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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 v. REGENCY GP LP, REGENCY GP LLC, ENERGYTRANSFER EQUITY, L.P., ENERGYTRANSFER PARTNERS, L.P., ENERGYTRANSFER 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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Defendants' brief[1] is premised on a mischaracterization of Plaintiff's position concerning the unitholder approval safe harbor in LPA §7.9(a)(ii) (A105). Plaintiff does not contend that "the common law stockholder ratification doctrine overrides Regency's limited partnership agreement," Def. Br. 1, but rather that no express or implied provision of the LPA allows Defendants to take advantage of the unitholder approval safe harbor by affirmatively misleading the unitholders regarding the Conflicts Committee. Pl. Br. 17-18. While LPA §14.3(a) merely requires that "a copy or summary of the Merger Agreement shall be included in or enclosed with the notice of a special meeting or the written consent" (A125), nothing in this provision or any other provision of the LPA can be interpreted as consent to being lied to. "[A] court can presume that the question 'Can I lie to you?' would have been met with a resounding 'No'." *In re ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 443 (Del. Ch. 2012), *mod. on other grounds*, 68 A.3d 665 (Del. 2013). Nothing in the LPA provides that the safe harbor would be available to bless a transaction if the vote was procured through misleading statements and material omissions.

For the reasons set forth below, the decision below should be reversed.

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[1] Appellees' Answering Brief, filed July 29, 2016 ("Def. Br."). Terms used herein have the meanings as indicated in Appellants' Opening Brief, dated June 9, 2016 ("Pl. Br."). Emphasis in quoted material has been supplied and internal quotation marks in such material omitted.

I. THE COURT OF CHANCERY ERRED IN HOLDING THAT THE UNITHOLDER APPROVAL SAFE HARBOR WAS SATISFIED

A. A UNITHOLDER VOTE PROCURED BY FALSE AND MISLEADING STATEMENTS DOES NOT INSULATE DEFENDANTS FROM LIABILITY UNDER THE LPA

1. The LPA Should Not Be Construed to Allow Reliance on the Unitholder Approval Safe Harbor Where the Approval Was Obtained by False and Misleading Statements

The Court should reject Defendants' position that since the LPA eliminates common law fiduciary duties, a unitholder vote procured by misleading information insulates them from contractual liability, as long as unitholders were given a copy of the Merger Agreement. Def. Br. 11-12, 16-19. Nothing in the LPA (or in Delaware law construing similar provisions) indicates that unitholders consented to being lied to, or agreed that a unitholder vote would satisfy LPA §7.9(a)(ii) if the vote was procured through material misstatements or omissions.

Plaintiff's position rests on contract construction, not on some broad common law duty of disclosure. The LPA required Regency GP to provide a copy of the Merger Agreement (§14.3) (A125) and provides that a transaction approved by a majority of the common units "shall not constitute a breach of this Agreement" (§7.9(a)(ii)) (A48). Nothing in these sections authorizes Regency GP to make misleading statements to procure unitholder approval or provides that unitholder approval procured through misleading statements is deemed approved. To be meaningful, §7.9(a)(ii) should not be construed to permit reliance thereon

when the vote was obtained by false information. *See* Pl. Br. 20. None of the cases cited by Defendants holds that GPs are permitted to rely upon the unitholder approval safe harbor when that approval was garnered by deception.[2] Where a GP undertakes to provide assurances to its limited partners, the limited partners should be permitted to expect that those representations will be truthful. *See In re Cencom Cable Income Partners*, 1997 WL 666970, at *5 (Del. Ch. Oct. 15, 1997).[3]

Defendants contend that Plaintiff is arguing that by voluntarily disclosing more than the LPA required, Defendants reintroduced the common law duty of disclosure into the LPA. Def. Br. 14. But that is not Plaintiff's position at all.

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[2] In *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2012 WL 1142351, at *10-11 (Del. Ch. April 4, 2012), the court rejected an actual claim of breach of the fiduciary duty of disclosure. Here, Plaintiff has asserted no such claim. Further, in *K-Sea*, the court found that there was no misstatement. *Id.* at *11-12. Here, Plaintiff has demonstrated false statements were used to induce the unitholder vote. Similarly, in *Lonergan v. EPE Hldgs, LLC*, 5 A.3d 1008, 1024 (Del. Ch. 2010), the plaintiff asserted a breach of the implied covenant claim based on a disclosure obligation, not for an affirmative misrepresentation, but rather for an omission. Plaintiff has made no such assertion here. Finally, *Gerber v. EPE Hldgs, LLC*, 2013 WL 209658, at *6 (Del. Ch. Jan. 18, 2013), does not address false and misleading disclosures to unitholders.

[3] Defendants' efforts to distinguish *Cencom* fail. First, Defendants argue that the Chancery Court "ultimately concluded that the general partner did not expend its duties based on its disclosure." Def. Br. 19. However, this conclusion came after a full trial on the merits and was based on the facts of that case, in which the court essentially found that the drafters of a disclosure statement inadvertently inserted the word "fair" and did not intend to subject the transaction to an "entire fairness" standard. *In re Cencom Cable Income Partners, L.P. Litig.*, 2011 WL 2178825, at *6 (Del. Ch. June 3, 2011). Further, *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2015 WL 4975270, at *9 (Del. Ch. Aug. 20, 2015), which Defendants cite, merely notes that *Cencom* does not provide grounds to alter a contractual standard. As discussed, Plaintiff does not seek to alter any LPA standard here, but rather to have the Court construe it appropriately and to enforce its terms effectively. Finally, Defendants misconstrue the purpose for which Plaintiff cites *Sonet v. Timber Co., L.P.*, 722 A.2d 319 (Del. Ch. 1998), which was to contrast a scenario where a GP undertook no affirmative obligation to make truthful disclosures with a situation – like this one – where the general partner distributed a false proxy statement to procure unitholder approval. *See* Pl. Br. 20-21.

Rather, Plaintiff asserts that because Defendants made false statements about how the Merger was negotiated by a Conflicts Committee consisting of purportedly "independent directors," while concealing Brannon's association with a Regency GP Affiliate to induce unitholder approval, the LPA should not be construed to preclude a breach of contract claim. *See* Pl. Br. 21 ("The LPA should not be construed to allow reliance on the unitholder approval safe harbor where the vote was obtained through misleading statements."); *see also* Pl. Br. 17-18.

Defendants also argue that Plaintiff's position would "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 the federal securities laws." Def. Br. 4 (emphasis by Defendants); *see also* Def. Br. 18. Again, Defendants misconceive Plaintiff's position. Plaintiff is not seeking damages based on a disclosure claim and has not asserted that voluntary disclosures cause a GP to forfeit contractual protections in the LPA; Plaintiff merely contends that the unitholder vote safe harbor cannot be invoked to preclude a breach of contract claim when the vote was induced by misleading statements. Whether or not certain disclosures are mandated by the federal securities laws, nothing in those laws requires Defendants to make false statements, as they did here. It is the false and misleading nature of Defendants' statements that causes them to lose the protection of the unitholder vote safe harbor. Having relinquished claims based on

fiduciary duties, Plaintiff should at least be able to "retain[] a reasonable contractual expectation that the Defendants would properly follow the LPA's substitute standards." *Gerber v. Enterprise Products Hldgs, LLC*, 67 A.3d 400, 422 (Del. 2013). Here, Defendants did not do so in procuring the unitholder vote.

2. This Is Not a New Argument on Appeal

Without merit is Defendants' argument that this is a new argument on appeal. Def. Br. 14-15. At oral argument below, Plaintiff's counsel stated:

> [I]f you provide a proxy and you state all types of information in there and you tout the fact that there was a conflicts committee that negotiated this transaction, you say in the proxy that this conflicts committee was "independent" ... and you procure the vote that way, you cannot then turn around and say, "Well, that vote absolves everything"....
>
> [N]othing in the LPA says anywhere that unitholders will deem to have ratified a conflicted transaction if the general partner withholds material information about the transaction…. It's not reasonable to infer that the parties would have agreed to that.

A602-03, A605.[4]

Arguments discussed during oral argument satisfy Rule 8. *See North River Ins. Co. v. Mine Safety Appliance Co.*, 105 A.3d 369, 382 (Del. 2014) ("We are satisfied that the broader issue [advanced on appeal] was sufficiently raised in the Court of Chancery during ... oral argument on the parties' Cross Motions for Judgment of the Pleadings."). Furthermore, assuming *arguendo* that Plaintiff did

[4] Defendants err in asserting (Def. Br. 15) that the cases on which Plaintiff relies concerning the unitholder vote safe harbor were not cited in the section of his Chancery Court brief addressing that issue. *See* A457 (citing *Cencom*).

not explicitly raise the arguments advanced in his appeal below, he did so implicitly, which also satisfies Rule 8. *See Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) ("The corporate opportunity theory, too, was implicitly raised below, in the argument that Meyerson breached his duty of loyalty.").[5]

B. WHETHER OR NOT DEFENDANTS' FALSE STATEMENTS ALSO GIVE RISE TO A CLAIM UNDER THE FEDERAL SECURITIES LAWS DOES NOT PRECLUDE THIS COURT FROM CONSIDERING THE IMPACT OF THOSE FALSE STATEMENTS ON THE AVAILABILITY OF THE UNITHOLDER VOTE SAFE HARBOR UNDER THE CONTRACT

Defendants suggest that because unitholders may have remedies under the federal securities laws based on Defendants' false statements, the Court should absolve them from breach of contract claims under the LPA. Def. Br. 12. Defendants again incorrectly assume that Plaintiff is seeking damages based on Defendants' misleading statements. Moreover, assuming that Plaintiff could assert a securities claim for the conduct he challenges, nothing in the federal securities laws precludes Plaintiff from pursuing a breach of contract claim under the LPA.[6]

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[5] The cases that Defendants cite do not hold otherwise. In *Smith v. Delaware State Univ.*, 47 A.3d 472, 479 (Del. 2012), the appellant did not even make the argument at issue in her opening brief *on appeal*, let alone in the court below; rather she waited until the Court ordered supplemental briefing. In *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 55 (Del. 2006), the Court held that appellants could not argue that an analytical approach the lower court adopted was incorrect when appellants themselves had urged the lower court to use that approach.

[6] Defendants cite no case holding that a contract claim is inappropriate merely because a federal securities claim might be premised on the same facts. Furthermore, it is far from clear that a federal securities claim, with all of the difficult pleading requirements and other barriers that such claims face, would be successful. Indeed, it was in light of all of the difficulties presented by such claims that Plaintiff withdrew his securities claim in the Texas federal court and choose to proceed in this Court with a contract claim. Defendants misleadingly suggest that Plaintiff's *(Cont'd)*

The law supports Plaintiff's choice to bring this breach of contract action under Delaware law in a Delaware court. As "the master of [his] own pleadings," Plaintiff is free to choose the course to pursue. *Rizk v. Tractmanager, Inc*., 2014 Del. Ch. LEXIS 94, at *28 n.52 (Del. Ch. May 30, 2014).[7]

C. DEFENDANTS' POLICY ARGUMENT FAILS

The Court should reject Defendants' argument that because MLPs offer certain tax benefits to common unitholders, they can be misled when casting votes designed to insulate the general partner from bad faith conduct. Def. Br. 13-14.

The notion that common unitholders "accept[] the terms of the LPA when [they] decide[] to invest in an MLP" (Def. Br. 13) "diverges from reality," particularly when MLPs seek capital from "ordinary investors or from accredited

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motivation to withdraw his securities claim was because he was not chosen by the court to be lead plaintiff. Def. Br. 12. That is incorrect. In fact, *Plaintiff never moved in the securities case to be appointed lead plaintiff.* To the contrary, he stipulated to the appointment of other persons as lead plaintiffs in that case. *See* Stipulation and Consent Order Establishing Responsive Pleadings Deadlines, Consolidating Actions, and Appointing Interim Lead Plaintiffs, Co-Lead Counsel, and Liaison Counsel in *Bazini v. Bradley*, No. 15-cv-389, ECF #10 (N.D. Tex. Mar. 31, 2015). Defendants further mislead in suggesting that Plaintiff abandoned his securities case as soon as others were appointed lead plaintiff. Def. Br. 12. That is also not true. Rather, he withdrew his securities case over two months later, as the difficulties and delays inherent in the securities case became apparent. *See Dieckman v. Regency Energy Partners LP*, No. 15-cv-389, ECF #50 (N.D. Tex. June 5, 2015).

[7] *See also Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987) (as the "master of the complaint," a plaintiff "may, by eschewing claims based on federal law, choose to have the cause heard in state court"); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master to decide what law he will rely upon."); *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 797 (Del. Ch. Feb. 2, 2016) ("A plaintiff generally is master of its complaint and can choose what it wants to plead.").

investors such as pension funds, universities or foundations."[8] Instead of "arms-length bargaining between the sponsors and the investors," the documents are "drafted unilaterally by the sponsors and proposed on a take-it-or-leave-it basis to the investors." Thus, the relevant policy is that the LPA 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).[9]

Further, the taxation benefits of MLPs cited by Defendants inure to the general partners as well as the unitholders and are derived wholly from federal tax law. *See* Def. Br. 13. There is no *quid pro quo* bargain of tax benefits in exchange for the unitholders' purported agreement to allow Defendants to rely on a unitholder vote induced by misleading statements.

[8] Leo E. Strine, Jr. & J. Travis Laster, "The Siren Song of Unlimited Contractual Freedom," Discussion Paper No. 789, 08.2014 (John M. Olin Center for Law, Economics, and Business, Harvard, Cambridge MA 02138). The Court below acknowledged that the LPA is likely not heavily negotiated. A604.

[9] *See also Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. 7141-CS, Tr. at 10 (Del. Ch. Oct. 30, 2012) (parties "have the contractual freedom to displace fiduciary duties, but there is also this notion that when you draft the partnership agreement, ambiguities are not interpreted in your favor; that we've got to be careful about exculpation; and that you can't have things both ways").

II. THE SPECIAL APPROVAL GIVEN BY THE CONFLICTS COMMITTEE DOES NOT PROVIDE A BASIS FOR DISMISSAL

A. THE APPOINTMENT OF THE CONFLICTS COMMITTEE VIOLATED THE EXPRESS TERMS OF THE LPA

1. The Conflicts Committee Was Not Composed Entirely of Independent Directors

Defendants' assertion that "Plaintiff cannot defeat the Special Approval safe harbor by alleging that Brannon was a 'de facto' member of the Conflicts Committee for four days prior to resigning from the Sunoco board on January 20, 2015," Def. Br. 21, is wrong. The LPA defines the Conflicts Committee as "a committee of the Board of Directors of the general partner of the General Partner *composed entirely* of two or more directors who are not ... (b) officers, directors or employees of any Affiliate of the General Partner …." LPA §1.1 (A62). This language plainly precludes a director of an affiliate of Regency GP such as Sunoco from becoming a member – de facto or otherwise – of the Conflicts Committee.

The Conflicts Committee was not composed entirely of directors who met the LPA independence requirement. Sunoco board member Brannon was added to the Regency Board on January 16, 2015 – the same day that the Regency Board decided to create a Conflicts Committee and pursue Special Approval of the merger. A34. Brannon immediately received a draft of the Merger Agreement, contacted Akin Gump to serve as Conflicts Committee counsel, and discussed the strategy for the proposed transaction with the other member of the Conflicts

Committee (Bryant), Akin Gump and Regency management. A34; A207-08. On January 20, 2015, Brannon temporarily resigned from the Sunoco board.[10] A29-30. Five days later, the Conflicts Committee approved the Merger at a paltry premium to Regency's artificially depressed stock price. A24-25. Thus, for almost half the time that the Conflicts Committee was composed and operating (from January 16 until January 25), Brannon was ineligible under the terms of the LPA to serve on the Conflicts Committee because he was a member of the Sunoco board.

The speed at which the Committee approved the Merger with ETP was no coincidence. The Merger was timed to take advantage of the artificially low trading price of Regency common units. A13; A16. Especially on a motion to dismiss, it is unreasonable to infer, as Defendants suggest, that Brannon "did not negotiate, evaluate or approve the Merger" until after he temporarily resigned from the Sunoco board on January 20, 2015. Def. Br. 22.

[10] Defendants infer that Brannon participated in the January 19, 2015 meeting to discuss the strategy of the proposed Merger in his capacity as a member of the Regency Board (Def. Br. 21). *See also id*. at 22 ("The LPA did not require Brannon to resign from the Sunoco board prior to attending this preliminary phone call."). This is improper at the pleading stage and ignores the allegation in the Complaint that this meeting included Brannon, Bryant – "*the other member of the Regency Conflicts Committee*" – Regency management and Akin Gump. A34.

2. The Conflicts Committee Did Not Meet NYSE Independence Requirements

Defendants' argument that Brannon and Bryant satisfied the NYSE Manual's independence requirements as a matter of law because a conflicted board pursuing a conflicted transaction determined that they were independent (Def. Br. 22) is wrong. The Manual contains no such conclusive presumption.[11]

The NYSE's official commentary makes clear that boards making independence determinations have to "broadly *consider all relevant facts and circumstances*" and "[i]n particular, when assessing the materiality of a director's relationship with the listed company, the board should consider the issue *not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation.*" A412.[12] Here, the conflicted Regency board added Brannon – a director of ETP-controlled affiliate Sunoco – to a Conflicts Committee to pursue Special Approval of a conflicted transaction with ETP. From the standpoint of Regency, Sunoco and their controller ETP, Brannon's role on the Conflicts Committee was highly material.

[11] The Manual states: "No director qualifies as 'independent' unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company)." A412. This is a minimum requirement, not a conclusive presumption.

[12] Defendants therefore err in arguing that "the NYSE Rules *only* disqualify directors who have *material relationships* with the listed company." Def. Br. 23. The lack of a material relationship is a minimum requirement – not an answer to any challenge to a director's independence. The NYSE commentary makes clear that "[i]t is not possible to anticipate, or explicitly provide for, all circumstances that might signal *potential conflicts of interest* ...." A412.

Indeed, as Brannon's game of "musical chairs" between the Sunoco board and the Regency board shows, the only reason for appointing him to the Regency board was to pursue Special Approval for a conflicted deal with ETP.

The allegations in the Complaint belie Defendants' suggestion (Def. Br. 23-24) that Brannon and Bryant had no idea that ETP would reward them for their service. While not required at the pleading stage, the Complaint sufficiently alleges that that they knew when they approved the Merger that this reward would consist of a Sunoco board membership. Pl. Br. 27; *see* A14.[13]

B. THE APPOINTMENT OF THE CONFLICTS COMMITTEE VIOLATED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The implied covenant of good faith and fair dealing is "best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). "[T]he implied covenant requires a party in a contractual relationship to refrain from arbitrary or

[13] Defendants' argument that Plaintiff must "allege and prove that the difference between a Regency board seat and Sunoco board seat was material to Brannon and Bryant" (Def. Br. 23) is wrong. Such a materiality analysis generally requires "a more developed factual background" than is available at the motion to dismiss stage, *Zimmerman v. Braddock*, 2005 WL 2266566, at *8 n.84 (Del. Ch. Sept. 8, 2005), *rev'd on other grounds*, 906 A.2d 776 (2006), which was not available here because the Court below stayed discovery at Defendants' request. Defendants' reliance on a post-trial opinion to suggest that Plaintiff needed to allege and prove materiality on a director-by-director basis at the pleading stage is thus misplaced. Def. Br. 23 (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156 (Del. 1995)).

unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Id.* at 442.[14]

Defendants do not dispute that Delaware law implies a covenant of good faith and fair dealing into the LPA or that this covenant constrained the Special Approval process. Pl. Br. 27-28. Defendants argue that the covenant does not apply here because there is no "gap" in the LPA and that the covenant cannot be invoked where a contract generally addresses a subject matter. Def. Br. at 24-25. Defendants are in error. The LPA does not address a situation where Regency GP would circumvent the LPA's requirements for a Conflicts Committee by briefly rotating a director of an Affiliate onto the Conflicts Committee to approve a conflicted transaction and then simply rotating that director back to the Affiliate board on the day the transaction closed. Pl. Br. 29. Courts recognize that "[g]aps also exist because some aspects of the deal are so obvious to the participants that they never think, or see no need, to address them." *In re El Paso Pipeline Partners, L.P. Deriv. Litig.*, 2014 WL 2768782, at *16 (Del. Ch. June 12, 2014). Defendants' argument that "the parties to the LPA could easily have identified and

[14] *See also Gerber*, 67 A.3d at 419 (covenant implies a "commitment to deal fairly in the sense of consistently with the terms of the parties' agreement and its purpose" and envisions "faithfulness to the scope, purpose, and terms of the parties' contract").

prohibited former or future board members from the Committee, but chose not to do so" (Def. Br. 27) misses this critical point.[15]

Defendants argue that because LPA §1.1 defines Committee members as directors who "*are* not officers, directors or employees of any Affiliate," Def. Br. 25 (emphasis by Defendants), the LPA permits directors to briefly hop off and onto boards in order to approve conflicted transactions. But Delaware courts do not blindly accept a defendant's self-serving interpretation of a contract, especially when the defendant is a general partner and solely responsible for the articulation of the disputed terms. *See SI Mgmt.*, 707 A.2d at 42-43. To the contrary, Delaware courts assessing implied covenant claims look to the past and ask "whether it is clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith – had they

[15] Defendants' cited cases involve contracts with unambiguous terms that, unlike here, directly dealt with the issue. *See Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) (affirming lower court finding that "the Stock Plan explicitly authorized the redemption's price and timing, and Booz Allen, Nemec, and Wittkemper received exactly what they bargained for under the Stock Plan"); *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1034 (Del. Ch. 2006) ("the parties directly addressed Glencoe's ability to make future investments in the Brafasco enterprise and specifically prohibited only unsubordinated debt investments"); *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 191 (Del. Ch. 2014) ("It would, in my view, conflict fundamentally with the plain language and structure of Section 7.9(a) to invoke the implied covenant to require that the Conflicts Committee follow a particular course by obtaining an opinion from financial advisor that addressed the fairness of the Drop-Down to the limited partners in a judicially proscribed manner.").

thought to negotiate with respect to that matter." *Gerber*, 67 A.3d at 418.[16] Defendants' cited cases do not hold differently.[17]

Here, the scope, purpose and terms of the LPA's requirements for a Conflicts Committee make clear that if the issue had been considered, the parties would not have agreed to allow Regency GP to circumvent the independence requirements for a Conflicts Committee in this manner. *See Dunlap*, 878 A.2d at 442 (covenant is breached where the parties' "conduct frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms"); *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *37 (Del. Ch. Oct. 4, 2013) (finding breach of the covenant because parties "deliberately undermined the scope, purpose, and terms of the Exclusive Agreement").

[16] *See also Dunlap*, 878 A.2d at 442; *E.I. Du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (1996); *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).

[17] *See Nemec*, 991 A.2d at 1126 ("[W]e must assess the parties' reasonable expectations at the time of contracting."); *Allied Capital*, 910 A.2d at 1032 ("Delaware jurisprudence on the implied covenant has, from time to time, stated the test thusly: 'is it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant—had they thought to negotiate with respect to the matter'?"); *Allen*, 113 A.3d at 184 (same); *Kuroda v. SPJS Holdings, LLC*, 971 A.2d 872, 888 (Del. Ch. 2009) ("[T]he implied covenant can only be used conservatively to ensure the parties' reasonable expectations are fulfilled.").

III. DEFENDANTS CANNOT OBTAIN DISMISSAL BASED SOLELY UPON THEIR FINANCIAL ADVISOR'S OPINION

While the Court below did not decide the issue, Plaintiff's Opening Brief showed why, as a matter of contract interpretation, Defendants should not be absolved of their bad faith behavior based solely on their purported reliance on their financial advisor, J.P. Morgan. Pl. Br. 32-34.[18]

The framework of the LPA demonstrates that reliance on advisors (§7.10(b) (A106)) does not singlehandedly absolve the general partner of liability in conflict-of-interest transactions, which instead are governed by §7.9's four safe harbors for conflicts of interests: (i) Special Approval; (ii) approval by a Unitholder vote; (iii) terms no less favorable to the Partnership; and (iv) fair and reasonable to the Partnership. A105. When interpreting contracts, the Court must defer to the "agreement's overall scheme or plan." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012). The "scheme" at issue creates four – not five – safe harbors for a conflicted transaction to be nonviolative

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[18] Defendants acknowledge that Plaintiff's counsel argued the issue during oral argument, Def. Br. 30, but nevertheless claim that this Court should not consider the issue because it was not sufficiently raised in the Court below. Defendants are incorrect. Plaintiff's counsel argued: "Section 7.10(b), the conclusive presumption that they're relying on, does not apply here." A637. He continued:

> [W]hy do we even have 7.9(a) and 1.1 regarding special approval if you just need to hire a financial advisor and he gives you, you know, a conclusive presumption no matter what the committee is, no matter how it is constituted? That's not how the contract works, and that's not how the contract should be interpreted.

A640. For the reasons set forth in Point IA2, *supra*, Rule 8 does not preclude this Court from addressing the issue concerning Defendants' reliance on their financial advisor.

of any other provision of the LPA. The "scheme" does not contemplate that a financial advisor's opinion – which is not one of the four enumerated safe harbors – standing alone can also insulate the general partner from liability in conflict-of-interest transactions when none of the safe harbors of LPA §7.09 are satisfied.[19]

Section 7.9 states that if Special Approval is not sought, the Board may make a determination that §§7.9(a)(iii) or (iv) (A105) are satisfied. Either of those determinations – which would in all likelihood be based upon advisors' opinions – will give rise to a *rebuttable presumption* that the Board acted in good faith. It is nonsensical to argue that an advisor's opinion, *standing alone*, creates *irrebuttable* proof of good faith in the context of conflicted transactions, when the final determinations that the opinion supports only give rise to a rebuttable presumption.[20]

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[19] *See Brinckerhoff v. El Paso Pipeline GP Co.*, C.A. 7141-CS, Tr. at 14-22 (Del. Ch. Oct. 30, 2012) (refusing to interpret LPA as providing a conclusive presumption of good faith under §7.10(b) when general partner pursues a conflicted transaction and elects Special Approval under §7.9(a)).

Additional evidence of the LPA's "scheme" lies in the section headings. Section 7.9 is titled, "Resolution of Conflicts of Interest; Standards of Conduct and Modifications of Duties." Section 7.10's title refers to "Other Matters Concerning the General Partner." In Delaware, section headings and captions are relevant to contract interpretation. *See Board of Educ. of Caesar Rodney School Dist. v. Caesar Rodney Educ. Ass'n*, 2003 WL 22232608, at *5 n.19 (Del. Ch. Sept. 17, 2003) (giving effect to contract's headings in its interpretation where contract did not state that they headings should be ignored); *see also Ward v. TheLadders.com, Inc.*, 3 F. Supp. 3d 151, 162 (S.D.N.Y. 2014) (giving effect to a contract's section headings in its interpretation).

[20] At a minimum, the LPA is ambiguous on this point, and extraneous evidence – which precludes dismissal on the pleadings – is required to determine its meaning. *GMG Capital Invs.*, 36 A.3d at 783 (finding that a contract's ambiguity precluded an award of summary judgment).

Defendants do nothing to contradict these points. First, their argument that §7.9(a) is merely "permissive" (Def. Br. 31) does not negate that they are attempting to shoehorn §7.10(b) as an additional "safe harbor" for conflicted transactions. Section 7.10(b) is also permissive. Second, their argument that Plaintiff is somehow discouraging MLPs from fulfilling multiple safe harbors is nonsensical. Def. Br. 32. In fact, because the various safe harbors enumerated in §7.9 are all likely to include a financial advisor's opinion, the proper interpretation of the LPA ensures an advisor opinion as well as another level of review, whether it come from Special Approval, the unitholders or the Board. Finally, in the cases that Defendants cite to support their contention that courts have held that the financial advisor opinion alone could insulate the general partner from a conflicted transaction, plaintiff did not allege that the members of the Conflicts Committee failed to meet the contractual independence requirements and were ineligible to serve on the Committee. *See In re Encore Energy Partners LP Unitholder Litig.*, 2012 WL 3792997, at *11 (Del. Ch. Aug. 31, 2012) ("Plaintiffs maintain that the Conflicts Committee's review was perfunctory and that the Committee effectively failed to negotiate"); *Brinckerhoff v. Enbridge Energy Co.*, 2011 WL 4599654, at *10 (Del. Ch. Sept. 30, 2011) (finding that "EEP GP's Board formed the Special Committee to negotiate with Enbridge, and the facts suggest that the Special Committee was independent of Enbridge").

IV. THE COMPLAINT ADEQUATELY ALLEGES BAD FAITH

While the Court of Chancery did not address whether the Complaint adequately alleges a breach of the LPA's requirement that the GP act in good faith (LPA §7.9(b) (A105-06)), Defendants urge this Court to do so. Def. Br. 33-35.

In contrast to LPA §§7.9(a)(iii) and (iv), LPA §§7.9(a)(i) and (ii) do not provide a contractual presumption that the GP acted in good faith. "To allege a breach of a contractual duty to act in good faith, a complaint need only allege facts related to the alleged act taken in bad faith, and a plausible motivation for it." *Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *7 (Del. Ch. Dec. 9, 2011) (noting this is a minimal standard).[21] The Complaint exceeds what is required.

First, timing the Merger to occur at the precise moment that the exchange ratio yielded the least value for Regency unitholders and the greatest value for ETP alone merits an inference of bad faith. A13. *Second*, the Board had divided loyalties, with a majority of the Board members serving on the boards of ETE and/or ETP-controlled Sunoco. A18-19. The Board members were incentivized to approve the Merger despite the inadequate price because of their loyalty to ETP

[21] *See Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II L.P.*, 624 A.2d 1199, 1206 (Del. 1993) (finding that plaintiff's allegation that defendants "acted in bad faith and in a retaliatory manner" was sufficient to satisfy the notice pleading threshold); *Winston v. Mandor*, 710 A.2d 835, 844 (Del. Ch. 1997) (finding that allegations that defendant made valuation decision in bad faith and hired an interested party to perform the valuation and that controlling shareholders would benefit from undervaluation were sufficient to survive motion to dismiss).

and/or ETE. *Third*, the runaround of the LPA's requirements for Conflicts Committee service is the type of action that is "so unreasonable that [the Court of Chancery] will necessarily determine that [it] could not have been undertaken in good faith." *DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 107 (Del. 2013); *see also Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 107 (Del. Ch. 2013) ("Some actions may objectively be so egregiously unreasonable, however, that they 'seem[] essentially inexplicable on any ground other than [subjective] bad faith.'"). A board appointing clearly conflicted members to serve on a purportedly independent Conflicts Committee cannot be found to be acting in good faith.

In any event, determination of subjective good faith raises questions of fact that cannot be resolved on the pleadings. *See Fox v. CDX Holdings, Inc*. 2015 WL 4571398, at *25 (Del. Ch. July 28, 2015); *Desert Equities*, 624 A.2d at 1208.

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Respectfully submitted,

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