; A478; A480; A481; A559; A632; A643-A644.

This voluntary determination was designed to provide a benefit to the limited partners or to influence their voting to approve the MLP Merger. A78, ¶ 115. The MLP Merger was approved by a majority of units eligible to vote on November 20, 2014. A105, ¶¶ 177-178.

G. The Dismissal Opinion

Plaintiffs filed suit on September 5, 2014. A Second Consolidated Class Action Complaint was filed on December 12, 2014 (the "Complaint"). On August 20, 2015, the Court of Chancery granted defendants' motion to dismiss the Complaint. In doing so, the trial court stated that "[i]t is reasonably conceivable, based on the facts alleged, that the members of the [Conflicts] Committee approved the terms of the MLP Merger to accommodate Parent, rather than because they believed they were in the best interests of the limited partners." Ex. A at 16. In support of this conclusion, the trial court cited factors that included "a pattern of concessions, a blind-eye towards contradictory market evidence, the transfer of significant value in the form of tax

benefits from the limited partners to the controller, and substantial opposition from disinterested unitholders." *Id*.

Despite these conclusions, the trial court dismissed the Complaint because "members of the [Conflicts] Committee did not have to believe that the MLP Merger was in the best interests of the limited partners." *Id*. at 17. The trial court held that the General Partner's and Conflicts Committee's repeated statements that the MLP Merger was "fair and reasonable to, and in the best interests" of the limited partners did "not provide grounds to alter the contractual standard that the Committee had to meet." *Id.* at 18. This appeal contests solely that aspect of the Court of Chancery's decision.

ARGUMENT

A. Question Presented

Whether the General Partner of a limited partnership, which stated that it determined a merger was in the best interests of, and fair and reasonable to, the limited partners and solicited votes from the limited partners on the basis of that determination, assumed duties to the limited partners consistent with its statement?[3]

B. Scope of Review

"A motion to dismiss a complaint presents the trial court with a question of law and is subject to *de novo* review by this Court on appeal." *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 557 (Del. 2002) (citing *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998)); *Chavous v. State*, 953 A.2d 282, 286 n.15 (Del. 2008) ("[W]e review the trial judge's determinations *de novo* for errors in formulating or applying legal precepts.").

Further, when reviewing a ruling on a motion to dismiss, this Court, like the trial court, "(1) accept[s] all well pleaded factual allegations as true, (2) accept[s] even vague allegations as 'well pleaded' if they give the opposing party notice of the claim, (3) draw[s] all reasonable inferences in favor of the non-moving party, and (4) do[es] not affirm a dismissal unless the plaintiff would not be entitled to recover under any

[3] These issues were preserved for appeal. A77, ¶¶ 113-114; A741-A744; A861-A863; A868; A885-A886.

reasonably conceivable set of circumstances." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs., LLC*, 27 A.3d 531, 535 (Del. 2011) (citations omitted).

C. Merits of the Argument

Because the Partnership Agreement contained a broad waiver of fiduciary duties, the limited partners' primary protection against unfair conduct—whether by Parent, Mr. Kinder, or the General Partner—was the ballot box. While Parent, Mr. Kinder, and other insiders controlled a significant block of Partnership votes, they needed the votes of at least some limited partners to ensure approval of the MLP Merger. A105, ¶ 177-178; A827-A828.

This approval by the limited partners was not a foregone conclusion. The MLP Merger represented a negative after-tax premium for the Partnership's limited partners—who received the same consideration as shareholders of GP Delegate, even though GP Delegate consistently traded at a significant discount to the Partnership. A79, A85-A88, A92-A95, ¶¶ 118, 133-139, 146-152. As the trial court found, there was "***a pattern of concessions, a blind-eye towards contradictory market evidence, [and] the transfer of significant value in the form of tax benefits from the limited partners to the controller***," sufficient to make it "***reasonably conceivable … that the members of the [Conflicts] Committee approved the terms of the MLP Merger to accommodate Parent, rather than because they believed they were in the best interests of the limited partners***." Ex. A at 16 (emphases added). Unsurprisingly, the

MLP Merger was deeply unpopular with the Partnership's limited partners. A105, ¶ 178.

In order to win the necessary votes and push the MLP Merger through, the General Partner and Conflicts Committee undertook to determine whether the MLP Merger was fair to the limited partners and in their interests. A77-A78, ¶¶ 113-115. The General Partner and Conflicts Committee based their approval and recommendation of the MLP Merger on that determination and incorporated that determination into the merger agreement. *Id.*; A632, A643-A644. Then, they solicited votes from the limited partners on the basis that the Conflicts Committee and General Partner had determined that the MLP Merger was fair and reasonable to and in the best interests of the limited partners. A77, ¶ 113. Thus, the General Partner and Conflicts Committee interjected this determination into the vote that constituted the limited partners' primary protection from overreaching by Parent, Mr. Kinder and the General Partner.

The General Partner's and Conflicts Committee's determination that the transaction was fair and in the best interests of the limited partners was not required by the Partnership Agreement. But by having taken upon themselves to make this determination and by extolling it to the limited partners, they must be held to their word and promise. Court of Chancery precedent and the basic dictates of fairness and

equity agree that a party to a partnership agreement may be bound to a voluntarily assumed duty above and beyond those set out in the partnership agreement.

1. Court of Chancery Decisions Recognize That a General Partner May Voluntarily Assume Additional Duties Above And Beyond the Baseline Duties Set Out In a Partnership Agreement

The specific question underlying this appeal is of first impression with this Court. However, similar questions have arisen in the Court of Chancery and are instructive. In a long-running litigation, the limited partners of Cencom Cable Income Partners L.P. ("Cencom") challenged a 1996 transaction in which Cencom sold partnership assets to an affiliate of its general partner ("Cencom GP").[4] One of the core issues in that litigation was Cencom GP's voluntary assumption of additional duties beyond the contractual duties set out in the governing partnership agreement. Specifically, the Court of Chancery ruled that Cencom GP "***voluntarily assumed a duty***" that did not exist in the governing partnership agreement, when it told the

[4] These included opinions on: a motion for preliminary injunction, *In re Cencom Cable Income Partners, L.P. Litigation*, 1996 WL 74726 (Del. Ch. Feb. 15, 1996) ("*Cencom I*"); three motions for summary judgment, *In re Cencom Cable Income Partners, L.P. Litigation*, 1997 WL 666970 (Del. Ch. Oct. 15, 1997) ("*Cencom II*"), *In re Cencom Cable Income Partners, L.P. Litigation*, 2000 WL 640676 (Del. Ch. May 5, 2000) ("*Cencom III*"), and *In re Cencom Cable Income Partners, L.P. Litigation*, 2008 WL 5050624 (Del. Ch. Nov. 26, 2008) ("*Cencom IV*"); and a post trial memorandum opinion, *In re Cencom Cable Income Partners, L.P. Litigation*, 2011 WL 2178825 (Del. Ch. June 6, 2011) ("*Cencom V*"), *aff'd sub nom.*, *Barnes v. Cencom Props., Inc.*, 49 A.3d 1192 (Del. 2012) (Table). *Cencom V*, as affirmed, did not answer the specific question raised here, *i.e.* whether a general partner may voluntarily assume additional duties above and beyond the baseline duties set out in a partnership agreement.

limited partners that it had hired special outside counsel "***to assure that the Appraisal Process and the Sale Transaction would be fair to the Limited Partners and to protect the rights of the Limited Partners in connection therewith***."[5] *Cencom II*, 1997 WL 666970, at *5 (emphases added).

The *Cencom* court found that Cencom GP had assumed a duty because, as here, "***it actively undertook this role ostensibly (1) to actually confer a benefit on the Limited Partners or (2) to convince them the self-interested transaction would conform to the terms of the Partnership Agreement in order to induce their approval***." *Id.* (emphasis added). As the court later explained, this voluntarily assumed duty arose out of common law fiduciary principles—not from the partnership agreement and not from the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). *Cencom IV*, 2008 WL 5050624, at *4 ("[B]y voluntarily undertaking

[5] While the *Cencom* court ruled that this statement created a duty, it could not define the scope of the duty on summary judgment. *Cencom II*, 1997 WL 666970, at *5 ("It is difficult, however, to discern on the present record whether the duty assumed is limited to compliance with the express terms of the Partnership Agreement or should be read more broadly to include an opinion about the fairness of the transaction beyond a mere process compliance checklist"). Later, in *Cencom V*, because the disclosure statement describing the role of the special outside counsel also included a detailed description of exactly what the special outside counsel did, the court determined that "a reasonable Limited Partner would have understood that [special outside counsel] had undertaken an effort to assure that the Limited Partners received that which they contracted for through the Partnership Agreement." *Cencom V*, 2011 WL 2178825, at *5-6. *Cencom V* was affirmed, but the question of whether the general partner could voluntarily assume a duty was not appealed – rather this Court affirmed the scope of the duty as found by the Court of Chancery. *Barnes*, 49 A.3d 1192 at *1.

to deliver to the Limited Partners an opinion by [special outside counsel], the General Partner 'imported common law fiduciary duties into its relationship' with the Limited Partners.").[6]

So too here. The General Partner and Conflicts Committee voluntarily made a determination that the MLP Merger was "fair and reasonable to, and in the best interests of" the limited partners. They incorporated this language into the Partnership's and GP's representations and warranties in §§ 3.3(d) and (f) of the Merger Agreement, and "in consideration of the representations, warranties, covenants and agreements contained in this [Merger] Agreement, and intending to be legally bound," they agreed to the MLP Merger. A633; A643-A644. They did so "ostensibly (1) to actually confer a benefit on the Limited Partners or (2) to convince them the self-interested transaction would conform to the terms of the Partnership Agreement in order to induce their approval." *See Cencom II*, 1997 WL 666970, at *5. The General Partner and Conflicts Committee then repeatedly touted their determination of fairness to the limited partners when soliciting the limited partners' votes.[7] *Id.*

[6] Because, as here, Cencom's partnership agreement did not address Cencom GP's assumption of fiduciary obligations, such an outcome was permitted under the partnership agreement. *Cencom IV*, 2008 WL 5050624, at *4 n.25.

[7] The statement at issue is not merely a passing reference, but appears in the first paragraph of Mr. Kinder's letter to limited partners, is highlighted in his Notice Of Special Meeting, and is prominently repeated throughout the Proxy Statement itself. A433; A447; A478; A480; A481; A559. The Merger Agreement also permits the General Partner to change its recommendation if not doing so would not be in the

By these actions, the General Partner and Conflicts Committee imported into their relationships with the limited partners a duty to determine, in good faith, that the MLP Merger was fair and reasonable to and in the best interests of the limited partners. *Cencom IV*, 2008 WL 5050624, at *4. They violated this duty. As the trial court correctly found, the Complaint sufficiently alleged that, in fact, "the members of the [Conflicts] Committee approved the terms of the MLP Merger to accommodate Parent, rather than because they believed they were in the best interests of the limited partners." Ex. A at 16.

2. Cencom's *Analysis That A General Partner May Voluntarily Assume Common-Law Fiduciary Duties Is Consistent With This Court's Decisions*

The basic principles and policy concerns that animated the Court of Chancery's decisions in *Cencom* are squarely in line with authority from this Court. Because the Partnership Agreement contained a waiver of fiduciary duties, the limited partners' primary source of protection from an unfair transaction was "the ballot box, not the courthouse." *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 368 (Del. 2013) (citing *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 326 (Del. Ch. 1998)). Given the importance of the vote, the parties would, undoubtedly, have agreed *ex ante* that if the General Partner sought to influence the vote by voluntarily undertaking to ensure that

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"best interests of the [limited partners]." A657.

the transaction was fair to the limited partners, then the General Partner should be held to its word and promise.

The DRULPA provides that "a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing." 6 *Del. C.* § 17-1101(f). And this Court has held that the implied covenant bars "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of its bargain." *Gerber v. Enter. Prods. Holdings, LLC*, 67 A.3d 400, 419 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440-42 (Del. Ch. 2012) as "a correct statement of our law"), *overruled in part on other grounds*, *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013). In other words, "a court confronting an implied covenant claim asks whether it is clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Id.* at 418.

Here, the limited partners could hardly have anticipated that the General Partner would try to manipulate and undermine the unitholder franchise by professing to determine that the MLP Merger was in the limited partners' best interests. Then having failed to make that determination in good faith, the General Partner and Parent

benefitted from its impact on the vote. This is analogous to the conclusion in *Gerber*, where the general partner undermined one of the protections provided to unitholders as a substitute for common-law fiduciary duties (a provision that the General Partner could only avail itself of a conclusive presumption of good faith if it was based upon the opinion of a qualified expert). *Id.* at 422. This Court concluded that "even though Gerber forewent the protections available under common law fiduciary principles, he still retained a reasonable contractual expectation that the Defendants would properly follow the [Partnership Agreement's] substitute standards." *Id.*

So too here. The limited partners were entitled to expect that the General Partner and the Conflicts Committee would not undermine the protection of the ballot box and would not solicit votes on the basis that they had made a determination that the MLP Merger was in the best interests of and fair and reasonable to the limited partners, unless they had actually, and in good faith, done so.

3. Plaintiffs Stated a Claim Regardless of Whether the Duty Described in Cencom *Was Only a Disclosure Duty*

The trial court treated *Cencom II* "as a decision about the duty of disclosure"[8] and ignored the analysis underlying the decisions. Ex. A. at 18. In *Cencom III*,

[8] This Court is, of course, not bound by *Cencom I - IV*. However, the logic and analysis underlying those decisions can certainly be instructive and persuasive. Indeed, the Court affirmed *Cencom V*, which was premised on previous rulings that a general partner may voluntarily assume a duty. 2011 WL 2178825, at *5-6, *aff'd*, 49 A.3d 1192. As noted herein, even if *Cencom* was strictly read as a disclosure violation, the Complaint should still have been sustained.

however, the court analyzed Cencom GP's statements *both* as creating an assumed duty and as containing potentially misleading disclosures. The *Cencom III* court concluded: (1) "I can not comfortably determine whether any representation or omission in the Disclosure Statement … constitutes an actionable breach *of the duty of candor* without a trial on the merits,"; and (2) "I conclude that whether [the special outside counsel] fulfilled its duties outlined in the Disclosure Statement is a triable issue." *Cencom III*, 2000 WL 640676, at *4 (emphasis added).[9]

The trial court also cited *Sonet* for the proposition that *Cencom* should be read solely as a disclosure claim. Ex. A at 18 (citing *Sonet*, 722 A.2d at 327). In *Sonet*, however, the plaintiff contended that by merely convening a special committee, the general partner voluntarily assumed the duty to ensure that the transaction was entirely fair. Not surprisingly, the court concluded that was not enough:

> Even if the General Partner's aim was to conduct a process in a manner designed to help obtain the support of the unitholders, without misleading affirmative disclosures professing the fairness and independence of the special committee, it would unreasonably distort the Agreement to hold this General Partner to common law fiduciary standards. Plaintiff's asserted theory of voluntary assumption of common law fiduciary duties is actually a *potential* disclosure claim. As such, it is not ripe and must be dismissed.

[9] Lubaroff & Altman recognize this distinction, writing that, in *Cencom II*, "the Court found that the complaint could be read to assert a claim that the defendants had voluntarily assumed such a duty outside of their obligations under the partnership agreement, and denied summary judgment on that ground." Martin I. Lubaroff & Paul M. Altman, *Lubaroff & Altman on Delaware Limited Partnerships* § 11.2.6.1, at 11-23 (2015 Supplement).

Sonet, 722 A.2d at 327 (emphasis added).

In other words, the *Sonet* court made clear that it viewed *Cencom* as distinguishable because in *Sonet*—unlike *Cencom* and unlike this case—"the proxy statement [had] not yet been distributed … [and] Defendants …. ha[d] not yet sought unitholder action. There [was] no element of reliance on misleading voluntary disclosure intended to induce the unitholders' acquiescence[.]" *Id.* That is, the *Sonet* court dismissed the claim because it was based on a future potential disclosure. Here, by contrast, there were already affirmative disclosures asserting that the General Partner and Conflicts Committee had determined the fairness of the MLP Merger to the limited partners. Thus, here, it would not be unfair or distort the Partnership Agreement to hold the General Partner and Conflicts Committee to that standard. Regardless, even if the Court were to find that these repeated assurances raised only a disclosure claim, the trial court's decision should still be reversed.

First, the trial court erred in concluding that "[t]he Complaint does not assert a claim regarding the accuracy of the disclosures." Ex. A at 18.[10] Although Plaintiffs

[10] Similarly, the trial court stated that "[i]n their brief but not in the Complaint, the plaintiffs contended that even if the Committee was only required to consider the interests of the Partnership, they voluntarily undertook a duty to act in the best interests of the limited partners." Ex. A at 17. In fact, the Complaint does allege that: "the [Conflicts Committee] and [General Partner] undertook the duty to consider the interests of [the limited partners]" and "voluntarily assumed" a "contractual duty to determine whether the [MLP Merger] was fair and reasonable to … [limited partners]." A77-A78, ¶¶ 114-115.

do not view this as a disclosure claim, the allegations of the Complaint are more than sufficient to support such a disclosure claim.

The Complaint alleges that "[e]ven if the … Conflicts Committee Defendants were not already subject to a contractual duty to determine whether the [MLP Merger] was fair and reasonable to [limited partners] by operation of the … Partnership Agreement, then the [Conflicts Committee] voluntarily assumed such a duty by representing that they had done so in the Definitive Proxy. KMP unitholders relied on those assurances in voting to approve the KMP transaction." A78, ¶ 115. The Complaint also alleges that "the terms of the [MLP Merger] were neither in the best interests of nor fair and reasonable to [the limited partners]" (A79, ¶ 117) and that "[General Partner] and the [Conflicts Committee[failed to, in good faith, ensure that the transaction would be fair and reasonable and in the best interests of [the Partnership] and its unitholders." A87-A88, ¶ 138.[11]

Second, Plaintiffs could still seek damages or other equitable relief for a disclosure violation, even though the MLP Merger has closed. The Court of Chancery's decision *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346 (Del. Ch. 2008) is often cited (incorrectly) for the proposition that a claim for disclosure violations does not survive a motion to dismiss. *See, e.g., In re Orchard Enters., Inc.*

[11] Appellants did not waive this issue in briefing because Defendants did not raise the argument that *Cencom* was actually a disclosure theory until their reply brief—giving Plaintiffs no opportunity to respond in their own papers. A786-A789.

S'holder Litig., 88 A.3d 1, 51 (Del. Ch. 2014) ("the defendants argue strenuously that in [*Transkaryotic Therapies*], this court held that monetary damages for a breach of the duty of disclosure cannot be awarded after a merger closes"; rejecting argument); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *15 n.49 (Del. Ch. Oct. 2, 2009) ("Defendants cite [*Transkaryotic Therapies*] and argue that they are entitled to summary judgment because there is no longer a remedy available for any of the alleged disclosure violations"; rejecting argument). Defendants may raise that argument here.

In fact, the trial court's opinion in *Transkaryotic Therapies* was a narrow decision, holding only that "where a breach of the disclosure duty does not implicate bad faith or self-interest, both legal and equitable monetary remedies (such as rescissory damages) are barred on account of the exculpatory provision authorized by 8 *Del. C.* § 102(b)(7)." 954 A.2d at 360. Here, of course, the General Partner's and the Conflict Committee's actions ***did*** implicate bad faith and self-interest.

Thus, the fact that the MLP Merger has closed should not prevent Plaintiffs from securing damages on a disclosure theory. *See, e.g.*, *Orchard Enters.*, 88 A.3d at 51 ("There is also sufficient evidence to give rise to triable issues of fact about the loyalty and good faith of the directors who authorized the disclosures. Monetary relief therefore remains a possible remedy, even under *Transkaryotic*."); *John Q. Hammons Hotels*, 2009 WL 3165613, at *15 n.49 ("[B]ecause of the issues of loyalty

'intertwined' with [the transaction] … this is not a case in which the Court will refrain from granting relief for disclosure violations because the transaction has been completed."). This Court has said the same thing. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 147 (Del. 1997) ("Damages will be available … where disclosure violations are concomitant with deprivation to stockholders' economic interests or impairment of their voting rights.").

CONCLUSION

For all the foregoing reasons, the trial court's decision should be reversed and remanded with instructions to deny the motion to dismiss as to the General Partner and the Conflicts Committee.

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