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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ADRIAN DIECKMAN, on behalf of himself and all others similarly situated, Plaintiff Below Appellant, vs. REGENCY GP LP, REGENCY GP LLC, ENERGY TRANSFER EQUITY, L.P., ENERGY TRANSFER PARTNERS, L.P., ENERGY RANSFER PARTNERS, GP, L.P., MICHAEL J. BRADLEY, JAMES W. BRYANT, RODNEY L. GRAY, JOHN W. McREYNOLDS, MATTHEW S. RAMSEY and RICHARD BRANNON, Defendants Below, Appellees.	)	No. 208, 2016 Appeal from the Memorandum Opinion and Order dated March 29, 2016 of the Court of Chancery of the State of Delaware, C.A. No. 11130-CB

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

Rules

Regulations

Other Authorities

NATURE OF PROCEEDINGS

Plaintiff, a unitholder of Regency Energy Partners, L.P. ("Regency"), appeals an opinion dismissing his lawsuit, which challenges the merger between Regency and Energy Transfer Partners, L.P. ("ETP"), two publicly traded master limited partnerships ("MLPs"). The only issue addressed by the Chancery Court and before this Court is whether the common law stockholder ratification doctrine overrides Regency's limited partnership agreement ("LPA"), which eliminates such obligations and duties as authorized by Delaware's Revised Uniform Limited Partnership Act ("DRULPA") and well-settled precedents. Plaintiff asks this Court to ignore DRULPA and overturn these precedents.

The Chancery Court correctly dismissed Plaintiff's lawsuit because a majority of unaffiliated units were voted in favor of the merger. The LPA contains a number of safe harbor provisions, and the fulfillment of any one of these provisions is undisputedly dispositive of Plaintiff's claims. Here, Regency's general partner (the "General Partner") fulfilled three independent safe harbors:

> (1) unitholders holding a majority of Regency's unaffiliated outstanding common units approved the merger (the "Unitholder Vote" safe harbor);
>
> (2) Regency's conflicts committee approved the merger (the "Special Approval" safe harbor); and
>
> (3) the General Partner and its conflicts committee relied on the advice and fairness opinion of J.P. Morgan in approving the merger (the "Conclusive Presumption" safe harbor).

The Chancery Court only reached the first of these provisions, holding that the Unitholder Vote safe harbor defeated Plaintiff's claims because 60% of Regency's outstanding unaffiliated common units were cast in favor of the merger.

Plaintiff argued—based on the common law stockholder ratification doctrine and omission allegations regarding the conflicts committee members' supposed self-interests—that the unitholder vote was not "fully informed" and, thus, cannot trigger the Unitholder Vote safe harbor. The Chancery Court properly rejected this argument as contrary to the language of the LPA and analogous case law: "[T]he terms of the LP[A] unambiguously extinguish the duty of disclosure and replace it with a single disclosure requirement….Plaintiff does not contend that defendants failed to satisfy this limited disclosure obligation." Op. 22, 25 (A682, 685).

Lacking legitimate grounds for reversal, Plaintiff mischaracterizes the Opinion as authorizing MLPs to "lie" to unitholders with impunity. Pl.'s Op. Br. ("OB") 5, 16. Plaintiff's rhetoric is incorrect: Defendants are subject to liability under federal securities laws if they make misrepresentations in proxy materials and other public statements to unitholders. Indeed, Plaintiff filed a federal securities lawsuit against Defendants but dismissed it after his attorneys were not selected as lead counsel in the federal matter.

Because Plaintiff's arguments require this Court to rewrite the LPA, eviscerate DRULPA, and overturn MLP precedent, they should be rejected.

SUMMARY OF ARGUMENT

I. Denied. Plaintiff's two attacks on the Unitholder Vote safe harbor are meritless attempts to insert common law disclosure duties into his breach of contract lawsuit. First, Plaintiff again advances his "stockholder ratification" argument. This doctrine and its requirement of "fully informed" stockholders are inapplicable because the LPA "eliminates traditional fiduciary duties" (Compl. ¶ 4 (A013); LPA § 7.9(e) (A106)), provides a contractual safe harbor for unitholder approvals (LPA § 7.9(a)(ii) (A105)), and defines the disclosures required for merger votes (*id.* §§ 7.9(e), 14.3(a) (A106, 124-25)). The Opinion is in accord with all prior MLP opinions concerning disclosure claims, fiduciary duty waivers, and freedom-of-contract principles.

Second, Plaintiff argues for the first time on appeal that the General Partner voluntarily adopted (and breached) an extra-contractual duty of candor by disclosing more than the LPA required. This argument is barred because it was not raised to the Chancery Court. If the Court nevertheless considers this argument, a "clear error" standard applies, and Plaintiff cannot satisfy this burden because, *inter alia*, the LPA eliminates all extra-contractual duties. Indeed, five months ago, this Court rejected a nearly identical argument that an MLP's general partner "voluntarily undertook a duty" by doing more than a partnership agreement required. *In re Kinder Morgan, Inc. Corp. Reorg. Litig.*, 2015 WL 4975270, at *8-

9 (Del. Ch. Aug. 20, 2015), *aff'd sub nom. Haynes Family Tr. v. Kinder Morgan G.P., Inc.*, 135 A.3d 76 (Del. 2016). Plaintiff's theory would abrogate *Kinder Morgan* and other precedents. His argument would also render the LPA's duty-limiting protections moot because a merging MLP will *always* disclose more than required by the LPA so as to comply with federal securities laws.

II. Denied. The Court need not and should not reach the Special Approval safe harbor because the Chancery Court did not reach this issue. To the extent the Court reaches this issue, it should affirm the Chancery Court's dismissal of the Complaint because Regency's conflicts committee (the "Committee") approved the merger, fulfilling the Special Approval safe harbor.

Plaintiff argues that the Committee's two members were ineligible to serve on the Committee and could not validly grant Special Approval because (i) one member (Richard Brannon) was a director of Sunoco LP, an ETP subsidiary, before Regency appointed him to the Committee, and (ii) both members (Brannon and James Bryant) joined the Sunoco board after the merger closed. The LPA forecloses Plaintiff's claim by forbidding only *current* Sunoco directors from serving on the Committee, not *past* or *future* Sunoco directors. LPA § 1.1 (A062). Plaintiff argues that Brannon was a "de facto" member of the Committee before resigning from Sunoco's board, but this argument finds no support in the LPA or case law. Further, Plaintiff's only allegation of Brannon's "de facto" Committee

membership is his attendance on one preliminary phone call regarding the merger while he was a non-Committee member of Regency's board of directors (the "Board"). Plaintiff concedes that Brannon and Bryant were not on Sunoco's board when they were appointed to the Committee, and when they negotiated and approved the merger.

Plaintiff next argues that Brannon and Bryant do not satisfy Section 303A.02(a) of the NYSE's independence rules. But Section 303A.02(a) was fulfilled when the Board determined that Brannon and Bryant were independent. Plaintiff's disagreement with that determination is irrelevant. Further, the NYSE rules prohibit only *material* self-interests, and the Complaint does not allege that Sunoco board seats were material to Brannon or Bryant.

Based on the same allegations concerning Sunoco board seats, Plaintiff argues that Brannon's and Bryant's appointments to the Committee violated the implied covenant, invalidating the Committee's Special Approval. This claim fails because there is no relevant "gap" in the LPA. The LPA explicitly addresses whether and when Committee members can serve on Sunoco's board. Because the LPA prohibits only current Sunoco directors from serving on the Committee, the implied covenant cannot be used to prohibit past or future Sunoco directors. Plaintiff's implied covenant claim would impermissibly modify the LPA's terms.

III. Denied. The Court should not reach the Conclusive Presumption safe harbor because the Chancery Court did not. If it decides to reach the issue, it should affirm the Chancery Court's dismissal because Plaintiff has not adequately alleged that the General Partner failed to fulfill its contractual good faith duty.

Plaintiff's arguments regarding the Conclusive Presumption safe harbor are barred because he did not make them below. Further, Plaintiff is incorrect in arguing that the Conclusive Presumption safe harbor does not apply to transactions that are eligible for the Unitholder Vote and Special Approval safe harbors. The LPA contains no such limitation. Further, this Court and the Chancery Court have applied the Conclusive Presumption safe harbor in analogous MLP lawsuits where the other safe harbors also applied.

In addition to these three safe harbors, Plaintiff's claims are subject to the LPA's good faith standard, which requires him to plead and prove that the merger was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Brinckerhoff v. Enbridge Energy Co.*, 67 A.3d 369, 373 (Del. 2013). Plaintiff's boilerplate allegations concerning the merger—i.e., that the 15% premium offered to Regency unitholders was inadequate and the result of a hasty and conflicted process—do not state a claim under the good faith standard, as the Chancery Court has held in dismissing other MLP lawsuits.

COUNTERSTATEMENT OF FACTS

On January 16, 2015, ETP offered to acquire Regency via a merger. Compl. ¶¶ 56-58 (A033-34). Energy Transfer Equity, L.P. ("ETE"), another publicly traded MLP, owned Regency's and ETP's general partners at the time. *Id*. ¶¶ 2, 14, 16 (A012, A017-18). On January 20, the Board appointed Brannon, a Regency director, to the Committee after he resigned from the Sunoco board. *Id.* ¶ 6 (A014). Brannon joined Bryant, who was already a Committee member, and they retained a financial advisor (J.P. Morgan) and legal advisors. Proxy at 53-54 (A208-09). The Committee and its advisors analyzed and negotiated the potential transaction, with four counterproposals passing between the Committee and ETP's conflicts committee. *Id.* at 51-58 (A206-13).

On January 25, 2015, the parties reached an agreement for ETP to acquire Regency (the "Merger"). Compl. ¶¶ 33, 64 (A024, A035). The Merger would provide Regency unitholders with a 13% to 17% premium and ownership in a larger, more stable enterprise during a period of extreme industry volatility. Proxy at 61-62 (A216-17). The Committee approved the Merger and recommended it to the Board, which also approved it. *Id.* at 57 (A212). In approving the Merger, the Committee and Board relied upon J.P. Morgan's analysis and fairness opinion concerning the Merger. *Id.* at 61 (A216).

Regency issued its 250-page Definitive Proxy Statement (the "Proxy") on March 24, 2015. Plaintiff alleges that the Proxy did not disclose "Brannon's recent service on the board of an ETP affiliate [Sunoco], or the expectation that Brannon would rejoin that board, along with Bryant, after" the Merger closed.[1] Compl. ¶ 53 (A032); Op. 17 (A677). But Plaintiff does not allege that the unitholders lacked information concerning the Merger's terms or its financial merits and risks. Plaintiff also concedes that the Proxy included the disclosures required by the LPA (i.e., a copy or summary of the Merger Agreement). Op. 24-25 (A684-85).

On April 28, 2015, Regency's unitholders almost unanimously approved the Merger: 99% of unaffiliated common units present at the special meeting (and 60% of total outstanding unaffiliated common units) were cast in favor of the Merger. Op. 9-11 (A669-71); Form 8-K (A405); Proxy at 46 (A201). The Merger closed, and the Board disbanded, on April 30, 2015. Compl. ¶ 2 (A012).

Plaintiff filed suit in Texas federal court on February 11, 2015, asserting disclosure claims under the federal securities laws. Op. 11 (A671). The federal court consolidated Plaintiff's suit with several other Merger-related lawsuits and later denied plaintiffs' motion for expedited discovery. *Id.* "Plaintiff voluntarily dismissed his federal action on June 5, 2015, after he was not selected as interim co-lead plaintiff" and filed this action on June 10, 2016. *Id.* at 12 (A672).

[1] This supposed "expectation" is based entirely on Plaintiff's speculation. Further, Brannon's service on the Sunoco board was publicly available information. MTD Ex. 6, Sunoco 8-K.

ARGUMENT

I. The Court of Chancery correctly held that the Unitholder Vote safe harbor forecloses Plaintiff's claims.

A. Questions presented

(1) Did the Chancery Court err in declining to apply the common law stockholder ratification; (2) should the Court consider an argument that Plaintiff raised for the first time on appeal; and (3) if so, did the General Partner create an extra-contractual duty of candor by disclosing more than the LPA required? Op. 2, 24-25 (A662, A684-85); OB 16-21; Pl.'s Mot. to Dismiss Opp'n. Br. ("MTD Opp. Br.") 21-26 (A454-59); B030-32; B078-80.

B. Scope of review

De novo review applies to the stockholder ratification question identified above. *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010). If the Court considers Plaintiff's new "extra-contractual duty" argument, a plain error standard of review applies. *Everett v. Scott*, 2016 WL 2585768, at *2 (Del. Apr. 26, 2016).

C. Merits of argument

The Chancery Court correctly dismissed Plaintiff's claims based on the Unitholder Vote safe harbor. Plaintiff's argument—that the Opinion allows Regency to "lie [to] and mislead the unitholders" in proxy statements—is incorrect and cannot overcome the plain language of the LPA. OB 16.

1. The Court of Chancery's holding.

Plaintiff alleges that the General Partner breached the LPA by approving the Merger. Compl. ¶ 1 (A011-12). Section 7.9(a) of the LPA provides that "any resolution or course of action by the General Partner or its Affiliates" with respect to a potential conflict of interest

> shall be permitted and deemed approved by all Partners [e.g., Plaintiff], and *shall not constitute a breach of this Agreement...or of any duty stated or implied by law or equity*, if the resolution or course of action in respect of such conflict of interest is....(ii) *approved by the vote of a majority of the Common Units (excluding Common Units owned by the General Partner and its Affiliates)....*

LPA § 7.9(a) (A105).[2] The Chancery Court held that the General Partner did not breach the LPA based on this provision and the following analysis:

- The Merger was eligible for Section 7.9(a)'s safe harbors (Op. 25 (A685)), as Plaintiff alleged that the transaction "posed a clear and indisputable conflict of interest…." Compl. ¶ 4 (A013).
- The General Partner cannot be liable for breaching the LPA if it fulfilled any one of Section 7.9(a)'s safe harbors. Op. 1 (A661).
- A majority of outstanding unaffiliated common units were voted in favor of the Merger, satisfying Section 7.9(a)(ii). *Id*. at 25 (A685).
- Section 7.9(e) eliminates all fiduciary duties, including the so-called "duty of disclosure," and the General Partner provided the disclosures required by Section 14.3(a). *Id.* at 2, 24-25 (A662, A684-85).

Plaintiff does not appeal any of these bases for the trial court's holding, which is fatal to his appeal because these uncontested bases are sufficient to establish that the Chancery Court did not err. Instead, Plaintiff contends that the Unitholder

[2] All emphases are supplied unless otherwise noted.

Vote safe harbor is inapplicable because the vote was allegedly not "fully informed." OB 15. His two arguments in support of this theory are unavailing.

2. The Chancellor did not err in declining to apply the common law stockholder ratification doctrine.

Plaintiff first argues that it "was error" for the trial court to hold that "principles regarding stockholder ratification were inapplicable." OB 16. Plaintiff is incorrect for three reasons.

a. The stockholder ratification doctrine is inapplicable.

First, the "stockholder" ratification doctrine and its requirement of "fully informed" stockholders are inapplicable where (as here) a partnership agreement "eliminates traditional fiduciary duties" (Compl. ¶ 4 (A013); LPA § 7.9(e) (A106)), provides a contractual safe harbor based on unitholder elections (LPA §7.9(a)(ii) (A105)), and defines the disclosures required for merger votes (LPA §§7.9(e), 14.3(a) (A124-25)):

- "*Absent contractual modification*," an MLP "would have been required to disclose fully and fairly all material information within their control when they submitted the Merger Agreement to a vote of the Limited Partners." *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2012 WL 1142351, at *10-11 (Del. Ch. Apr. 4, 2012). However, Section "14.3 details the procedure that must be followed to gain approval of the limited partners of a merger" and "limit[s] the requirements to those detailed in the LPA." *In re K-Sea Transp. Partners, L.P. Unitholders Litig.*, 2011 WL 2410395, at *8 (Del. Ch. June 10, 2011), *aff'd*, 67 A.3d 354 (Del. 2013).

- "The complaint does not identify a contractual duty to disclose material information in connection with the Proposed Transaction. To the contrary," the "LP Agreement requires only that the limited partners be given [the

items in Section] 14.3(a)." Thus, the Chancery Court "cannot infer an obligation to disclose all material information...." *Lonergan v. EPE Hldgs, LLC*, 5 A.3d 1008, 1024 (Del. Ch. 2010).

- "Only 'if the partners have not expressly made provisions in their partnership agreement...will [a court] look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence." *Gerber v. EPE Hldgs, LLC*, 2013 WL 209658, at *6 (Del. Ch. Jan. 18, 2013) (alteration in original).

b. The Opinion does not permit Defendants to mislead unitholders.

Second, the Chancellor's holding does not "allow" Defendants to "lie" to or "mislead" unitholders. OB 16, 18.[3] As the Chancery Court explained, "[f]ederal securities laws still apply" to the Proxy and would provide unitholders with monetary and equitable relief if Defendants had misled the unitholders (which they did not). Op. 27 (A687). Vice Chancellor Laster has similarly reasoned that "the absence of a Delaware disclosure duty does not mean that holders of LP units will lack for information. Publicly traded MLPs remain subject to the federal securities laws. Limited partners also retain a state law remedy for common law fraud." *Lonergan*, 5 A.3d at 1025. Plaintiff voluntarily dismissed his federal securities lawsuit after he was not selected as lead plaintiff in the consolidated matter. Op. 12 (A672). This Court should not distort the LPA or disregard case law to accommodate Plaintiff's tactical decision to abandon his federal securities claim and pursue a contract claim under the LPA. *Id.* at 26 (A686).

[3] Contrary to Plaintiff's suggestion, the Chancery Court did not find that the unitholders were "uninformed." OB 17. Defendants did not omit any material information from the Proxy.

c. Plaintiff is simply upset at the terms of the contract that he voluntarily entered.

Third, Plaintiff's attempt to inject common law corporate doctrines runs counter to the freedom-of-contract principles established by the Delaware legislature and this Court. The policy of DRULPA is "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." 6 *Del. C.* § 17-1101(c). "Consistent with the underlying policy of freedom of contract…, limited partnership agreements are to be construed in accordance with their literal terms." *K-Sea*, 2011 WL 2410395, at *8; *Emps. Ret. Sys. of City of St. Louis v. TC Pipeline GP, Inc.*, 2016 WL 2859790, at *1 (Del. Ch. May 11, 2016) (MLPs can "provide for modified versions of [fiduciary] duties and rights—*or none at all*—by contract"). The Chancery Court followed this policy.

Plaintiff accepted the terms of the LPA when he decided to invest in an MLP instead of a corporation, and he is bound by his decision. MLPs offer many benefits to unitholders that are not available to stockholders of corporations, such as reduced taxation and generous quarterly distribution requirements. 26 U.S.C. § 7704(c); LPA § 6.3(a) (A095). Corporations, by contrast, mandate stockholder protections such as non-waivable common law fiduciary duties. *Allen v. El Paso Pipeline GP Co., L.L.C.*, 113 A.3d 167, 179-80 (Del. Ch. 2014), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015). Plaintiff wants the benefits of an MLP *plus* the aspects of corporate law that support his claim. OB 18. Delaware courts have

rejected similar attempts by MLP investors to invoke corporate doctrines and ignore their partnership agreements:

- "[W]ith the benefits of investing in alternative entities often comes the limitation of looking to the contract as the exclusive source of protective rights." *Haynes Family Tr. v. Kinder Morgan G.P., Inc.*, 135 A.3d 76, 2016 WL 912184, at *2 (Del. 2016).

- "If [an MLP plaintiff] seeks the protections the common law duties of loyalty and care provide, he would be well-advised to invest in a Delaware corporation. He is bound by his decision to forgo these protections." *Allen v. Encore Energy Partners, LP*, 72 A.3d 93, 109 (Del. 2013).

- "[Plaintiff] willingly invested in a limited partnership that provided fewer protections to limited partners than those provided under corporate fiduciary duty principles. He is bound by his investment decision." *Norton v. K-Sea Transp. Partners LP*, 67 A.3d 354, 368 (Del. 2013).

- "Having decided to take a leap of faith and to reach for the kind of returns a master limited partnership investment might yield,...Plaintiffs cannot reintroduce fiduciary review...." *In re Encore Energy Partners Unitholder Litig.*, 2012 WL 3792997, at *13 (Del. Ch. Aug. 31, 2012), *aff'd*, 72 A.3d 93 (Del. 2013).

3. The Court of Chancery did not err in failing to hold that the General Partner has "voluntarily" adopted the common law duty of disclosure.

Plaintiff also advances a new argument on appeal—i.e., that the General Partner reintroduced the eliminated duty of disclosure by "voluntarily" disclosing more than the LPA required. OB 18-19. This argument fails for several reasons.

a. Rule 8 bars Plaintiff's new argument.

Plaintiff's 'voluntary duty' argument is barred because he raised it for the first time on appeal. "Only questions fairly presented to the trial court may be

presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Del. Supr. Ct. R. 8. Pursuant to Rule 8, this Court has refused to consider arguments raised for the first time on appeal. *See, e.g.*, *Smith v. Delaware State Univ.*, 47 A.3d 472, 479 (Del. 2012); *In re Walt Disney Co. Derivative Litig*., 906 A.2d 27, 55 (Del. 2006). In the Chancery Court, Plaintiff never raised his 'voluntary duty' theory or cited to any of the five cases in this section of his appellate brief. MTD Opp. Br. 21-26 (A454-59); OB 18-21.

Rule 8's "interests of justice" exception does not apply for two reasons. First, Plaintiff failed to invoke this exception in his Opening Brief and has, therefore, waived it. Del. Supr. Ct. R. 14(b)(vi), 14(c). Second, Plaintiff cannot satisfy the "interests of justice" exception, which is "very narrow" and "extremely limited." *Everett*, 2016 WL 2585768, at *2; *Russell v. State*, 5 A.3d 622, 627-28 (Del. 2010). The exception applies only where appellant satisfies the "plain error" standard of review by proving "material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and…which clearly show manifest injustice." *Everett*, 2016 WL 2585768, at *2; *Russell*, 5 A.3d at 627 (the error must be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process"). Plaintiff's new

argument does not satisfy this standard; his theory directly contradicts the plain language of the LPA and well-settled case law.

b. Plaintiff's new argument contradicts the LPA and well-settled MLP precedents.

Even if the Court reaches this new argument, it should reject Plaintiff's theory that the General Partner "has a duty to make a full and fair disclosure" when it "voluntarily" discloses more than required by the LPA. OB 17-18. First, the LPA forecloses the application of such extra-contractual duties:

> *Except as expressly set forth in this Agreement*, neither the General Partner nor any other Indemnitee shall have *any duties* or liabilities, including fiduciary duties, to the Partnership or any Limited Partner and *the provisions of this Agreement*, to the extent that they restrict, eliminate or otherwise modify the duties…*otherwise existing at law or in equity, are agreed by the Partners to replace such other duties and liabilities* of the General Partner or such other Indemnitee.

LPA § 7.9(e) (A106); *see also* § 7.9(b) (A105-06) (explaining that the General Partner "shall not be subject to any other or different standards imposed by...the Delaware Act or any other law, rule or regulation or at equity").[4] Plaintiff's newest argument is yet another inappropriate attempt to inject corporate law principles that are contrary to the express language of the LPA. *See supra* §§ I.C.2.a, I.C.2.c.

Second, in March 2016, this Court rejected an argument that an MLP's general partner expands its contractual duties by taking actions that go beyond the

[4] The LPA does not eliminate the implied covenant. However Plaintiff did not raise an implied covenant claim in connection with the Unitholder Vote safe harbor. Op. 22 n.50, 30 n.70 (A682; A690).

requirements of a partnership agreement. *Kinder Morgan*, 2016 WL 912184, at *2. In *Kinder Morgan*, the partnership agreement required the general partner to make decisions that it believed were in the best interests of the "partnership." Based on *Cencom II* (Plaintiff's leading authority, discussed below), the *Kinder Morgan* plaintiff argued that the general partner "voluntarily undertook a duty to act in the best interests of the limited partners" when approving a merger because the special committee had determined that the merger was in the best interests of the *limited partners*. *In re Kinder Morgan*, 2015 WL 4975270, at *8-9. This Court affirmed dismissal and rejected plaintiff's argument:

> [T]he Court of Chancery properly held that the unitholders could not seek to hold the general partner or the other defendants responsible for duties inconsistent with the agreement, simply because the approval committee opined as to its view of the fairness of the transaction to the [limited partners].

Kinder Morgan, 2016 WL 912184, at *2.

Third, Plaintiff's argument is contrary to Chancery Court decisions. The defendants in *Lonergan* and *K-Sea* disclosed more than required by those MLPs' partnership agreements, which—like Section 14.3—required only the disclosure of a "copy or summary of the merger agreement." *K-Sea*, 2011 WL 2410395, at *8; *Lonergan*, 5 A.3d at 1011-12, 1014-15, 1022, 1024. Nevertheless, *Lonergan* and *K-Sea* held that defendants did not have a "duty to make a full and fair disclosure" (OB 18-19) about the voluntarily disclosed issues. As Vice Chancellor Laster

explained, the "duty not to speak falsely that applies whenever directors *choose to communicate with stockholders* similarly flows from a board's fiduciary duties….[T]he [LPA] eliminates all fiduciary duties, which therefore cannot support a disclosure obligation." *Lonergan*, 5 A.3d at 1023-24.

Fourth, Plaintiff incorrectly assumes that the General Partner's disclosures were "voluntary." OB 17. As noted above, federal securities laws apply to MLPs and required Defendants to make disclosures beyond those mandated by the LPA. *See supra* § I.C.2.b; *see also, e.g.*, 17 C.F.R. § 229.1000 *et seq*., § 240.14a-101. If an MLP loses the protections of Sections 7.9(e) and 14.3(a) by disclosing more than required by Section 14.3(a), then these provisions of the LPA are rendered meaningless, as federal law requires a merging MLP to disclose more than required by the LPA. OB 33 (conceding that "a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.").

Fifth, the only authority interpreting the DRULPA that Plaintiff cites on this issue, *In re Cencom Cable Income Partners, L.P. Litig*., 1997 WL 666970 (Del. Ch. Oct. 15, 1997) ("*Cencom II*"), does not support his argument. In *Cencom II*, the Chancery Court held that a general partner might have "voluntarily assumed a duty" not found in a partnership agreement by disclosing that specific actions would be taken. *Id.* at *5. But *Cencom II* is of dubious precedential value:

- This Court recently refused to extend *Cencom II* to an MLP partnership agreement; the *Kinder Morgan* holding is directly contrary to *Cencom II*. *Kinder Morgan*, 2016 WL 912184, at *2; *see supra* pp. 16-17.

- In the twenty years since *Cencom II*, no Court has ever applied this opinion to expand a general partner's duties beyond those set forth in a partnership agreement. Plaintiff's only other authority on this issue *refused* to apply the principle articulated in *Cencom II*. OB 20-21 (citing *Sonet v. Timber Co., L.P.*, 722 A.2d 319 (Del. Ch. 1998)).

- The Chancery Court in *Cencom* ultimately concluded that the general partner did not expand its duties based on its disclosure, and the Supreme Court affirmed this conclusion. *In re Cencom Cable Income Partners, L.P. Litig*., 2011 WL 2178825, at *1 (Del. Ch. June 6, 2011) , *aff'd sub. nom. Barnes v. Cencom Properties Inc.*, 49 A.3d 1192 (Del. 2012) (TABLE).

Moreover, *Cencom II* did not involve the duty-limiting provisions found in the LPA. *Cencom II* assumes that common law fiduciary duties applied in conjunction with contractual duties, which is not the case here. Compl. ¶ 4 (A013); *Cencom II*, 1997 WL 666970, at *4. Five years after *Cencom II* was decided, the Legislature amended DRULPA § 17-1101(d) to permit partnership agreements to eliminate fiduciary duties entirely. As a post-amendment *Cencom* opinion confirmed, "the substantive rights of the limited partners are determined by reference to the provisions of the limited partnership agreement, and one sentence in a disclosure statement cannot change those rights." *Cencom*, 2011 WL 2178825, at *1. *Cencom II* does not apply where, as here, the LPA eliminates and fully replaces fiduciary duties. LPA § 7.9(e) (A106).[5]

[5] Plaintiff also invokes the doctrine of "*contra proferentem*" to support his theory, but he does not allege any ambiguities in the LPA. OB 18.

II. The Special Approval safe harbor is irrelevant to Plaintiff's appeal, and even if it were not, Defendants complied with its requirements.

A. Questions presented

(1) Should the Court reach an issue that the Chancery Court did not reach, and (2) if so, did the Committee's Special Approval of the Merger satisfy the LPA's express and implied covenants? Op. 16, 29-30 (A676, A689-90); OB 23; B020-29; B080-83.

B. Scope of review

De novo review applies. *See supra* § I.B.

C. Merits of argument

Because a validly constituted Committee gave Special Approval to the Merger, the transaction was "deemed approved by all Partners" and did "not constitute a breach of [the LPA]…or of any duty stated or implied by law or equity." LPA § 7.9(a)(i) (A105).

1. The Court need not reach this issue.

As Plaintiff acknowledges, the Special Approval safe harbor is irrelevant to his appeal:

- If this Court affirms dismissal on the Unitholder Vote issue, then the Special Approval safe harbor is a moot point. OB 23; Op. 1 (A661).
- Even if this Court reverses on the Unitholder Vote issue, this Court should not reach the Special Approval safe harbor because the Chancery Court did not reach this issue. OB 23 (citing Op. 16, 29-30 (A676, A689-90)); *Bhole, Inc. v. Shore Investments, Inc.*, 67 A.3d 444, 449-451 (Del. 2013) ("Because the Superior Court did not address any of these alternatives, we *must* remand

> for the court to decide this question in the first instance."); *Brinckerhoff*, 67 A.3d at 373 (remanding and declining to reach an issue that was not essential to the trial court's disposition).[6]

If the Court reaches the Special Approval issue, it should affirm the dismissal of Plaintiff's claims because the Merger received Special Approval, i.e. "approval by a majority of the members of the Conflicts Committee." LPA § 1.1 (A070).

2. The Committee satisfied the LPA's express terms.

a. Plaintiff's "de facto" argument is unsupported by the LPA and inadequately pleaded.

Plaintiff cannot defeat the Special Approval safe harbor by alleging that Brannon was a "de facto" member of the Committee for four days prior to resigning from the Sunoco board on January 20, 2015. OB 10-11.

First, the only allegation in the Complaint concerning Brannon's actions prior to January 20 is that he participated in a single phone call on January 19 with Regency executives and attorneys "to discuss strategy with regard to the proposed transaction." Compl. ¶ 60 (A034).[7] Plaintiff concedes that Brannon was a director of Regency at the time of this phone call—i.e., someone that might be expected to take part in such a strategy call—and does not allege that Brannon engaged in conduct on behalf of Sunoco, let alone ETP, during these four days. *Id.* ¶ 22

[6] Plaintiff makes no attempt to satisfy the "interest of justice" exception to this rule. OB 23 n.9.

[7] The Opening Brief also includes allegations not found in the Complaint, e.g., (a) the Committee's legal advisor, Akin Gump, was involved in the Merger prior to January 20, and (b) Sunoco did not appoint a director immediately after Brannon resigned from Sunoco's board. OB 11 n.5, 24-25. Plaintiff cannot add allegations to his pleadings through his Opening Brief, *supra* § I.C.3.a, and these allegations say nothing about *Brannon's* actions prior to January 20.

(A109). Brannon's attendance on one preliminary phone call with other Regency representatives is irrelevant. He was not appointed to the Committee—and did not negotiate, evaluate, or approve the Merger—until after resigning from the Sunoco board. *See* OB 10-11, 29.

Second, Plaintiff offers no legal or contractual support for this argument. "Special Approval" is "*approval* by a…Conflicts Committee." LPA §1.1 (A070). The LPA did not require Brannon to resign from the Sunoco board prior to attending this preliminary phone call.

b. Plaintiff's NYSE argument mischaracterizes the NYSE Manual and is inadequately pleaded.

Plaintiff mischaracterizes the NYSE Listed Company Manual in arguing that Brannon and Bryant did not satisfy the LPA's requirement that Committee members "meet the independence standards required" by the NYSE "of directors who serve on an audit committee…." LPA § 1.1 (A062). He incorrectly claims that Brannon and Bryant did not satisfy NYSE Manual § 303A.02(a) because they joined/rejoined the Sunoco board after the Merger closed. OB 26-27.

First, Plaintiff concedes that the relevant section of the NYSE rules is satisfied if "the *board of directors affirmatively determines* that the director has no material relationship with the listed company…." OB 26 (quoting NYSE Manual § 303A.02(a)); *Gerber*, 2013 WL 209658, at *5 (rejecting challenge to conflicts committee under NYSE rules where plaintiff did not challenge whether "the Board

made the affirmative determination"). Plaintiff does not, and cannot, allege that the Board failed to make this determination or did not make this determination in good faith.[8] The Board's determination is dispositive. NYSE Manual § 303A.02(a) (A412); *Gerber v. Enter. Prods. Hldgs, LLC*, 2012 WL 34442, at *10 (Del. Ch. Jan. 6, 2012) (conflicts committee members "met the requirements of Rule 303A.02(a)" because "the Board stated" they were independent), *rev'd in part on other grounds*, 67 A.3d 400 (Del. 2013).[9]

Second, Plaintiff does not adequately allege materiality. As he acknowledges, the NYSE rules only "disqualify directors who have '*material* relationship[s] with the [listed] company.'" OB 11. Materiality is a subjective, director-by-director inquiry. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995). There is no allegation that Sunoco board seats are material to Brannon or Bryant. Further, given that Plaintiff alleges that Brannon and Bryant traded one board seat (Regency) for another (Sunoco), Plaintiff must—but fails to—allege and prove that the *difference* between a Regency board seat and Sunoco board seat was material to Brannon and Bryant. Further, the Complaint lacks well-pled factual allegations that Brannon or Bryant knew that they would be appointed

[8] Form 10-K (A417) (Brannon and Bryant "qualify as independent under [NYSE]" rules).
[9] While Section 303A.02(**b**) contains provisions that require more than the board's affirmative determination, Plaintiff does not make any allegations or arguments concerning Section 303A.02(b) in his Complaint or Opening Brief. *See Gerber*, 2013 WL 209658, at *5 (explaining the difference between 303A.02 subsections (a) and (b)).

to the Sunoco board when they provided Special Approval to the Merger, let alone that approving the Merger was a *quid pro quo* for the Sunoco board appointment.

3. Plaintiff's implied covenant claim fails as a matter of law.

Plaintiff fares no better in arguing that the General Partner breached the implied covenant of good faith and fair dealing by appointing past and/or future Sunoco directors to the Committee. OB 27-29.

a. The LPA has no relevant gap.

Plaintiff's implied covenant claim fails because there is no relevant "gap" in the LPA; rather, the relevant issue is expressly addressed by the contract, and Plaintiff's claim would modify those terms. The implied covenant "is a limited and extraordinary legal remedy" (*Nemec*, 991 A.2d at 1128) that "cautiously supplies terms" to an agreement only where there are "gaps in the express provisions of a specific agreement." *Allen*, 113 A.3d at 182; *Nemec*, 991 A.2d at 1125; OB 27. A "gap" exists only when a contract is "*truly silent* with respect to" an issue. *Allied Capital Corp. v. GC–Sun Hldgs., L.P.*, 910 A.2d 1020, 1032-33 (Del. Ch. 2006). Thus, if "the language of the contract expressly covers a particular issue," then "the implied covenant will not apply...." *Allen*, 113 A.3d at 183; *Kuroda v. SPjS Hldgs, LLC*, 971 A.2d 872, 888 (Del. Ch. 2009).

Plaintiff alleges that the General Partner breached the implied covenant because the Committee included directors who served on Sunoco's board before

and/or after being on the Committee. *See, e.g.*, Compl. ¶¶ 7, 45, 50, 85 (A014-15, A029, A030-31, A041-42). But there is no relevant gap because the LPA expressly covers this issue. Section 1.1 of the LPA defines Committee members as directors of the General Partner who "***are*** not...officers, directors or employees of any Affiliate of the General Partner...." LPA § 1.1 (A062). This is not silence; this is an express choice by the contracting parties to use a present tense verb to define the scope of acceptable Committee members. *Id.* Indeed, Plaintiff admits that Section 1.1 provides "clear standards" regarding Committee eligibility. Compl. ¶¶5-6; *see also, e.g.*, *id.* ¶¶ 7, 10, 43-45, 49, 85 (A013-16, A028-30, A041-42).

Plaintiff argues that there is a gap in the Committee definition because it does not contain a detailed clause that precisely tracks the exact circumstances that allegedly occurred here. OB 29. But the "implied covenant cannot be asserted…where the contract addresses the subject of the alleged wrong, but fails to include the obligation alleged." *Homan v. Turoczy*, 2005 WL 2000756, at *18 (Del. Ch. Aug. 12, 2005); *Overdrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209, at *2, *8-9 (Del. Ch. June 17, 2011) (dismissing implied covenant claim where the "contract addresses the subject of the alleged wrong" but the relevant provisions were "amorphous"). The Committee definition forbids *current* directors of affiliates from the Committee; thus, the implied covenant cannot be used to forbid *past* or *future* directors of affiliates. *Allied*, 910 A.2d at 1024

(dismissing implied covenant claim because the contract "explicitly addressed what types of investment were forbidden, and thus also impliedly addressed [what] types of investment were not subject to contractual restriction.").

Far from filling a gap, Plaintiff seeks to modify the LPA's express terms by changing "are not" into "were not, are not, and will not be." The implied covenant will not be used to "rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal." *Nemec*, 991 A.2d at 1126; *Allen*, 113 A.3d at 191; *Kuroda*, 971 A.2d at 888; *Allied*, 910 A.2d at 1035.

Plaintiff's implied covenant claim also runs afoul of the negative-implication interpretive canon, often referred to by its Latin maxim *expressio unius est exclusio alterius* (meaning "the expression of one thing is the exclusion of the other"). *See Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007). When, as here, a contract includes a list of qualifications, the absence of a particular qualification means that no such qualification exists (particularly where the extant qualifications cover the same subject matter as the absent qualification).

Plaintiff's primary authority, *Gerber v. Enterprise Products Holdings, LLC*, 67 A.3d 400 (Del. 2013), illustrates the lack of a gap in his case. *Gerber* involved a fairness opinion that evaluated two related transactions as a whole but did not analyze each transaction on its own merits. *Id.* at 406. Based on this *joint, indivisible* fairness opinion, defendants argued that plaintiffs' claims, which related

to just *one* of the transactions, were foreclosed by a partnership agreement provision concerning decisions made in reliance on fairness opinions (analogous to LPA § 7.10(b), discussed *supra*). *Id*. at 412. The provision referenced an "opinion of [an advisor]" without defining that term or specifying the requirements for an opinion. *Id*. at 410-11, 422. This Court permitted an implied covenant claim to withstand dismissal on those facts. As the Chancery Court later explained:

> For understandable reasons, the Conclusive Presumption Provision did not establish parameters for a fairness opinion or identify analyses that a financial advisor would have to conduct, doubtless because it would have been costly and difficult (at best) or impossible (at worst) for the drafters to specify all of the potential transactions to which the Conclusive Presumption Provision might apply and the different analyses that should be conducted. This left a gap….

Allen, 113 A.3d at 187. Plaintiff's case is different. First, the LPA's "Conflicts Committee" definition undisputedly "establish[es] parameters" for Committee membership (*id.*), including parameters that squarely address the board service timing issue at the heart of Plaintiff's implied covenant claim. *See supra*. Second, Plaintiff has not identified any term that is so undefined that the implied covenant is necessary to cabin discretion. Third, unlike the fairness opinion issue in *Gerber*, the parties to the LPA could easily have identified and prohibited former or future board members from the Committee, but chose not to do so. *See also Nemec*, 991 A.2d at 1126; *Allied Capital*, 910 A.2d at 1035.

b. Plaintiff cannot use the implied covenant as a backdoor to reintroduce common law duties.

Plaintiff's implied covenant claim fails for the additional reason that it seeks to impose common law fiduciary duties on the General Partner. The Chancery Court has repeatedly rejected attempts to use the implied covenant to reintroduce common law fiduciary duties in MLP unitholder actions. *See In re Encore Energy Partners*, 2012 WL 3792997, at *13; *In re Atlas Energy Res., LLC*, 2010 WL 4273122, at *13 (Del. Ch. Oct. 28, 2010). "When an LP agreement eliminates fiduciary duties as part of a detailed contractual governance scheme, Delaware courts should be all the more hesitant to resort to the implied covenant....To the extent the complaint seeks to re-introduce fiduciary review through the backdoor of the implied covenant, it fails to state a colorable claim." *Lonergan*, 5 A.3d at 1018-19. Given that Bryant and Brannon would not have been conflicted under common law principles,[10] Plaintiff seeks to impose *more than* what is required under common law fiduciary duties. The Court should reject Plaintiff's repeated attempts to avoid the LPA. *See supra* § I.C.2.c.

[10] *E.g.*, *Orman v. Cullman*, 794 A.2d 5, 29 (Del. Ch. 2002) (rejecting argument based on future board seats); *Solomon v. Armstrong*, 747 A.2d 1098, 1126 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (same); *Krim v. ProNet, Inc.*, 744 A.2d 523, 528 n.16 (Del. Ch. 1999) (same).

III. Plaintiff has not pleaded a breach of the good faith standard.

A. Questions presented

Plaintiff's final issue raises four questions: (1) should the Court reach an issue that the Chancery Court did not reach; (2) if so, should the Court consider an argument that Plaintiff raised for the first time on appeal; (3) if so, can Section 7.10(b) apply where Section 7.9(a) also applies; and (4) if not, has Plaintiff adequately alleged a breach of the contractual good faith standard? Op. 16 n.26 (A676); OB 32-34; MTD Opp. Br. 26-28 (A459-61); B035-40; B083-91.

B. Scope of review

Plaintiff raises a new argument on appeal that is procedurally barred for the reasons set forth below. *Infra* § III.C.2. To the extent that the Court nevertheless considers Plaintiff's argument, a plain error standard applies. *Supra* § I.B.

C. Merits of argument

1. The Chancery Court did not reach the Conclusive Presumption safe harbor.

Plaintiff concedes that the Conclusive Presumption issue is not before the Court because the Chancery Court did not address the merits of this issue. OB 32-33; Op. 16 n.26 (A676). As such, the Court should not reach the Conclusive Presumption issue regardless of its disposition of the Unitholder Vote issue. *See supra* § II.C.1. To the extent the Court reaches the issue, it should affirm dismissal of the Complaint: the Conclusive Presumption safe harbor conclusively establishes

that the General Partner acted in good faith, and even if it did not, Plaintiff has not adequately alleged a breach of the contractual good faith standard.

2. Plaintiff's new allegations regarding the applicability of Section 7.10(b) should be deemed waived.

Both of Plaintiff's appellate arguments concerning the Conclusive Presumption safe harbor were not raised in Plaintiff's Complaint or motion to dismiss briefing and, as such, are barred. *See supra* § I.C.3.a. First, Plaintiff incorrectly asserts Section 7.10(b) cannot apply to conflict-of-interest transactions that are subject to Section 7.9(a). OB 33-34. Previously, Plaintiff opposed the application of this safe harbor solely by arguing that J.P. Morgan lacked independence. MTD Opp. Br. 27-28 (A460-61). His perfunctory attempt to raise the issue at the end of his rebuttal at the motion to dismiss argument does not suffice to "fairly present" the issue to the trial court. Del. Sup. Ct. R. 8; *supra* § I.C.3.a; Hrg. Tr. at 117:17-118:19 (A640-41). Second, Plaintiff claims for the first time that the General Partner's reliance on J.P. Morgan is a question of fact that cannot be resolved at the pleadings stage. OB 34. Plaintiff has made no attempt to satisfy the narrow "interests of justice" exception to Rule 8. Thus, Plaintiff's arguments concerning the Conclusive Presumption safe harbor are barred under Rule 8.

3. Section 7.10(b) is not limited to situations where Section 7.9(a) does not apply.

Plaintiff's argument that Sections 7.9(a) and 7.10(b) are mutually exclusive is incorrect under the language of the LPA, case law, and logic for three reasons.

First, the language of the LPA does not restrict Section 7.10(b) to situations in which Section 7.9(a) is inapplicable. Section 7.10(b) applies to "*any act* taken or omitted to be taken" by the General Partner and includes no qualifiers or limitations. LPA § 7.10(b) (A106-07). Further, "Section 7.9(a) is 'a permissive safe harbor'" that the General Partner can employ "if it so chooses." *Norton*, 67 A.3d at 364. If Section 7.9(a) is not satisfied, the General Partner must instead fulfill the good faith standard set forth in Section 7.9(b), as Plaintiff concedes. *Id.*; *Allen*, 72 A.3d at 102; MTD Opp. Br. 14, 28, 31-32 (A447, A461, A464-65). Because Section 7.10(b) constitutes one way of fulfilling Section 7.9(b)'s good faith standard, it serves an important and non-superfluous role in conflicts transactions where the optional Section 7.9(a) safe harbors are not invoked or fulfilled. Further, because a unitholder can challenge whether a Committee provided Special Approval in good faith, Sections 7.9(a)(i) and 7.10(b) are often complementary, not alternative, provisions. Thus, Plaintiff's "surplusage" argument is contrary to the LPA's terms and case law. OB 33-34.

Second, Delaware courts have applied Section 7.10(b) in transactions where Section 7.9(a) also applied. For instance, this Court applied Sections 7.9(a) and

Section 7.10(b) to a conflict of interest transaction and explained that plaintiff's breach of contract claim would survive dismissal only if he pleaded around both the Special Approval and Conclusive Presumption safe harbors. *Gerber*, 67 A.3d at 423. The Court referred to Sections 7.9(a) and 7.10(b) as "two separate layers of protection designed to insulate the Defendants from judicial review" and explained that Section 7.10(b) "applied more broadly" than Section 7.9(a) "and was not limited to conflict of interest transactions." *Id.* at 410; *see also In re Encore Energy Partners*, 2012 WL 3792997, at *14 (applying Sections 7.9(a) and 7.10(b) to a conflict transaction and granting motion to dismiss); *Brinckerhoff v. Enbridge Energy Co.*, 2011 WL 4599654, at *9 (Del. Ch. Sept. 30, 2011) (same), *aff'd*, 67 A.3d 369 (Del. 2013). Furthermore, this Court has rejected a similar argument that Section 7.9(a) renders other LPA provisions inapplicable. *Norton*, 67 A.3d at 363-66 (holding that Section 7.9(b) applied even where Section 7.9(a) applied).

Third, Plaintiff's argument is contrary to Delaware policy. MLP general partners should be *encouraged* to fulfill as many safe harbors as possible, such as the General Partner in this case, which obtained (a) Special Approval, (b) Unitholder Approval, and (c) a fairness opinion from J.P. Morgan in connection with the Merger. Plaintiff signed up for a partnership in which any one of these three would be dispositive of his claims; he should not be permitted to complain when the General Partner goes beyond its minimum requirements. *Supra* § I.C.2.c.

4. Plaintiff's reliance argument contradicts well-established case law.

In addition to being waived, Plaintiff's assertion that alleged reliance on the opinion of a financial advisor is a matter of fact that should not be determined on a motion to dismiss is incorrect and should be ignored. OB 34. Boards should—and do—rely upon fairness opinions from financial advisors after incurring millions in expenses to obtain such opinions. *See* MTD Opp. Br. 26 (A459) (Plaintiff acknowledging Defendants' reliance on the advice of a financial advisor). Moreover, Delaware courts have determined that directors rely upon fairness opinions when dismissing analogous MLP cases for failure to state a claim. *Norton*, 67 A.3d at 367-68; *Brinckerhoff*, 2011 WL 4599654, at *9. Plaintiff's authorities are irrelevant; they do not apply Delaware law or discuss reliance on a fairness opinion within the M&A context. OB 34.

5. Even if Plaintiff has pleaded around Sections 7.9(a) and 7.10(b), his claims should be dismissed because he does not adequately allege a breach of the good faith standard.

Regardless of whether Defendants are protected by the LPA's safe harbors, Plaintiff has not adequately alleged a breach of the LPA. Plaintiff concedes that the "good faith" requirement of the LPA requires only that the Board "subjectively" believed that the Merger was "in the best interests of [the Partnership]." MTD Opp. Br. 3, 28-29 (quoting LPA § 7.9(b) (A436, A461-62)). The complaint fails to satisfy this arduous standard.

This Court has explained that this contractual good faith standard requires a plaintiff to plead and prove that the General Partner "believed it was acting against [Regency's] best interests" or "consciously disregarded its duty to form a subjective belief that the Merger was in [Regency's] best interests." *Allen*, 72 A.3d at 106. "It would take an extraordinary set of facts" to satisfy this burden. *Id.* at 105-06. Further, the General Partner is not limited to considering the best interests of the unitholders, but instead has "discretion to consider the full range of entity constituencies, including but not limited to employees, creditors, suppliers, customers, the general partner, . . . and of course the limited partners." *Allen*, 113 A.3d at 181. Thus, the General Partner's approval of the Merger will violate the contractual good faith standard only if it is "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Brinckerhoff*, 67 A.3d at 373; *Allen*, 72 A.3d at 108; *In re Alloy, Inc.*, 2011 WL 4863716, at *10 (Del. Ch. Oct. 13, 2011).[11]

The Complaint fails to meet this high bar. Plaintiff alleges that "[t]he consideration offered in the Merger represented a meager 13% [to] 15% premium," which he blames on purportedly "halfhearted and perfunctory" negotiations by

[11] Plaintiff ignores these on-point authorities, instead arguing that he must only satisfy a "minimal standard" based on an inapposite, non-MLP decision concerning a stock repurchase agreement that required a corporation to value its stock in "good faith." OB 14 (citing *Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *7 (Del. Ch. Dec. 9, 2011)). *Clean Harbors*, which has never been referenced in an MLP decision and does not involve the subjective "best interests" standard, does not supplant the Supreme Court's *Allen* and *Brinckerhoff* authorities.

conflicted directors. Compl. ¶¶ 34, 62 (A025, A035). Courts have dismissed analogous claims for failing to adequately allege a breach of the contractual "good faith" standard. *E.g.*, *Allen*, 72 A.3d at 109 ("Allegations that the [directors] should have started with a higher counteroffer [or] should have negotiated more forcefully" do not suffice); *In re Atlas*, 2010 WL 4273122, at *14 (dismissing claims where special committee members only "briefly considered various options" and were "guarantee[d]…seats on the surviving company's Board"); *see also Allen*, 113 A.3d at 182 (granting summary judgment). It is not reasonable to infer that the Board believed it was acting against Regency's best interests by approving a premium transaction that provided unitholders with equity in a larger, more stable and diversified entity during a time of severe industry volatility.

CONCLUSION

For all of the foregoing reasons, the decision below should be affirmed.

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CERTIFICATE OF SERVICE

I, Tammy L. Mercer, Esquire, do hereby certify that on July 29, 2016, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

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