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Case Number 515,2015 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE HAYNES FAMILY TRUST and WILLIAM BRYCE ARENDT,	)	No. 515, 2015
Plaintiffs-Below/Appellants,	)	COURT BELOW:
v.	)	
KINDER MORGAN G.P., INC., TED A. GARDNER, GARY L. HULTQUIST, and PERRY M. WAUGHTAL,	)	COURT OF CHANCERY OF THE STATE OF DELAWARE, IN AND FOR NEW CASTLE COUNTY
Defendants-Below/Appellees.	)	C.A. No. 10093-VCL

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NATURE AND STAGE OF PROCEEDINGS

Plaintiffs appeal from the pleadings-stage dismissal of their challenge to the merger of a publicly traded limited partnership, Kinder Morgan Energy Partners, L.P. (the "Partnership" or "KMP"), into a wholly owned subsidiary of its ultimate parent, Kinder Morgan, Inc. ("KMI" or "Parent"), for a combination of cash and KMI shares (the "Merger"). Within weeks of the August 10, 2014 announcement of the proposed Merger, Plaintiffs filed suit on behalf of the Partnership's limited partners and moved to preliminarily enjoin the Merger on the basis that it required a supermajority vote of the limited partners. The Court of Chancery denied Plaintiffs' motion on November 5, 2014, *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2014 WL 5667334, at *9 (Del. Ch. Nov. 5, 2014), and Plaintiffs have not appealed that decision.

The Merger closed on November 26, 2014 and Plaintiffs filed their Second Consolidated Amended Class Action Complaint (the "Complaint" or "SAC") on December 12, 2014. A33-148. The Complaint asserted three counts: (1) breach of contract; (2) aiding and abetting a breach of contractual and common law duties; and (3) tortious interference with the limited partnership agreement (the "Partnership Agreement"). SAC ¶¶ 186-207 (A108-12).[1] The Complaint contains

[1] Plaintiffs initially also challenged the merger of the partnership's affiliate, El Paso Pipeline Partners, L.P., with Parent; those claims were voluntarily dismissed after Defendants moved to dismiss. A4.

no cause of action for breach of fiduciary duty. *Id.* The Defendants included Parent; the Partnership's general partner, Kinder Morgan G.P., Inc. (the "General Partner" or "KMGP"); and the directors of the General Partner, including the members of the Conflicts and Audit Committee of the General Partner's board (the "Conflicts Committee"), which had been constituted to consider the Merger in accordance with the safe harbor provisions of the Partnership Agreement. SAC ¶¶ 12-17 (A40-43); Proxy, at 31 (A459).

Defendants moved to dismiss the Complaint on the basis that Plaintiffs had failed to plead a breach of the Partnership Agreement or any other duty. Defs. Mot. to Dismiss (A380-A419). The Court of Chancery granted Defendants' motion to dismiss on August 20, 2015, holding that the General Partner "did not breach any express term of the LP Agreement," and that Plaintiffs had not "identified a conflict that would support an implied covenant claim." *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2015 WL 4975270, at *9, *11 (Del. Ch. Aug. 20, 2015). The Court of Chancery also held that the General Partner did not assume an extra-contractual duty to act in the best interests of the limited partners, rejecting Plaintiffs' reliance on *Cencom*, and holding that *Cencom* "is more properly viewed as a decision about the duty of disclosure" and "does not provide grounds to alter the contractual standard that the [Conflicts] Committee had to

meet." *Kinder Morgan*, 2015 WL 4975270, at *8-9. A final order of dismissal was entered on August 24, 2015. A1. This appeal followed.

In their opening brief, Plaintiffs abandon their central theory below that the General Partner breached a contractual duty to act in "objective good faith" in approving the Merger. Instead, Plaintiffs seek judicial review of the substantive fairness of that transaction to the limited partners under a standard found nowhere in the Partnership Agreement, but rather one that supposedly arises from the Proxy's disclosure of the determinations made by the Conflicts Committee.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery did not err when it held that neither the General Partner nor the Conflicts Committee adopted or assumed an extra-contractual fiduciary duty arising from the disclosure of the Conflicts Committee's determination of fairness to the Partnership, after determining the fairness to the limited partners.

Plaintiffs do not dispute on appeal that: (1) the Partnership Agreement expressly disclaims all fiduciary and other duties that might otherwise apply; (2) the Partnership Agreement provides a clear path for the resolution of conflict transactions through a "Special Approval" safe harbor that requires approval of the transaction by the Conflicts Committee, which may consider in its "sole discretion" any factors, including (or not including) the interests of the limited partners; (3) any conflict of interest resolved by this "Special Approval" process is "conclusively deemed" "fair and reasonable" to the Partnership by "operation of" the Partnership Agreement and precludes any claim for breach of any duty "stated or implied" by "law or equity;" (4) a properly constituted Conflicts Committee approved the Merger, determining that it was "fair and reasonable to, and in the best interests of" the Partnership "after determining that the" Merger was "fair and reasonable to, and in the best interests of, the [limited partners];" and (5) the Proxy *accurately* disclosed the Conflicts Committee's determinations.

Plaintiffs' sole argument on appeal, based entirely on one of five decisions in the *Cencom* litigation, *In re Cencom Cable Income Partners, L.P. Litigation*, 1997 WL 666970 (Del. Ch. Oct. 15, 1997) ("*Cencom II*"), is that the Conflicts Committee "assumed" the obligation to ensure that the Merger was, in fact, fair and reasonable to the limited partners, and, accordingly, its determination must now be reviewed under a fiduciary duty-like standard. Placing all of their appeal eggs in the *Cencom* basket, Plaintiffs argue for a new rule (never even hinted at, much less articulated, in *Cencom* itself) that accurate disclosure of the reasons underlying approval of a transaction creates common-law duties that are otherwise expressly disclaimed by the Partnership Agreement. *See* Op. Br. at 16 (Question Presented).

Nothing recommends this approach. *Cencom* has been consistently and correctly interpreted as requiring that disclosures to limited partners be accurate, and Plaintiffs have never challenged the accuracy of the disclosure at issue. Stated differently, *Cencom* stands for the common sense proposition that if the General Partner promises something – in *Cencom*, that a law firm would allegedly "assure" the fairness of a transaction – then the general partner must do what it promised. Here, in contrast, the General Partner did not promise to "assure" the fairness of a transaction. And it accurately disclosed what the Conflicts Committee had, in fact, done. Applying *Cencom* in the manner Plaintiffs advocate to create fiduciary-like

duties where they have been disclaimed would undermine the General Assembly's clear mandate granting "maximum effect to the principle of freedom of contract." It would also be bad policy in its own right.

For each of these reasons, and those set forth below, this Court should affirm the judgment of the Court of Chancery.

STATEMENT OF FACTS

Plaintiffs were purported limited partners of KMP, a Delaware limited partnership formed in 1992. SAC ¶¶ 9-11 (A40). Prior to the Merger, the Partnership's common units traded on the New York Stock Exchange under the ticker symbol "KMP." *Id.* ¶ 18 (A43). KMGP, a wholly owned, indirect subsidiary of Parent, served as general partner to the Partnership. *Id.* ¶¶ 19, 23 (A43-45).

On July 17, 2014, Parent proposed to acquire all of the outstanding limited partnership units it did not already own for a 10% premium to the then-trading price of the units. *Id.* ¶ 118 (A79). The General Partner delegated authority to consider the Merger to the "Conflicts and Audit Committee" comprised of three directors, Defendants Ted A. Gardner, Gary L. Hultquist, and Perry M. Waughtal, each of whom Plaintiffs now concede met the contractual independence requirements to serve on that committee in accordance with the "Special Approval" safe harbor for conflict transactions. *See* LPA § 6.9(a) (A201-02); Article II (A166, A174); SAC ¶ 17 (A43); Proxy, at 32 (A460).

The Conflicts Committee and its advisors met on multiple occasions to consider and negotiate the Merger. Proxy, at 33-51 (A461-79). In these meetings, the Conflicts Committee discussed and addressed numerous factors and issues relating to the proposed Merger, including each of the matters Plaintiffs allege

rendered the Merger unfair to the limited partners. *See, e.g.*, Proxy, at 33, 37-39, 45-46 (A461, A465-67, A473-74). Plaintiffs nowhere allege that any of these issues were ignored by the Conflicts Committee; Plaintiffs merely disagree with the conclusions it reached.

Following negotiation and deliberations, the Conflicts Committee "determined that the KMP merger is fair and reasonable to, and in the best interests of, KMP, after determining that the KMP merger is fair and reasonable to, and in the best interests of, the KMP [limited partners] (other than [Parent] and its affiliates) . . . ." SAC ¶ 113 (A77); *see also* Proxy, at 49 (A477); Op. Br. at 13-14. The Conflicts Committee unanimously approved the Merger, and recommended that the limited partners do the same. Proxy, at 49 (A477).

Based on the Conflicts Committee's recommendation, the Board of the General Partner approved the Merger and recommended it to the limited partners. *Id.* at 50 (A478). Under federal securities law rules governing "going private" transactions, the General Partner and the Partnership were "required to express their beliefs as to the fairness" of the Merger to the limited partners. Proxy, at 62 (A490) (citing SEC Rule 13e-3). The Proxy in fact did so. *Id.* at 62-63 (A490-91). The Merger was approved by a majority of the Partnership's limited partners and closed on November 26, 2014.

ARGUMENT

I. QUESTIONS PRESENTED

By disclosing that the Conflicts Committee had determined that the Merger "is fair and reasonable to, and in the best interests of, the Partnership, after determining that the [Merger] is fair and reasonable to, and in the best interests of the Partnership's [limited partners]," did the Conflicts Committee or the General Partner thereby assume an extra-contractual duty, contrary to the express language of the Partnership Agreement, to ensure that the Merger was, in fact, fair and reasonable to, and in the best interests of, the limited partners?[2]

II. SCOPE OF REVIEW

"This Court reviews *de novo* the grant of a motion to dismiss under Court of Chancery Rule 12(b)(6), 'to determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.'" *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010) (citation omitted).

III. MERITS OF THE ARGUMENT

A. The Court of Chancery Correctly Determined that the General Partner Complied with the Partnership Agreement, Which Expressly Precludes a Breach of any "Duty Stated or Implied by Law or Equity," Including the Claim Here.

We start with the two undisputed building blocks for our position and the decision below. First, Plaintiffs acknowledge that, as authorized by statute, the

[2] This position was presented below by Defendants. A786-89.

Partnership Agreement eliminated all common-law duties and replaced them with a series of contractual provisions to govern the Partnership and the General Partner's duties and obligations, including as to merger transactions involving conflicts of interest. *See, e.g.*, Op. Br. at 6, 17, 22; *see also Norton v. K-Sea Transp. Partners, L.P.*, 67 A.3d 354, 361-62 (Del. 2013) (holding that contractual language identical to Section 6.10(d) here "eliminates any duties that otherwise exist and replaces them" with purely contractual obligations).

Second, there is no dispute that the General Partner properly invoked and followed the Special Approval process for conflicts transactions and thereby complied with its contractual obligations. These provisions preclude Plaintiffs' effort to impose a fiduciary duty-like review of the Merger. Under Section 16.2 of the Partnership Agreement, a merger requires the "prior approval of the General Partner," and the General Partner is entitled to act in its "sole discretion" and to consider "only such interests and factors as it desires" when considering such a transaction. LPA §§ 16.2, 6.9(b)(i) (A229, A202). If a merger presents conflicts of interest, the Partnership Agreement provides a Special Approval safe harbor, which requires approval by a committee comprised of directors who are neither officers nor employees of the General Partner or any of its affiliates. *Id.* § 6.9(a), Art. II (A201-02, A166, A174). The resolution of a conflict transaction through Special Approval is "conclusively deemed fair and reasonable to the Partnership,"

"permitted and deemed approved by all Partners," and "shall not constitute a breach of [the Partnership] Agreement" or "of any duty stated or implied by law or equity." *Id.* § 6.9(a) (A201-02).

In granting Special Approval, as the Court of Chancery found below, the Conflicts Committee need not act in the best interests of the limited partners. *See Kinder Morgan*, 2015 WL 4975270, at *8. The Conflicts Committee has no duty "to consider the interest of any Person other than the Partnership." LPA § 6.9(a) (A201-02); *see also id.* § 6.9(b)(i) (A202) (in exercising sole discretion, General Partner has "no duty or obligation to give any consideration to any interest of, or factors affecting . . . any Limited Partner"). Indeed, the Partnership Agreement affords the Conflicts Committee authority to consider "the relative interests of any party to such conflict, agreement, transaction or situation and the benefits and burdens relating to such interest" as well as "such additional factors" it "determines in its sole discretion to be relevant, reasonable, or appropriate under the circumstances." *Id.* § 6.9(a) (A201-02). The Conflicts Committee exercised its "sole discretion" here and determined that the Merger was in the best interests of each of the Partnership and its limited partners.

Relying on this Court's decision in *Norton*, the Court of Chancery held that Plaintiffs had failed to plead a breach of the Partnership Agreement. *Kinder Morgan*, 2015 WL 4975270, at *9. Plaintiffs have not appealed that ruling,

abandoning any claim that the process did not comply with the terms of the Partnership Agreement. Instead, Plaintiffs seek to circumvent the Partnership Agreement by arguing that in exercising their discretion to consider the interests of the limited partners, and by disclosing that exercise of discretion in the Proxy, the General Partner or the Conflicts Committee somehow "voluntarily assumed" a fiduciary-like duty to ensure the fairness of the Merger to the limited partners. *See, e.g.*, Op. Br. 2, 9, 18-19, 22.

Plaintiffs' argument ignores that the express language of the Partnership Agreement precludes any finding of an adopted duty and bars any effort to impose new or different standards not found in the contract itself. As described above, compliance with the conflicts section precludes not just a breach of contract claim, but *any* claim, "stated or implied" in "law or equity," including Plaintiffs' equitable claim for breach of an assumed fiduciary duty.[3] *See* LPA § 6.9(a) (A201-02); *see also* LPA § 6.9(b)(iii) (A202) (actions taken when acting "under another express standard" set forth in the Partnership Agreement "shall not be subject to any other or different standards imposed by . . . the Delaware Act or any other law, rule or regulation"). The language of Section 6.9 is consistent with DRULPA, which authorizes a partnership agreement to disclaim *all* duties, 6 *Del. C.* § 17-

[3] As described below, the sole limitations are the implied covenant of good faith and fair dealing, which cannot be waived under the statute, and fraud.

1101(d) (allowing disclaimer "[t]o the extent that, at law or equity, a partner or other person has duties"), as well as all *liability* for breach of any duties. 6 *Del. C.* § 17-1101(f) (authorizing the "elimination of any and all liabilities for breach of contract and breach of duties"). Each of these statutes, and the terms of Section 6.9 here, are broad enough to preclude any liability for an "adopted" duty.

Simply put, because Special Approval "conclusively" deems the Merger fair and reasonable "by operation of th[e Partnership] Agreement," *see* § 6.9(a) (A201-02), there is no room for Plaintiffs' second-guessing of whether the transaction is, in fact, "fair and reasonable." Nor is there room for any extra-contractual theory, untethered to the language of the Partnership Agreement, to impose a substantive fairness review of the transaction. Plaintiffs do not cite a single case supporting the proposition they advance: that the Conflicts Committee's exercise of its contractually authorized "sole discretion" to consider any interests it deems appropriate (here, the interests of the limited partners), and its subsequent disclosure of that determination, somehow leads to a new fiduciary-like standard of review.

B. *Cencom* Provides No Support for Plaintiffs' Argument.

Plaintiffs' sole support for their effort to avoid the conclusive effect of the Partnership Agreement is one of the Court of Chancery's five decisions in *In re Cencom Cable Income Partners, L.P. Litigation*, 1997 WL 666970 (Del. Ch. Oct.

15, 1997) ("*Cencom II*").[4] Op. Br. at 19-23. Fatal to Plaintiffs' argument, however, is the lack of any allegation in the Complaint that the disclosures concerning the Conflicts Committee's "determination" were inaccurate or misleading. Plaintiffs have never challenged that the Conflicts Committee actually did, in fact, make the determinations disclosed in the Proxy and its resolutions: that the Merger was fair to, and in the best interests of, each of the Partnership and its limited partners. Plaintiffs nevertheless seize upon a few sentences from the 1997 decision in *Cencom II*, the first of four *Cencom* rulings addressing the assumed duty argument, in an effort to create a new rule that transforms a factual disclosure into a substantive standard of conduct. But read in conjunction with the Court of Chancery's subsequent decisions, *Cencom II* does not support Plaintiffs' effort to require the General Partner to prove that the Merger was substantively fair to the limited partners.

In *Cencom*, a general partner disclosed that: (1) although not contractually required to do so, it had retained a law firm to "act as special outside legal counsel on behalf of the Limited Partners" and to "*assure* that [the transaction] would be fair to the Limited Partners and to *protect* the rights of the Limited Partners in connection therewith;" and (2) the firm would deliver an opinion stating that the

[4] *Cencom I* has no bearing on this matter, as it did not address this issue of adopted or assumed duties.

transaction had been completed in compliance with the partnership agreement. *Cencom II*, 1997 WL 666970, at *5 (emphasis added). But, following depositions, plaintiff questioned whether the firm had acted in accordance with the disclosures that the firm would "assure" the fairness of the transaction. *Id.* ("[P]laintiffs claim that [the law firm] (1) did not believe it was its role to determine if the process was fair to the Limited Partners, (2) never formed an opinion on whether it was fair, [and] (3) was not engaged to determine if the price was fair and never formed such a conclusion . . . ."). The Court of Chancery denied summary judgment, determining that "a genuine issue of material fact exist[ed] about whether [the law firm] fulfilled its duties outlined in the Disclosure Statement." *Id.* at *6.[5]

After trial, however, the Court of Chancery rejected the plaintiffs' contention that the "fairness" language of the disclosure statement could subject the transaction to a review similar to "entire fairness," where doing so would override the substantive rights of the limited partners under the governing partnership agreement. *In re Cencom Cable Income Partners, L.P. Litig.*, 2011 WL 2178825, at *1 (Del. Ch. June 3, 2011) ("*Cencom V*"), as revised (June 6, 2011), *aff'd sub nom. Barnes v. Cencom Props., Inc.*, 49 A.3d 1192 (Del. 2012).

[5] Prior to trial, the scope of the law firm's duty was unclear. *See Cencom II*, 1997 WL 666970, at *5 ("It is difficult . . . 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.").

The Court characterized the same type of argument Plaintiffs make here as an "untenable stretch," and analyzed the claim as an alleged breach of the duty of disclosure. *Id.* at *1, *5-6; *see also id.* at *6 (entering judgment in defendants' favor and holding that "[t]here is, however, no basis from which anyone could reasonably infer that somehow their financial rights, or financial expectations, were being increased as a result of [the law firm]'s role. In short, the disclosure regarding [the law firm]'s role was not inaccurate . . . .").

Four judges, including then-Vice Chancellor Steele who authored the original *Cencom II* language latched onto by Plaintiffs, have considered *Cencom II*'s application with regard to extra-contractual fiduciary duties. Tellingly, all four judges reached the same conclusion: *Cencom II* implicates the duty of disclosure whereby a general partner, when communicating with limited partners, must do so truthfully and fulfill any promised obligations. *See Sonet v. Timber Co.*, 722 A.2d 319, 326-27 (Del. Ch. 1998) (Chandler, Ch.);[6] *In re Cencom Cable Income Partners, L.P. Litig.*, 2000 WL 640676, at *4 (Del. Ch. May 5, 2000) (Steele, V.C.) ("*Cencom III*"); *Cencom V*, 2011 WL 2178825, at *1, *5-6 (Noble, V.C.);

[6] Plaintiffs' attempt to distinguish *Sonet*'s reading of *Cencom II* fails. *See* Op. Br. 25-26 (citing *Sonet*'s language referring to a "potential disclosure claim" and alleging that "there were already affirmative disclosures" here). Plaintiffs' argument is a distinction without a difference, because the *Cencom* doctrine always requires false disclosure. *See Sonet*, 722 A.2d at 327 ("[W]ithout 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.").

Kinder Morgan, 2015 WL 4975270, at *8-9 (Laster, V.C.).[7] Here, too, *Cencom* cannot be applied to impose the substantive review Plaintiffs seek. At least three separate reasons compel rejection of Plaintiffs' attempted application and extension of *Cencom*.

First, there was no argument in *Cencom* that the relevant partnership agreement precluded extra-contractual duties with respect to the disclosure at issue. *See Cencom IV*, 2008 WL 5050624, at *4 n.25 (Defendants "have not argued that [the] Partnership Agreement excludes the possibility of the subsequent assumption of fiduciary obligations."). Just the opposite is the case here. As set forth above, the Partnership Agreement specifically precludes the importation of fiduciary obligations. Indeed, Plaintiffs would have the Court hold that by complying with

[7] *See Cencom III*, 2000 WL 640676, at *4 (Steele, V.C.) ("I can not comfortably determine whether any representation or omission in the Disclosure Statement about [the law firm's] role constitutes an actionable breach of the duty of candor without a trial on the merits . . . whether [the law firm] fulfilled its duties outlined . . . is a triable issue"); *In re Cencom Cable Income Partners, L.P. Litig.*, 2008 WL 5050624, at *4 (Del. Ch. Nov. 26, 2008) (Noble, V.C.) ("*Cencom IV*") ("The Court did not grant summary judgment because it could 'not comfortably determine whether any *representation or omission* in the Disclosure Statement about [counsel]'s role constitute[d] an actionable breach of the *duty of candor* without a trial on the merits'" and denying summary judgment premised on defendants' promissory estoppel theory that plaintiffs did not rely on the disclosures) (emphasis added) (quoting *Cencom III*, 2000 WL 640676, at *4)); *Sonet*, 722 A.2d at 327 (refusing to find that general partner imported fiduciary duties into its contractual relationship with the limited partners, stating "[p]laintiff's asserted theory of voluntary assumption of common law fiduciary duties [relying "heavily" on *Cencom*] is actually a *potential* disclosure claim. As such, it is not ripe and must be dismissed" where proxy had not yet been issued); *Kinder Morgan*, 2015 WL 4975270, at *9 (Laster, V.C.) ("*Cencom [II]* is more properly viewed as a decision about the duty of disclosure."). *See also Leung v. Schuler*, 2000 WL 264328, at *6 (Del. Ch. Feb. 29, 2000) (Jacobs, V.C.) (finding that *Cencom II* was "distinguishable" because "[h]ere, the plaintiff represents a class of investors to whom *no* fiduciary duties were owed at the time of the alleged disclosure violation" given that those investors were not stockholders at the time of the disclosure).

its express duties, and then accurately disclosing its process, the Conflicts Committee's actions override contractual language that: (1) waives all fiduciary duties; (2) expressly provides that the Conflicts Committee may in its "sole discretion" consider any factors it deems relevant; and (3) immunizes the resulting decision from a finding of breach of any duties "stated or implied by law or equity."[8] The Partnership Agreement here very much "excludes the possibility of the subsequent assumption of fiduciary obligations." *Id.* at *4 n.25.[9]

Second, *Cencom II* involved a promise by a general partner that had hired a law firm to "assure" the fairness of a transaction, and the apparent failure of the law firm to even consider the fairness of the transaction (rendering the disclosure of the promise allegedly false). *See Cencom II*, 1997 WL 666970, at *5-6. But here, the General Partner accurately disclosed a historic fact (that the Conflicts Committee had made a determination of fairness), and there is no corresponding

[8] Citing the Partnership Agreement as a whole, Plaintiffs make the conclusory assertion that it does not "exclude the possibility of the subsequent assumption of fiduciary obligations." Op. Br. at 6. Plaintiffs, however, nowhere attempt to show why that broad statement is true nor do they address any of the specific Partnership Agreement provisions cited herein which contradict their general contention.

[9] Essentially, the *Cencom* decisions are a reflection of Delaware's longstanding prohibition on fraud. *See ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059-60 (Del. Ch. 2006). As the Court of Chancery has recognized, "the absence of a Delaware disclosure duty does not mean that holders of LP units will lack for information," because "[p]ublicly traded MLPs remain subject to the federal securities laws" and limited partners "also retain a state law remedy for common law fraud." *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1025 (Del. Ch. 2010). So long as the disclosure at issue was accurate – as it was here – the limited partners' remedy was "the ballot box, not the courthouse." *Norton*, 67 A.3d at 368 (quoting *Sonet*, 722 A.2d at 326).

challenge that the determination was not, in fact, made. Indeed, Plaintiffs have never alleged or argued below that the General Partner's descriptions in the Proxy of the Conflicts Committee's "determination" were inaccurate, and Plaintiffs admit that they "do not view this as a disclosure claim." Op. Br. at 26-27.[10]

Plaintiffs' belated attempts to salvage their *Cencom* claim by pointing to several "allegations of the Complaint" claimed to be "more than sufficient to support such a disclosure claim" fail. Op. Br. 26-27. None of the three paragraphs cited provides any such support as they do not allege that the Conflicts Committee did not in fact make the determination the Proxy says it did. On the contrary, each concerns the substantive fairness of the Merger itself, merely parroting Plaintiffs' disagreement with the Conflicts Committee's conclusion and offering its legal argument that extra-contractual obligations should apply; such allegations would not state a disclosure claim even if fiduciary duties applied.[11]

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[10] Although Plaintiffs' Complaint included a few paragraphs criticizing unrelated disclosures, *see* SAC ¶¶ 166-70 (A100-02), Plaintiffs did not advance those claims at the preliminary-injunction stage nor in briefing the motion to dismiss. *See* Pls. Ans. Br. Opp. Mot. to Dismiss (A709-65). As a result, any potential disclosure claim, whether or not it was alleged in the complaint, is waived for failing to adequately raise this issue to the trial court below. *See* Sup. Ct. R. 8; *see also* Defs. Reply Br. at 19 n.10 (A789) (arguing that Plaintiffs waived any disclosure claims).

[11] Paragraph 115 of the Complaint (A78) (quoted in Op. Br. at 27) argues that the Conflicts Committee had voluntarily assumed a duty to determine whether the MLP Merger was fair because of the disclosures in the Proxy statement, not that the disclosure about what the Conflicts Committee determined was inaccurate. Paragraph 117 (A79) (quoted in Op. Br. at 27) alleges that the "Proxy makes clear that the process used to approve the [Merger] was hopelessly flawed and conducted in bad faith." No mention is made of the Proxy's accuracy (if anything, their reliance on the Proxy undercuts any claim of falsity). Finally, Paragraph 138 (A87-A88) (quoted in Op. Br. at 27) concerns the substantive fairness of the Merger itself (and Plaintiffs' belief that

Third, there is a logical disconnect between the rule articulated in *Cencom*, that disclosure must be accurate, and the result Plaintiffs ask for here, that the Court should review the substantive fairness of the Merger. Plaintiffs' argument essentially demands that the Conflicts Committee guarantee that its "determination" of fairness was, in fact, correct. This is not the law of our State, even in the corporate context.

Adopting Plaintiffs' position, and thereby allowing a disclosed "determination" to impose a new "duty" on a general partner, would conflict with the General Assembly's policy directive that courts are to give "maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements" in accordance with their terms. *See* 6 *Del. C.* § 17-1101(c); *see also DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chicago*, 75 A.3d 101, 106-07 (Del. 2013) ("[B]ecause [DRULPA] is intended to give 'maximum effect to the principle of freedom of contract' . . . . our analysis here must focus on, and examine, the precise language of the LPA that is at issue in this case."). Indeed, the Court in *Cencom V* flatly rejected Plaintiffs' theory, concluding that "the substantive rights of the limited partners are determined by reference to the provisions of the limited partnership agreement, and one sentence

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it was unfair), but does not contain any allegation that the relevant disclosure was false and misleading.

in a disclosure statement cannot change those rights." *Cencom V*, 2011 WL 2178825, at *1.

Further, Plaintiffs' extension of *Cencom* would effectively impose a new obligation in many going-private transactions. Here, the General Partner was required under the federal securities laws to express its opinion on the proposal's fairness to the unaffiliated limited partners. *See* 17 CFR § 229.1014(a) (company must file a statement that it "reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders"); Proxy, at 62 (A490). Thus, by Plaintiffs' logic, other general partners in such transactions will be compelled not only to express their views on fairness, but also to *prove* the transactions' substantive fairness regardless of the terms of their respective partnership agreements.

And with respect to transactions that are not subject to this SEC rule, endorsing Plaintiffs' argument would discourage general partners from (1) exercising their discretion to consider the interests of limited partners, absent a contractual mandate to do so; and (2) providing disclosure of the reasons for its decisions in transactions of the sort at issue here. This result would provide a disincentive to general partners and their conflicts committees to consider the transaction's fairness to the limited partners because such a request would alter the

contractual standards.[12] It would also prevent general partners and their conflicts committees from comfortably relying on how Delaware Courts have interpreted similar provisions in previous cases, because their duties and obligations in each case would vary depending on their disclosure documents.

C. Absent a Breach of the Express Terms of the Partnership Agreement, Plaintiffs May Only Allege a Breach of the Implied Covenant of Good Faith and Fair Dealing, Which Plaintiffs Have Failed to Plead.

Bound by their concession that the General Partner did not breach the Partnership Agreement, Plaintiffs argue for the first time on appeal that the implied covenant allows them to impose an "adopted" duty on the General Partner, because the parties to the Partnership Agreement "would, undoubtedly, have agreed *ex ante* that if the General Partner sought to influence the vote by voluntarily undertaking to ensure that the transaction was fair to the limited partners, then the General Partner should be held to its word and promise." Op. Br. 22-23. But the only

[12] This is not a far-fetched hypothetical, as it is not uncommon for general partners to consider the interests of limited partners although the partnership agreement imposes a "best interests of the Partnership" standard, as here. *See, e.g.*, *Norton*, 67 A.3d at 367 n.61 ("Defendants argue that Stifel's opinion went beyond the LPA's requirements because it stated that the consideration Kirby paid to the limited partners was fair, as opposed to the consideration paid to K-Sea as a whole."); *In re Encore Energy Partners, L.P. Unitholder Litig.*, 2012 WL 3792997, at *5 (Del. Ch. Aug. 31, 2012) (committee "determined that the Merger Agreement was fair and reasonable to, and in the best interests of, [the partnership] and its public unitholders").

"gap" pled in the Complaint had nothing to do with the disclosure upon which Plaintiffs now rely, the implied covenant is not applicable here.[13]

The implied covenant is a "limited and extraordinary legal remedy," that cannot be employed to "rewrite a contract." *Nemec*, 991 A.2d at 1125-26, 1128. It has no application where the contract expressly addresses the matter in dispute. *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 896 (Del. 2015), as revised (Mar. 27, 2015) (the implied covenant "does not apply when the contract addresses the conduct at issue"); *Nemec*, 991 A.2d at 1127 ("The implied covenant will not infer language that contradicts a clear exercise of an express contractual right."). Here, the Partnership Agreement leaves no room for the implied covenant because it expressly covers the Special Approval process, including the factors the Conflicts Committee in its "sole discretion" can, and need not, take into account. *See* LPA §§ 6.9(a), 6.9(b), Art. II (A201-02, A166, A174). These provisions control and preclude application of the implied covenant.[14]

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[13] *See* SAC ¶ 116 (A78) (alleging "gap" in the contract regarding conflicts of interest for directors serving on the Conflicts Committee); *Home Ins. Co. v. Maldonado*, 515 A.2d 690, 697 (Del. 1986) (concluding that where plaintiff "did not plead or argue" the issue below, the "issue was not fairly presented to the Trial Court" and declining "under Supreme Court Rule 8, to rule on th[e] issue upon appeal").

[14] Plaintiffs argue that *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400 (Del. 2013) supports their position, but even Plaintiffs agree that *Gerber* was about a general partner taking action that had "the effect of preventing the other party to the contract from receiving the fruits of its bargain." Op. Br. at 23-24 (citing *Gerber*, 67 A.3d at 419, 422). Here, the General Partner did not deprive the limited partners of the benefit of their bargain, and to apply *Gerber* in the manner advocated by Plaintiffs would extend the implied covenant beyond its intended "limited and extraordinary" application. *Nemec*, 991 A.2d at 1128.

CONCLUSION

For each of the reasons explained above, this Court should accordingly affirm the decision of the Court of Chancery granting the Defendants' Motion to Dismiss.

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