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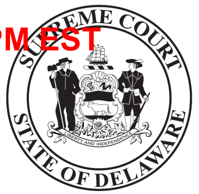

IN THE

Supreme Court of the State of Delaware

WILLIAM ALLEN,

Plaintiff Below, Appellant,

v.

ENCORE ENERGY PARTNERS L.P., ENCORE ENERGY PARTNERS GP LLC, SCOTT W. SMITH, RICHARD A. ROBERT, DOUGLAS PENCE, W. TIMOTHY HAUSS, DAVID BAGGETT, JOHN E. JACKSON, MARTIN G. WHITE, and VANGUARD NATURAL RESOURCES LLC,

Defendants Below, Appellees.

No. 534, 2012

COURT BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 6379-VCP (CONSOLIDATED INTO CONS. C.A. NO. 6347-VCP)

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

In their Answering Brief, dated December 20, 2012 ("Answering Brief" or "Ans. Br."), Defendants ground their defense on Jefferies'[1] fairness opinion, which they assert entitles them to a conclusive presumption of good faith or, alternatively, warrants dismissal of the Complaint by establishing that the Exchange Ratio was "fair." Ans. Br. at 20-26.

This argument misconstrues the section of the LPA that establishes a conclusive presumption for actions based on expert advice and opinions, misstates the matters addressed by the fairness opinion at issue here, and ignores the opinion's express proviso that it assumed effective arm's length bargaining had occurred.

Defendants' alternative claim that the fairness opinion established that the Merger consideration was "fair" asks this Court to accord an investment banker's opinion an unprecedented, dispositive weight, ignoring the limitations of such opinions widely recognized by academics, practitioners, this Court, and the Court of Chancery.

In their effort to recast the Complaint as simply grieving price, Defendants choose to flatly ignore the Complaint's actual allegations and large sections of Plaintiff's Opening Brief, which addressed in detail the Conflicts Committee's duty to bargain, and its members' abdication of this duty in the present case.

With respect to Vanguard's bad faith pre-announcement value-depressive disclosures, Defendants again contend that the fairness opinion should immunize the disclosures – despite the fact that Jefferies explicitly relied on Encore's manipulated historical trading price in rendering its opinion. Defendants also, somewhat incredibly, challenge whether the disclosures at issue – concerning the prospects of a merger and lower future cash distributions – would have a negative effect on Encore's trading price.

Defendants' analysis, if adopted by this Court, would countenance sham "independent committee" processes and place limited partnership conflict transactions beyond judicial review. Nothing in the LPA supports this result, and

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[1] Capitalized terms not defined herein have the respective meanings ascribed in Appellant's Opening Brief, dated November 20, 2012 (the "Opening Brief" or "Opening Br.").

it would be a grave disservice to limited partnership investors and alternative entity sponsors who want to cost-effectively raise funds in the public markets in the future.

ARGUMENT

I. THE FAIRNESS OPINION DOES NOT RESULT IN A CONCLUSIVE PRESUMPTION OF GOOD FAITH OR OTHERWISE EXCUSE THE CONFLICTS COMMITTEE'S BAD FAITH FAILURE TO NEGOTIATE

Defendants' principal argument – that Jefferies' fairness opinion results in a conclusive presumption of good faith or otherwise immunizes the Merger from review – accords the Jefferies opinion a role that is not supported by the terms of the LPA and is contrary to Delaware law.

First, Defendants' argument misconstrues the reach of Section 7.10(b). Second, it misstates the matters that the fairness opinion by its own terms addressed. Third, it ignores that the fairness opinion specifically assumed the Merger's terms were "the *most beneficial terms from the perspective of the ENP Unaffiliated Unitholders that could under the circumstances be negotiated among the parties to such transactions*" (A435, emphasis added) – exactly what the Complaint pleads was not the case. Fourth, it asks this Court to assign the fairness opinion an unprecedented and unjustified dispositive weight, ignoring the well-recognized limitations of such opinions.

A. The Conclusive Presumption Set Forth in LPA Section 7.10(b) Does Not Apply in the Present Case

1. Section 7.10(b) Does Not Apply to Decisions by the Conflicts Committee under Section 7.9(a)

Conflict transactions are reviewed under Section 7.9(a) of the LPA, which sets forth a detailed framework that applies "whenever a potential conflict of interest exists or arises" between, *inter alia*, Encore's general partner and public unitholders. A083. Section 7.9(a) expressly addresses the standard governing Conflicts Committee decisionmaking, stating that "[i]f Special Approval is sought, then it shall be presumed that, in making its decision, the Conflicts Committee acted in good faith, and . . . in any proceeding brought by any Limited Partner . . . challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption." *Id.* Accordingly, Section 7.9(a) expressly adopts a *rebuttable* presumption of good faith for Conflicts Committee decisionmaking.

In contrast, Section 7.10, titled "*Other Matters Concerning the General Partner*," by its clear terms speaks only to the powers and rights of the "General Partner" itself, and does not purport to address conflict transactions at all. A085.

The Director Defendants serving on the Conflicts Committee are manifestly not the "General Partner" and the LPA consistently distinguishes between the General Partner itself, and "Affiliates causing it" to act – a definition that includes the Director Defendants, *see* A022, as Defendants themselves argue. Ans. Br. at 11 n.6 ("Thus, Vanguard and the Director Defendants are 'Affiliates' of the Encore GP . . . ."). The provisions that adopt this distinction include LPA Sections 7.9(b), 7.9(c), and 7.9(d) – each addressing the liability of Encore GP *and* its "Affiliates."

The LPA also expressly distinguishes between the "General Partner" and "Indemnitees" – another term that includes the Director Defendants, *see* A029, as Defendants again confirm. Ans. Br. at 10 ("Thus, the Director Defendants are 'Indemnitees' under the Partnership Agreement . . . ."). The fiduciary waiver section of the LPA, Section 7.9(e), expressly draws this distinction, stating that "neither the General Partner nor any *other* Indemnitee" shall owe fiduciary duties, except as provided in the LPA. A085 (emphasis added).

Defendants' attempt to import Section 7.10(b)'s conclusive presumption into Section 7.9(a) is thus foreclosed by the plain language of the LPA. It would also offend established interpretative principles. First, Defendants' analysis would violate the principle that "a more specific provision prevails over a more general one." *Brinckerhoff v. Texas E. Products Pipeline Co.*, 986 A.2d 370, 387 (Del. Ch. 2010) (holding that a specific provision addressed to conflict transactions in a limited partnership agreement prevailed over a separate provision broadly conferring authority to the general partner).

Second, Defendants' interpretation would diminish unitholders' rights by replacing a rebuttable presumption with a conclusive one, and would therefore be contrary to the principle that if the terms of a partnership agreement are ambiguous, they "should be construed against the General Partner as the entity solely responsible for the articulation of those terms." *SI Mgmt. L.P. v. Wininger,* 707 A.2d 37, 43 (Del. 1998).

Finally, we note that Defendants' proffered analysis is contrary to the Court of Chancery's. The court below expressly applied Section 7.10(b)'s conclusive presumption *only* to Encore GP, and *only* in the context of addressing the implied covenant of good faith and fair dealing.[2] *See* Op. at 38, 2012 WL

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[2] The Court of Chancery's opinion addressed the implied covenant at length, *see* Op. at 31-40, 2012 WL 3792997, at *12-*15, and Defendants also do so. *See* Ans. Br. at 30-32. Given the express good faith obligation under the

(continued . . .)

3792997, at *14 ("*Encore GP* is the only Defendant against whom a claim can be asserted for breach of the implied covenant" and "*Encore GP* enjoys an express right to rely on the opinions of investment bankers under Section 7.10(b) of the LPA." (emphasis added)). By contrast, the court below recognized that the "somewhat inconsistent accounts" regarding the Conflicts Committee's reliance on Jefferies' advice precluded reliance on the fairness opinion with respect to the Merger negotiations, Op. at 9 n.18, 2012 WL 3792997, at *4 n.18.

Accordingly, the conclusive presumption of Section 7.10(b) is not available to the Conflicts Committee and has no application here.

2. The Conduct at Issue Here Was Not Taken "in Reliance upon the Advice or Opinion" of the Financial Advisor

Section 7.10(b) is also inapplicable here, even with respect to Encore GP, because the express requirements of the section have not been fulfilled. Section 7.10(b) provides:

> The General Partner may consult with legal counsel, accountants, appraisers, management consultants, investment bankers and other consultants and advisers selected by it, and any act taken or omitted to be taken *in reliance upon the* ***advice*** *or* ***opinion*** (including an Opinion of Counsel) of such Persons as to matters that the General Partner reasonably believes to be within such Person's professional or expert competence shall be conclusively presumed to have been done or omitted in good faith and in accordance with such advice or opinion.

A065 (emphasis added).

(. . . continued)

LPA, however, Plaintiff has not argued that the implied covenant imposed broader duties. The Court of Chancery's opinion simply misread Plaintiff's brief below on this point. *Compare* Op. at 32, 2012 WL 3792997, at *12 ("Plaintiffs argue that the implied covenant imposes a discrete duty 'at least as broad as' Section 7.9(b) of the LPA") *with* Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, at 23 (A488) ("The express covenant imposed by Section 7.9(b) of the LPA is at least as broad as the implied covenant addressed in the cases cited above.").

Here, Jefferies' fairness opinion does not entitle any party to a conclusive presumption for two distinct reasons.

First, the bad faith conduct at issue here – the Conflicts Committee's abdication of its duty to meaningfully bargain on behalf of Encore's public unitholders – was not the subject of any "advice" or "opinion" by Jefferies. As Jefferies' fairness opinion expressly stated:

> ***[W]e were not requested to and did not*** *provide advice concerning the structure, the determination of the specific Exchange Ratio, or any other aspects of the Merger, or to* ***provide services other than the delivery of this opinion****. . . . We* ***did not participate in negotiations*** *with respect to the terms of the Merger and related transactions.*

A449 (Complaint); A435 (Proxy) (emphasis added).

This point was emphasized in the Opening Brief (at 10, 27 n.4). Defendants respond that because the Conflicts Committee was in possession of Jefferies' "preliminary valuation materials," the conclusive presumption should apply to the Merger negotiations, and the fairness opinion should be deemed conclusive because an unfair price is ultimately at issue. Ans. Br. at 22-24. In fact, preliminary work product is clearly not the "*advice or opinion*" of an expert, and the fact that an investment banker was prepared to opine that a particular price was fair simply does not constitute a determination that the negotiator acted in good faith in reaching that price.

Second, no party is entitled to a conclusive presumption of good faith based on the fairness opinion because the opinion is *expressly premised* on an assumption that the Merger's terms were "the *most beneficial terms from the perspective of the ENP Unaffiliated Unitholders that could under the circumstances be negotiated among the parties to such transactions*" (A435, emphasis added). This is exactly what the Complaint pleads was *not* the case.

Reliance on the fairness opinion to excuse the very breach of duty that it assumes did not occur would constitute impermissible bootstrapping around the central issue before the Court.

Accordingly, in light of the facts pled in the Complaint, the fairness opinion provides no party a conclusive presumption of good faith.

B. The Financial Advisor's Analysis Does Not Otherwise Excuse the Conflicts Committee's Bad Faith Failure to Bargain

Defendants also assert that even if a conclusive presumption does not apply, the fairness opinion still establishes that the Exchange Ratio was "fair," and this should defeat Plaintiff's claim of bad faith. Ans. Br. at 24-26. Defendants' approach would accord an investment banker fairness opinion the wholly unprecedented effect of immunizing a conflict transaction from judicial review.

This Court has long recognized the value of independent analysis by a qualified financial advisor. *See Smith v. Van Gorkom*, 488 A.2d 858, 811 (Del. 1985). No case in this Court or the Court of Chancery, however, has assigned dispositive weight to a fairness opinion or ruled that such an opinion shields a transaction from judicial review, and this Court should decline Defendants' invitation to adopt such a holding here.

While fairness opinions can lend rigor and an independent perspective to directors' deliberations, commentators and practitioners have frequently noted their limitations. *See, e.g.*, Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 556 (2002) ("The uncomfortable truth is that investment banker fairness opinions often say almost whatever their client wants them to, the facts be damned."); Charles M. Elson, *Fairness Opinions: Are They Fair or Should We Care?*, 53 OHIO ST. L.J. 951, 952-53 (1992) ("Fairness opinions, this Article will argue, are inherently unfair. No process or judicially created liability scheme can make them 'fair.' Structural considerations inherent in the way these opinions are formed prevent accurate valuation. Only the marketplace can determine what price is 'fair' and what is not."); Lucian Arye Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can Be Done About It?*, 1989 DUKE L.J. 27, 29 (1989) (explaining that when applying the prevailing valuation methodologies, "investment banks possess significant discretion in issuing fairness opinions" and "have a choice among several widely disparate estimates of fair price, all of which are justifiable"); Dale Arthur Oesterle & Jon R. Norberg, *Management Buyouts: Creating or Appropriating Shareholder Wealth?*, 41 VAND. L. REV. 207, 214 (1988) ("the chicanery of using made-to-order fairness opinions is probably widespread").

Practitioners have noted much the same. As one prominent member of the New York bar commented:

> MR. WOLINSKY: A fairness opinion, you know — it's the Lucy sitting in the box: "Fairness Opinions, 5 cents."

SLM Corp. v. J.C. Flowers II L.P., C.A. No. 3279-VCS, Tr., Oct. 22, 2007, at 18.

Citing this comment, the *Wall Street Journal* observed, "[t]ruth be told, many deal types share Wolinsky's opinion. It is just interesting to hear someone from the preeminent M&A law firm say it in court. Banks can earn more than $1 million for rendering these opinions, which many see as no more than a rubber stamp." Dana Cimilluca, *Wachtell's Fairness Opinion*, Wall St. J., Oct. 23, 2007.

Delaware jurisprudence confirms that fairness opinions are not authoritative indicators of value, and that financial advisors sometimes bend to achieve controlling shareholders' objectives. In *In re Emerging Communications, Inc. Shareholders Litigation*, 2004 WL 1305745 (Del. Ch. May 3, 2004) – the Delaware public company entire fairness case involving the largest disparity between deal price and judicially-determined value – the investment banker retained to opine as to fairness concluded that $10.25 per share constituted fair value; a member of this Court, sitting by designation, ultimately found fair value to be nearly four times as much – $38.05 per share. Similarly, this Court's recitation of the facts and the Court of Chancery's findings in *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), documents the exertions by the financial advisor there to support the controller's desired valuation of an asset. The investment bank there opined to the fairness of a price more than 50% higher than the asset's true value, as later determined by the Court of Chancery and affirmed by this Court.

In sum, this Court's jurisprudence does not support Defendants' argument that a financial advisor's fairness opinion should be assigned any dispositive weight, or that it should excuse independent directors' bad faith conduct.

The valuation analysis and fairness opinion here also do not inspire special confidence. Jefferies' analysis yielded implied exchange ratio ranges spanning from 0.44 all the way to 1.56, underscoring the "significant discretion" inherent in the process. A261-63. The final Exchange Ratio was also far below the bottom of the much tighter range yielded by the industry-specific Net Asset Value analysis performed by Vanguard's advisor, RBC. A451-52.

Defendants also assert that the final Exchange Ratio was justified because it "matches (approximately) the historical average exchange ratio between Encore and Vanguard for the period since Vanguard bought control of

Encore GP" and "given that there was no change of control – Vanguard indirectly controlled Encore's holdings before and after the Merger – there is no justification for a merger premium alleged in the Complaint." Ans. Br. at 25.

This statement is just empirically wrong. In fact, minority squeeze-outs are typically accomplished at a substantial premium. *See* Peter A. Hunt, *Structuring Mergers & Acquisitions: A Guide to Creating Shareholder Value* § 16.04[A] (2009) ("The acquisition of minority shares in a squeeze-out transaction usually entails paying a premium to shareholders. This premium can range depending on the circumstances of the transaction and whether the transaction is a cash tender offer or a stock merger. In the transactions shown above, cash tender offer premiums in minority squeeze-outs were an average of 61.5%.).[3]

The Proxy indicates that Jefferies had not informed the Conflicts Committee whether the final 0.75 Exchange Ratio was fair at the time its members chose that ratio as their opening counteroffer. A231. Even if it had, however, Jefferies' advice that it could support the 0.75 Exchange Ratio does not in any way excuse or justify the Conflicts Committee's failure to bargain for more. No serious negotiator opens with his or her reservation price, and neither the fiduciary principles that the LPA imports nor the alternative contract principles discussed at length in the Opening Brief (at 25-26) permit a finding of good faith absent an effort to replicate the same arm's length bargaining that the Conflicts Committee's members would have pursued had their own financial interests been at stake.

[3] Defendants also complain that it is "completely inaccurate" to point out that as of the closing, the Exchange Ratio represented a 10% discount to Encore's pre-Offer trading price. Ans. Br. at 25. Had there been a general market decline, we would agree. In fact, Vanguard sustained a company-specific run-down during this period, A453, rendering this comparison appropriate.

II. DEFENDANTS DO NOT ATTEMPT TO DEFEND THE LEGAL STANDARD APPLIED BY THE COURT OF CHANCERY AND MISSTATE THE LAW GOVERNING USE OF A PROXY STATEMENT ON A MOTION TO DISMISS

A. Defendants Do Not Attempt to Defend the Legal Standard under Rule 12(b)(6) Applied Below

In his Opening Brief (Point I.C.1, at 16-18), Plaintiff argued that the Court of Chancery erred by holding that the objective facts surrounding the Conflicts Committee's flawed process and deficient result were "not relevant" to the contractually prescribed, subjective belief standard under the LPA.

Defendants' response is limited to their Summary of Argument section, where they contend that "[c]ontrary to Plaintiff's claims, the Court of Chancery did not hold that objective facts are not probative of the subjective beliefs of the Conflicts Committee or that Plaintiff had to make particularized allegations regarding the state of mind of each Conflicts Committee member." Ans. Br. at 5.

In fact, that is exactly what the court below did hold, stating:

> In the final analysis, the relevant inquiry dictated by the LPA is whether the Conflicts Committee approved the Merger with the subjective belief that it was in the best interests of the Partnership. *Whether their determination was objectively reasonable is not relevant to that contractually prescribed standard. However bad* the Conflicts Committee's decision may appear from the allegations of the Complaint, Plaintiffs have not alleged facts from which one could infer that the Conflicts Committee made its decision in bad faith, i.e., with the subjective belief that their approval was contrary to the Partnership's best interests.

Op. at 30, 2012 WL 3792997, at *11 (emphasis added, footnote omitted).

As stated previously, this was error.

B. Defendants Misstate the Law Governing Use of a Proxy Statement on a Motion to Dismiss

In his Opening Brief (Point I.C.2, at 18-19), Plaintiff also argued that the Court of Chancery erred by relying on the Proxy to establish the Conflicts

Committee's subjective state of mind. Defendants contend that the Court of Chancery's use of the Proxy is proper since the Complaint also cites the Proxy and "Plaintiff may not . . . cherry pick the parts of the Proxy they [sic] want the Court to consider." Ans. Br. at 20 n.7.

Plaintiff's reliance on the Proxy, however, was limited to particular, objective facts concerning the Merger: the contents of the fairness opinion and supporting valuation analysis (¶¶ 7, 57, 61-62, A438-39, A450-53); and the merger process (¶¶ 41-59, A446-51). In *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59, 70 (Del. 1995), this Court applied evidentiary principles to determine the proper use of a proxy statement on a motion to dismiss, holding that a proxy statement is "hearsay with respect to claims other than the disclosure claims." Applying the same evidentiary principles here, the Court of Chancery's use of the Proxy should have been limited to "any other part [of the Proxy] which ought in fairness to be considered contemporaneously with" the sections cited in the Complaint. Del. R. Evid. 106.

III. DEFENDANTS DO NOT ATTEMPT TO DEFEND THE COURT OF CHANCERY'S ERRONEOUS "GOOD FAITH" STANDARD, WHICH DIRECTLY GOVERNS THE COMPLAINT'S ALLEGATIONS OF A BAD FAITH FAILURE TO BARGAIN

In his Opening Brief (Point II.C, at 20-24), Plaintiff argued that the Court of Chancery erred by requiring Plaintiff "to allege facts from which one reasonably can infer that Defendants subjectively believed that they were acting *against* Encore's interests." Op. at 24, 2012 WL 3792997, at *9 (emphasis in original). Plaintiff argued that "intentional dereliction of duty, a conscious disregard for one's responsibilities" also constitutes actionable bad faith under the LPA.

Defendants do not defend the standard advanced by the Court of Chancery. Rather, they argue that "[t]his alleged point of error is completely irrelevant given that the Complaint does not contain any allegations of 'dereliction of duty.'" Ans. Br. at 26. In fact, this is precisely what the Complaint pleads: the Conflicts Committee's "failure to negotiate in good faith as an effective bargaining agent for the common unitholders," (¶ 6, A438), and that its conduct in the course of the negotiations, including selection of a counteroffer just 4% higher than Vanguard's opening bid and at a discount to Encore's pre-announcement unit price was "simply incompatible with that of an effective bargaining agent acting in good faith." ¶¶ 53-59, A448-51.

Accordingly, the Court of Chancery's use of the incorrect definition of "good faith" was directly relevant to its decision to dismiss the Complaint.

IV. DEFENDANTS DO NOT ATTEMPT TO DEFEND THE CONFLICTS COMMITTEE'S BAD FAITH FAILURE TO BARGAIN

In his Opening Brief (Point III.C.1, at 26), Plaintiff argued that the Court of Chancery erred in dismissing the Complaint because the Conflicts Committee had a duty to "bargain at arm's length and seek in good faith to obtain financially advantageous terms for public unitholders, the same as they would do if bargaining for their own interests." Plaintiff further argued that the facts here fully support a claim for a bad faith failure to meaningfully bargain. Point III.C.2, at 27-29.

In their Answering Brief, Defendants elect to address neither the applicable legal standard nor their compliance with it.

Defendants at points in their brief suggest that receipt of Special Approval for the Merger should, ipso facto, immunize the transaction from judicial review. Ans. Br. at 8, 17-18. By the express terms of the LPA, however, Special Approval is valid only if approval is given "by a majority of the members of the Conflicts Committee *acting in good faith*." A037 (emphasis added).[4]

As stated in the Opening Brief, the Complaint amply pleads a claim for bad faith conduct by the Conflicts Committee.

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[4] Defendants also inexplicably assert that they "fully complied with the terms of the Partnership Agreement and Plaintiff does not claim otherwise or plead any facts to the contrary." Ans. Br. at 16-17. Of course, the very gravamen of the Complaint is that Defendants breached the express duty of good faith set forth in the LPA.

V. THE CONFLICTS COMMITTEE'S APPROVAL OF THE MERGER DID NOT EXCUSE BAD FAITH CONDUCT BY VANGUARD AND THE COMPLAINT AMPLY PLEADS SUCH BAD FAITH CONDUCT

In his Opening Brief (Point IV.C.1, at 30), Plaintiff argued that the Court of Chancery erred by holding that Vanguard's bad faith conduct leading up to its Acquisition Offer was immunized by the Conflicts Committee's subsequent Special Approval.

Defendants do not defend the Court of Chancery's analysis, which was based on the view that Special Approval cured any prior wrongdoing, whether or not known to or considered by the Conflicts Committee, because it was "part and parcel of a singular conflict transaction . . . ." Op. at 24, 2012 WL 3792997, at *9.

Rather, Defendants argue causation: that "[b]ecause the Exchange Ratio is conclusively presumed to be fair and is admitted to be within the range of fair consideration, Plaintiff cannot show any damages for a claim of breach of the Partnership Agreement based on the pre-merger disclosures discussed." Ans. Br. at 27-28.

As discussed in Point I above, however, Defendants are entitled to neither a conclusive presumption nor a finding that the Exchange Ratio was fair based on Jefferies' fairness opinion.

In addition, the Proxy specifically states that one of the metrics that Jefferies relied on was a "historical exchange ratio analysis," which analyzed the relative trading price of Encore and Vanguard common units. A263. Defendants themselves underscore the importance of this metric. Ans. Br. at 25. Accordingly, Jefferies relied on a metric that was affected by Vanguard's bad faith, value-depressive disclosures, and Defendants are not entitled to exculpation based on an opinion that was itself impaired by the very misconduct at issue.

Defendants also, somewhat incredibly, assert that the Complaint's allegations against Vanguard are too "vague" and "conclusory" to state a claim. Ans. Br. at 28.

In fact, Vanguard's bad faith, deceptive conduct is pled with great specificity:

On January 3, 2011, Defendant Smith stated in a Vanguard press release that "[w]e are excited about this acquisition and the prospect of managing a great set of assets for the *long-term benefit of the Encore unitholders*." A444 (Complaint) (emphasis added).

According to the Proxy, however, *at that very time*, "Vanguard management continued to study the potential effects of combination of Vanguard and Encore . . . ." A446 (Complaint), quoting A226 (Proxy).

Defendants justify these contradictory statements by arguing that Smith's public statement was literally true since Encore unitholders became Vanguard unitholders through the Merger, and Vanguard is continuing to manage the assets he referenced. Ans. Br. at 28-29. That is obviously not, however, what any reasonable investor would have understood Smith to mean.

Defendants also assert that there is no reason to believe that Smith's announced intention not to acquire Encore's public units would have a negative price effect. *Id.* Given that premiums are almost universally paid in minority squeeze-outs, however, that is not a credible assertion.

Similarly, Defendants contend that there is no reason to believe that Vanguard's announced decision to more than triple capital expenditures on February 22, 2011, roughly a month before making the Offer, driving Encore's distributions to its lowest level as a public entity, "contributed to any price decline or was a bad faith or fraudulent attempt to decrease Encore's unit price." *Id.* at 30. Defendants' argument again simply ignores economic reality.

Defendants also make a causation argument: that the February 22, 2011 announcement included Encore's fourth quarter 2010 financial results "so it contains literally hundreds of pieces of information, including that Encore's 'net loss for the fourth quarter of 2010 was $14.2 million.'" *Id.* at 29. In fact, the stated loss was the result of a "non-cash derivative fair value loss related to future periods of $28.7 million," B593, and as set forth in the Complaint, the earnings per unit reported on February 22, 2011 exceeded the analyst consensus forecast. A444.[5]

With respect to the divergence between Defendants' production forecasts on February 22 and the far better actual results, Defendants seek to minimize the disparity. In fact, Defendants misstated the direction of production level

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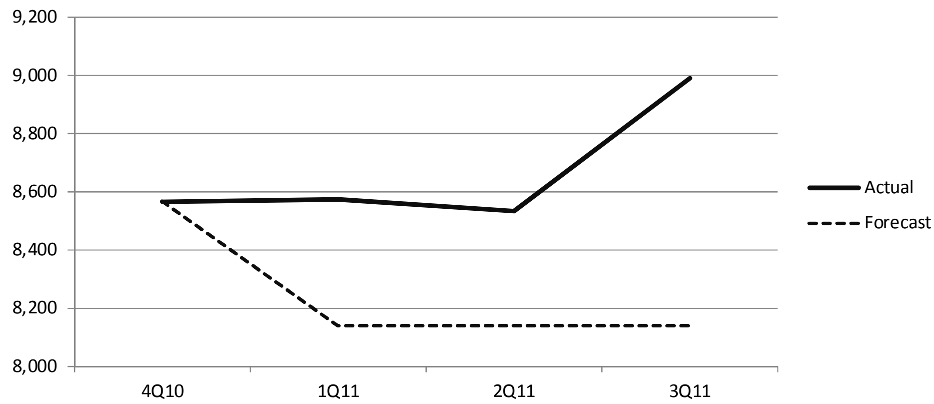
[5] We have re-checked source material to confirm this point.

changes, and the magnitude was substantial – facts that Defendants obscure by citing total 2010 production, rather than the trend from the fourth quarter of 2010. The disparity between forecasted results and actual is best shown graphically:



A444-45 (data).

Accordingly, each of the Complaint's allegations of bad faith, price-depressive disclosures was pled with ample specificity and should be sustained.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Appellant's Opening Brief, the judgment of the Court of Chancery should be reversed.

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January 7, 2013

CERTIFICATE OF SERVICE

I, Carmella P. Keener, do hereby certify that on the 7th day of January, 2013, a copy of the foregoing brief was served by electronic filing upon the following counsel of record:

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