IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHRISTOPHER MILLER, an individual, and CHRISTOPHER MILLER and LINDSAY MILLER as trustees of the C & L MILLER REVOCABLE TRUST,

Plaintiffs-Below, Appellants,

v.

HCP TRUMPET INVESTMENTS, LLC; HISPANIA PRIVATE EQUITY II, L.P.; HISPANIA INVESTORS II LLC; CARLOS SIGNORET; JASON SHAFER; MARK RUSSELL, and VICTOR MARURI,

Defendants-Below, Appellees.

No. 107, 2018

Court Below: Court of Chancery
In the State of Delaware
C.A. No. 2017-0291-SG

APPELLEES' ANSWERING BRIEF

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Dated: May 22, 2018

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NATURE OF PROCEEDINGS

Plaintiffs were investors in a Delaware limited liability company, Trumpet Search LLC ("Trumpet" or the "Company"). A-7 (Verified Complaint ("Compl.") ¶ 3).[1] As specified in its Second Amended and Restated Operating Agreement (the "Operating Agreement" or "OA"), Trumpet had multiple classes of ownership. *See, e.g.,* A-11 to A-13 & A-121 to A-131 (Compl. ¶¶ 23-24 & Ex. 1 (OA) at Schd. A & B).

The Company and all of its "Members", including Plaintiffs, signed the Operating Agreement. *See, e.g.,* A-97 to A-120 & A-132 to A-133 (Compl. Ex. 1 (OA) at signature pages). Members with different classes of ownership had different rights to payment upon a sale of the Company. A-7, A-12 to A-13 & A-70 to A-73 (Compl. ¶¶ 3, 24 & Ex. 1 (OA) at §§ 7.02-.03). Class D and Class E enjoyed the greatest preference. *See, e.g.,* A-12 to A-13 (Compl. ¶ 24).

In 2017, after a process involving two different competing bidders, multiple bids, and an increase in price of 30% or more from the initial bid, Trumpet was sold. *Compare* A-17 (Compl. ¶ 40) *with* A-20 to A-21 (Compl. ¶¶ 49, 51). The price was high enough so that owners of Class D and Class E units, including one

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[1] Citations to Appellants' Appendix are in the form "A-[number]." Citations to Appendix to Appellees' Answering Brief ("Appellees' Appendix") are in the form "B-[number]."

of the Plaintiffs, received a "2x payout." *See* A-7, A-12 (Compl. ¶¶ 3, 24(b)). But the price was not high enough for a payout to all classes. Some investments in the lower classes of ownership returned "nothing" or "almost nothing." A-20 to A-21 (Compl. ¶ 51).

Plaintiffs had several investments in these lower classes. *See* A-7 (Compl. ¶ 3). After the sale closed, Plaintiffs tried to improve their returns on those investments by suing Defendants, as "majority managers" or "entities controlling such managers", A-6 (Compl. ¶ 1), for breach of the Operating Agreement. They contended that these Defendants (now identified collectively as "HCP", *see* Plaintiffs' Br. at 1 n.1), had an obligation to "achieve the highest value" for all classes of ownership and failed to do so by not using an "open-market process" for the sale. *E.g.*, A-6, A-16 (Compl. ¶¶ 1, 36).

The Operating Agreement, however, contained no provision imposing such an obligation or requiring such a process. *See* A-38 to A-133 (Compl. Ex. 1 (OA)). Instead, it reserved to the Trumpet Board of Managers the right to determine the "manner in which such [a sale] should occur", so long as it was to an independent third party. A-80 (Compl. Ex. 1 (OA) at § 8.06(a)). It also eliminated all fiduciary duties owed by those Managers. A-14, A-65 (Compl. ¶ 30 & Ex. 1 (OA) § 3.09).

Because they could not point to any "open-market" language in the Operating Agreement, or to any fiduciary duty owed to them to use an "open-market process" to maximize the price for Trumpet, Plaintiffs tried instead to stretch a claim of "good faith and fair dealing" to cover these issues. They demanded that the Court of Chancery insert into the Operating Agreement a requirement that any sale of the Company occur through "an open-market process designed to achieve the highest value reasonably available for *all*" the company's investors. A-16 (Compl. ¶ 36) (emphasis in original). Plaintiffs also claimed that they had expected or anticipated at the time they signed the Operating Agreement an "open-market process" in any sale of the Company. *See, e.g.,* A-16, A-17 (Compl. ¶¶ 36, 39).

The Court of Chancery rejected Plaintiffs' demand, correctly following this Court's instructions to be "cautious" when asked to insert an implied covenant into a preexisting contract. *Miller v. HCP & Co.*, 2018 WL 656378, at *9 (Del. Ch. Feb. 1, 2018) (quoting *Nemec v. Schrader*, 991 A.2d 1120, 1125 (Del. 2010)). This Court should uphold that well-reasoned decision.

This Court has emphasized that litigants demanding insertion of an implied covenant into a supposed "gap" in an existing contract must satisfy a number of strict requirements. They must show that the existing contract did not already fill that "gap", because "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement." *Nemec*, 991 A.2d at 1125-26 (quotation omitted). If the claimed "gap" is not filled by anything in the existing contract, they must then show that it is "*clear* from what was expressly agreed upon" in that contract "that the parties . . . would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418 (Del. 2013), *overruled in part on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013) (emphasis added) (quotation omitted). In either instance, they must actually allege that "neither party anticipated" the supposed contractual "gap" being asserted. *E.g., Gerber*, 67 A.3d at 421 (quoting *Nemec*, 991 A.2d at 1125 (citing *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441-42 (Del. 2005) (citing *Cincinnati SMSA Ltd. P'shp v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) and *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 443 (Del. 1996)))).

The Court of Chancery held that Plaintiffs did not satisfy the first and second of these requirements in their demand for an "open-market process" or "auction" covenant. *See, e.g., Miller*, 2018 WL 656378, at *10-12. Because the Court of Chancery was correct in these holdings, and because Plaintiffs also did not satisfy the "neither party anticipated" pleading requirement set by this Court, this Court should affirm.

<u>SUMMARY OF ARGUMENT</u>

Plaintiffs did not number the five paragraphs of the Summary of Argument in Appellants' Opening Brief ("Plaintiffs' Br."). *Cf.* Del. Sup. Ct. R. 14(b)(iv) (requiring numbering). The second, third, and fourth paragraphs correspond to the incorrect arguments in the headings of Points I, II and III of that brief. But even before then, in their first paragraph, Plaintiffs do not correctly state what the Court of Chancery did. As a result, they have not properly addressed the standard or scope of review applicable to their claim. We address this and Plaintiffs' other paragraphs as if they had been numbered consecutively.

1. Denied. The Court of Chancery did not base its decision on a theory that "HCP" had "unfettered discretion to market Trumpet however it wanted, for whatever price it wanted, so long as Trumpet was sold to an independent third party." Plaintiffs' Br. at 3. What it held was that Plaintiffs had not satisfied two of the three requirements set by this Court for inserting an implied covenant into an existing contract. *See Miller*, 2018 WL 656378, at *10-12. First, it concluded that the discretion given in the Operating Agreement to the Trumpet Board left no "gap" with respect to how the Company could be sold. *Id.* at *10-11. *See Nemec*, 991 A.2d at 1125-26 (if the conduct alleged is "authorized by the agreement", it leaves no "gap") (quoting *Dunlap*, 878 A.2d at 441). Second, it concluded that, even if the Operating Agreement had a "gap", it was not clear from that contract

that the parties would have filled the "gap" with an "open-market process" as now proposed by Plaintiffs. *Miller*, 2018 WL 656378, at *12. *See Gerber*, 67 A.3d at 418 (it must be "clear from what was expressly agreed upon" that the parties "would have agreed to proscribe" the conduct at issue "had they thought to negotiate with respect to that matter.") (quotation omitted). The Court of Chancery did not directly address this Court's requirement that a plaintiff allege that "neither party anticipated" the "gap" being asserted. *Gerber*, 67 A.3d at 421; *Nemec*, 991 A.2d at 1126. Plaintiffs have not acknowledged that this requirement is part of the scope of review, although Defendants fairly raised the issue below, *see* A-167, A-170, A-264 to A-247. Because the Complaint contains no such allegation (it essentially pleads the opposite, *see* A-16 to A-17 (Compl. ¶¶ 36, 39)), and because this Court examines a complaint *de novo* when reviewing a motion to dismiss, *e.g.*, *Nemec*, 991 A.2d at 1125, the decision below may also be affirmed on that additional, alternative ground. *See, e.g., Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (citing *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993)).[2]

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[2] Because this Court may look to the record and affirm on the basis of rationales not presented in the trial court's decision, Plaintiffs are technically wrong that this Court must reverse the holdings below on the other claims for secondary liability (Counts II-IV) made in the Complaint if it were to reverse the dismissal of the breach of implied covenant claim. *See* Plaintiffs' Br. at 11 n.4.

2. Denied. Contrary to Point I of Plaintiffs' Brief, and the second paragraph (called "First") of Plaintiffs' Summary of Argument, the Court of Chancery did not "err[] in holding that the [Operating] Agreement's express terms left no room for application of the implied covenant of good faith and fair dealing." Plaintiffs' Br. at 12. As this Court has held, "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement." *Nemec*, 991 A.2d at 1125-26 (quoting *Dunlap*, 878 A.2d at 441). The Operating Agreement provided the Board with "sole" discretion in selling the Company, subject to two conditions: that the sale be for the entire Company and that it be to an "independent third party." A-80 (Compl. Ex. 1 (OA) § 8.06(a)). This left no "gap" to be filled with an implied covenant *requiring* such a sale to be public. Plaintiffs try to avoid this problem by dividing the sale of Trumpet into specific issues of "marketing, pricing, negotiating" and "approv[ing]" a sale, supposedly distinct from "the 'manner' or form" of the sale. Plaintiffs' Br. at 13, 15-17. They then argue that, absent "express language" on each of the specific issues they invented, there is a "gap" to be filled. Plaintiffs' Br. at 15. This artificial dissection of the matter of selling the Company into finer and finer parts, and the

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Nonetheless, a remand for further consideration under such circumstances would be warranted.

insistence that a "gap" exists if no express language addresses each of them, is contrary to this Court's decisions. *Cf., e.g., Gerber*, 67 A.3d at 418 (testing whether a "matter" is addressed, not individual issues). It would convert the narrow covenant of good faith and fair dealing into a broad fiduciary duty to provide "best price" protections, *see, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986)—even though Plaintiffs knew that, in signing the Operating Agreement, they were eliminating all their rights to such fiduciary duty protections.

3. Denied. Contrary to Point II of Plaintiffs' Brief, and the third paragraph (called "Second") of Plaintiffs' Summary of Argument, the Court of Chancery did not "err[] in rejecting Plaintiffs' reasonable expectations that the Board would undertake at least some level of market check, and that HCP would not seek to undermine efforts to obtain a fair price for Trumpet." Plaintiffs' Br. at 21. *See also id* at 3, 24, 27 (variations on that theme). The test is not Plaintiffs' expectations. It is whether it is "*clear* from what was *expressly agreed upon*" that the parties "would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Gerber*, 67 A.3d at 418 (emphasis added) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440 (Del. Ch. 2012), *aff'd in part and rev'd in part on other grounds*, 68 A.3d 665

(Del. 2013)). The language of the Operating Agreement does *not* make it "clear" that the parties would have agreed that a sale of the Company required an "open-market sale or auction." *E.g., Miller*, 2018 WL 656378, at *12. Even if Plaintiffs were right that the discretion granted to the Board left a "gap" in how the Company might be sold, that does *not* mean that the parties would have agreed to use only an "open-market process." More than the "gap" itself would be needed to make that clear—and none of the other language in the Operating Agreement does.

4. Denied. Contrary to Point III of Plaintiffs' Brief, and the fourth paragraph (called "Third") of Plaintiffs' Summary of Argument, "HCP's conduct was" not "arbitrary and unreasonable and" did not "deprive[] Plaintiffs of the fruits of their bargain." Plaintiffs' Br. at 4, 28. Plaintiffs got exactly what they bargained for. They knew the senior preferred classes of ownership in the Company, Classes D and E, would have an incentive to sell the Company to obtain their "200% return." Plaintiffs' Br. at 29. The entire point of different classes of ownership is to provide different incentives. The realization of those incentives does not mean that doing so was unreasonable. Nor did the Vice Chancellor improperly substitute his "own view of the facts", Plaintiffs' Br. at 32, by noting what the Complaint pleaded—that the Board did take actions that increased the sales price for Trumpet. *E.g.,* A-19 to A-20, A-23, A-26 to A-27 (Compl. ¶¶ 44, 48-49, 61-62, 71-73); *compare* A-17 (Compl. ¶ 40) ($31 million price) *with* A-20

(Compl. ¶¶ 49, 51) ($41 million after actions by the Board). Finally, because they had expressly agreed to eliminate any fiduciary duties owed to them, Plaintiffs knew that their bargain did *not* include the duty to maximize price on a change of control as otherwise required by cases such as *Revlon*.

COUNTERSTATEMENT OF FACTS

Trumpet was a privately-held behavioral health services company. A-8 to A-9, A-121 to A-129 (Compl. ¶¶ 16-17 & Ex. 1 (OA) at Schd. A). Plaintiffs (including Christopher Miller, a "founder" of the Company, A-9 to A-10 (Compl. ¶ 16)) were investors and parties to its Operating Agreement, A-102, A-103 (Compl. Ex. 1 (OA) at signature pages).

The Operating Agreement provided that neither the Members nor the Managers of Trumpet would owe any fiduciary duties to each other. A-57, A-65 (Compl. Ex. 1 (OA) §§ 2.05, 3.09). They would, of course, remain subject to any express contract terms, and to any contractual covenant of good faith and fair dealing that might properly be implied into the Operating Agreement. *See, e.g.,* A-15, A-65 (Compl. ¶ 24 & Ex. 1 (OA) § 3.09). *See also* 6 Del. Code § 18-1101(c).

Between them, Plaintiffs initially owned "Common Interest[s]" and "'participating' Class A units" in the Company. A-7, A-128, A-130 (Compl. ¶ 3 & Ex. 1 (OA) Schd. A at pp. A-8, B-1). In "late 2014", Trumpet issued a new preferred class of ownership, the "Class D Interests." One of the Plaintiffs purchased some of this new class. *See* A-7, A-121 (Compl. ¶ 3 & Ex. 1 (OA) Schd. A at p. A-1). Some of the Defendants purchased the majority of it. A-14, A-125 to A-126 (Compl. ¶ 22 & Ex. 1 (OA) Schd. A at pp. A-5, A-6).

To raise additional funds, in May 2016, Trumpet issued a further preferred class of ownership, the "Class E units." A-11 (Compl. ¶ 23). Again, some of the Defendants purchased the majority of that class. *E.g.,* A-13 (Compl. ¶ 25). Plaintiffs purchased none, but did execute the revised Operating Agreement. A-102 to A-103 (Compl. Ex. 1 (OA) at signature pages).

To encourage the Class D and Class E investments, Trumpet gave those investors priority in the "waterfall" of payments following any sale of the Company. A-11 to A-13, A-72 to A-73 (Compl. ¶ 24 & Ex. 1 (OA) §§ 7.02-.03). As signatories to the Operating Agreement (and because Mr. Miller was on the Board, A-15 (Compl. ¶ 31)), Plaintiffs knew this. They also allege that they anticipated "[a]t the time the Operating Agreement was executed" the issue of an "open-market process" for any sale. A-16, A-17 (Compl. ¶¶ 36, 39). They did nothing to ensure those expectations were reflected in the Operating Agreement, however.

Later in 2016, a sales process for Trumpet began. *See, e.g.,* A-16 (Compl. ¶ 37). It included at least "two funds that had previously indicated some interest . . . ." A-20 (Compl. ¶ 48); *see also* A-19 (Compl. ¶ 44). This led to two different letters of intent, first from MTS Health Investors, LLC ("MTS"), and later from Baird Capital ("Baird"). *See, e.g.,* A-18, A-20, A-23 to A-24 (Compl. ¶¶ 41, 48, 63).[3] In turn, this resulted in price increases—from an initial bid of approximately $31 million by MTS, to a bid of approximately $36 million by Baird, to a further bid of approximately $41 million by MTS. A-17 to A-18, A-20 (Compl. ¶¶ 40-41, 48, 49).[4]

When the Board received the first of these bids, Mr. Miller "requested" that it "engage in an open market process with an investment bank or otherwise attract a more market-based offer than what MTS presented." A-19 to A-20 (Compl. ¶ 47). On December 26, 2016, after receipt of the second and third increased bids, the Board authorized the Company to enter into a letter of intent, with a limited

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[3] Plaintiffs did not identify Baird by name or include any of these letters of intent, which were obviously central to their allegations, with the Complaint. Defendants therefore provided the Court of Chancery with copies of those letters and other documents that were referred to or integral to the Complaint. *See* Affidavit of Tammy L. Mercer dated June 19, 2017 ¶¶ 2-9. The parties disagreed over exactly how much of this material the court could consider on a motion to dismiss. *Compare* A-148, A-152 to A-153, A-158, A-163 to A-165 *and* A-258 to A-261 (Defendants' arguments and authorities) *with* A-217 to A-219 (Plaintiffs' partial opposition). (At oral argument, Plaintiffs also waived objections to some of the documents. *See* B-54 to B-55 (Nov. 8, 2017 transcript ('Tr.") at pp. 50-51).) The Court of Chancery dismissed Plaintiffs' claims without referring to the additional documents. But Defendants' arguments remain valid if this Court wishes to review them in the record.

[4] Plaintiffs alleged that the increased $41 million offer from MTS was "effectively $39 million", but do not explain this, or how it compared to the "$36 million range" of Baird's offer. *Compare* A-20, A-25 (Compl. ¶¶ 49, 51, 68) *with* A–20 (Compl. ¶ 48).

exclusivity period (eventually extended to March 2017), with respect to the $41 million proposal from MTS. *See* A-20, A-23-24, A-26 (Compl. ¶¶ 50, 63, 73). (Plaintiffs did not allege that Mr. Miller, either of the two others Board members who represented lower classes of Trumpet ownership, *see* A-15 (Compl. ¶ 31), or anyone else, voted against this.)

On February 24, 2017, two days before a Board meeting, Mr. Miller supposedly received an "unsolicited voicemail message from a Mr. Chris Harris" of "FFL Partners, LLC ('FFL')." A-21 to A-22 (Compl. ¶¶ 54, 58). In a subsequent call, Mr. Harris allegedly "indicated" to Mr. Miller "that FFL was interested in pursuing a purchase of Trumpet's membership interests", that "FFL conservatively valued" those "interests to be worth in excess of $50 million", and that "four of five investors would agree that Trumpet is worth more than $50 million." A-21 to A-22 (Compl. ¶ 55).

The next day, Mr. Miller asked Mr. Harris to "put that valuation in writing through a non-binding indication of interest . . . ." A-22 (Compl. ¶ 56). Mr. Miller did not do this so that FFL could bid for Trumpet. He did it "so that [he] could show the valuation to the Board to support his ongoing position that the MTS offer was below market." A-22 (Compl. ¶ 56).

Mr. Harris responded as requested with a letter. A-22, B-1 to B-4 (Compl. ¶ 57 & Ex. 2).[5] It was an indication of interest—not a letter of intent—stating that FFL "would be willing to invest in a transaction", of an unknown kind, for an unknown amount of ownership, "that values the Company in a range of $50 million - $60 million on a cash-free, debt-free basis." B-4 (Compl. Ex. 2 at 3, ¶ 1).[6] The basis for this "interest" in Trumpet was "the information we have received to date", which was not described in any way. B-4 (Compl. Ex. 2 at 3, ¶ 1). Unless someone had leaked confidential information, FFL would not have had actual financial or performance data as a basis for any valuation of the Company.

The Trumpet Board nonetheless considered the FFL letter. A-22 to A-23 (Compl. ¶¶ 58-61). Belying Plaintiffs' vague allegations that the "HCP Board members" who comprised the majority of the Board "reacted with suspicion" and "marginalize[d] . . . FFL's valuation", A-22 to A-23 (Compl. ¶¶ 59-60), the Board members decided to notify MTS about FFL's "interest." *See* A-19 (Compl. ¶ 61).

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[5] Plaintiffs did not include the entire complaint with all exhibits in their appendix. We have provided the missing Exhibit 2 in Appellees' Appendix. *See* B-1 to B-4.

[6] While Mr. Harris had supposedly "indicated" earlier that FFL wanted to purchase "Trumpet's membership interests", A-21 (Compl. ¶ 55), his letter did not say this.

They did so even though FFL's letter did not say whether it was interested in purchasing the entire Company, as MTS intended to do.

MTS responded by threating to sue Trumpet for violating the exclusivity it had been promised. A-23 to A-24 (Compl. ¶ 63). Replying to this threat, Trumpet's Chief Executive Officer supposedly "pulled support from the proposed MTS transaction", as did the "HCP Board members." *See* A-25 to A-26 (Compl. ¶¶ 69-70).

Faced with this tough negotiating stance by the Board, MTS soon raised again its offer for Trumpet by another $1.6 million. A-26 (Compl. ¶ 73). On March 7, 2017, the Board approved a sale at this "new-and-improved" price of "roughly $43 million (effectively $41 million)." A-27 to A-28 (Compl. ¶¶ 76, 78).[7] Plaintiffs do not allege that any Board member voted against the deal.

After the sale of Trumpet closed, Plaintiffs commenced this lawsuit. They claimed that the Board "could" and "should" have "presented" Trumpet "to the open market" instead of voting on the MTS deal, because "a much higher price would have been obtained." A-27 to A-28 (Compl. ¶¶ 75, 77, 79). They did not allege when this could have occurred or what it might have cost. Instead, they

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[7] Plaintiffs do not explain this supposed $2 million spread. *See also supra* n.4.

offered only hypotheticals of how much money they might have received (up to an additional "$530,000") if the sales process had "yielded $53 million", or "$54,092,500", or "$60 million." A-28 to A-29 (Compl. ¶¶ 79-81). Following the decision below dismissing their Complaint, Plaintiffs filed this appeal.

ARGUMENT

I. Plaintiffs have failed to recognize the high bar set by this Court's standard for implying covenants of good faith and fair dealing into existing contracts.

A. Questions presented.

Have Plaintiffs correctly stated the standard this Court should use in reviewing the dismissal of a claim for breach of an implied covenant of good faith and fair dealing and, if not, what is that standard?

B. Scope of review.

Plaintiffs are correct that this Court reviews *de novo* the grant of a motion to dismiss under Court of Chancery Rule 12(b)(6), including the interpretation of any written contract that is part of that decision. Plaintiffs' Br. at 12-13 (citing *Nemec*, 991 A.2d at 1125, *GMG Capital Invs., LLC v. Athenian Venture P'rs I L.P.*, 36 A.3d 776, 779 (Del. 2012), and *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009)). Plaintiffs are also correct that the standard for interpretation of the factual allegations of a complaint when deciding such a motion is whether a claim is stated "under any 'reasonably conceivable' set of circumstances inferable from" those "alleged facts." Plaintiffs' Br. at 12 (quoting *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 813 n.12 (Del. 2013)).

But the review here is not whether it is "reasonably conceivable" that the implied covenant demanded by Plaintiffs would have been a part of the parties' contract had the parties negotiated over it. Unless this Court decides to overrule its prior precedents, diminish Delaware's traditional respect for freedom of contract, and convert implied covenants of good faith and fair dealing into free-floating versions of the very fiduciary duties that Delaware law permits participants in limited liability companies such as Trumpet to eliminate, the standard it must apply in its *de novo* review is the far narrower and stricter one set forth in decisions such as *Gerber*, 67 A.3d at 421, *Nemec*, 991 A.2d at 1126, and *Dunlap*, 878 A.2d at 441.

C. Merits of argument.

The Court of Chancery properly applied this Court's strict standard for review of a demand for insertion of an implied covenant into the express terms of an existing contract. It properly held that Plaintiffs had not met two of the three requirements of that standard.

This Court should adhere to that same standard in its review. It should affirm the decision below with respect to the two requirements that the Court of Chancery held Plaintiffs had failed to satisfy. It may (and should) also affirm the decision below on the basis of the additional requirement of that standard—a simple "yes or no" pleading test—which the lower court's opinion did not directly address, and which Plaintiffs now ignore.

1. The standard for review of a claim for an implied covenant of good faith and fair dealing includes whether, if neither party anticipated the "gap" alleged, the contract nonetheless covers it.

Under this Court's precedents, there is no "gap" to be filled by an implied covenant if the contract in question authorizes the behavior in question in any way. As this Court put it in *Nemec* and *Dunlap*, "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the agreement." *Nemec*, 991 A.2d at 1125-26 (quoting *Dunlap*, 878 A.2d at 441). This does not mean that the existing contract must recite each item of conduct permitted. It is sufficient, for example, that it addresses who may decide the matter. As shown below, *see infra* at 23-26, the Court of Chancery properly applied this requirement

2. The standard for review of a claim for an implied covenant of good faith and fair dealing includes whether it is *clear* from the express terms of the contract that the parties would have included the particular covenant alleged had they thought to negotiate with respect to the underlying matter.

Under this Court's decision in *Gerber*, it must be "*clear* from what was expressly agreed upon" in the parties' contract that they "would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Gerber*, 67 A.3d at 418 (emphasis added). It is not enough that it might be "reasonably conceivable" that the parties would have done so, or that it might be "conceivable" that the facts alleged would support such a conclusion. It must be *clear* from the words of the contract itself. Plaintiffs have also failed to apprise the Court of this heightened requirement. *See* Plaintiffs' Br. *passim*; *cf.* Plaintiffs' Br. at 14, 17 (using the word "clear" in other ways). As shown below, *see infra* at 34-40, the Court of Chancery properly applied this requirement.

3. The standard for review of a claim for an implied covenant of good faith and fair dealing includes whether the plaintiff has *pleaded* that the alleged "gap" to be filled is something that *neither* party to the underlying contract anticipated.

Under this Court's decisions in *Gerber* and *Nemec*, a plaintiff demanding that a court insert an implied covenant into an existing contract must always plead that "*neither* party anticipated" the "gap" claimed to exist in the underlying contract, whatever the plaintiff pleads as to the other two requirements for such a claim. *Gerber*, 67 A.3d at 421 (emphasis added); *accord, e.g., Nemec*, 991 A.2d at 1125; *Dunlap*, 878 A.2d at 441(citations omitted). Plaintiffs have not apprised the Court of this requirement. *See* Plaintiffs' Br. *passim.* Nor does their Complaint contain the required allegation. In fact, it appears to allege the opposite—that Plaintiffs *did* anticipate the issue of an "open-market process" for the sale of the Company, although such a process is not mentioned in the Operating Agreement. *See, e.g.,* A-16, A-17 (Compl. ¶¶ 36, 39).

The Court of Chancery did not address directly this requirement for an allegation that no party anticipated the "gap" being asserted.[8] This Court may (and should), however, affirm the decision below on that additional basis. *See, e.g.*, *Unitrin, Inc.*, 651 A.2d at 1390.

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[8] It may be that the court below tacitly considered this part of the separate requirement that it be "clear from what was expressly agreed upon" that the parties "would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter", *Gerber*, 67 A.3d at 418, because it would be wrong for a party to *know* of the potential problem and not negotiate over it. We believe, however, that these are two distinct requirements in this Court's decisions.

II. The Court of Chancery did not "err[] in holding that the [Operating] Agreement's express terms left no room for application of the implied covenant of good faith and fair dealing."

A. Questions presented.

Did the Court of Chancery "err[] in holding that the [Operating] Agreement's express terms left no room for application of the implied covenant of good faith and fair dealing"? Plaintiffs' Br. at 12.

B. Scope of review.

De novo review applies, but the standard the Court should apply in that *de novo* review is the narrow and strict one set forth in decisions such as *Gerber*, 67 A.3d at 421, *Nemec*, 991 A.2d at 1126, and *Dunlap*, 878 A.2d at 441. *See supra* at 18-19.

C. Merits of argument.

The Court of Chancery properly concluded that the Operating Agreement did not contain a "gap" as to how Trumpet could be sold. It held that the "OA is not silent as to that issue; to the contrary, it explicitly vests the Board with sole discretion as to the manner in which a sale is conducted, subject to the limitation that the company is ultimately sold to an unaffiliated third-party buyer." *Miller*, 2018 WL 656378, at *10. Thus, there was simply no room to insert an implied covenant requiring the Board to conduct a sale in any particular way. Doing so now would be inconsistent with the preexisting contractual grant of discretion to the Board. *See* A-80 (Compl. Ex. 1 (OA) § 8.06(a)). It would also be inconsistent with the Operating Agreement's disclaimer of fiduciary duties on the part of its Managers. *See* A-65 (Compl. Ex. 1 (OA) § 3.09). In effect, Plaintiffs are asking that this Court give to them the fiduciary protections of *Revlon*, 506 A.2d 173 (or even more, because Plaintiffs cite no authority for the proposition that, even under *Revlon*, an "open-market process" is required to obtain the "best price"), and to ignore their express agreement to eliminate all fiduciary duties. This Court should strongly reject that request.

1. The Court of Chancery properly held that there was no "gap" on the face of the Operating Agreement.

As the Court of Chancery noted, the Operating Agreement is not silent on how Trumpet could be sold. *See Miller*, 2018 WL 656378, at *12. To the contrary, in detailed "drag-along" provisions—provisions which Plaintiffs concede applied to them, A-15 (Compl. ¶ 33)—it provides that the Board may "approve[] a sale of all the Membership Interests or equity interests in the LLC to *any* independent third party (. . . an 'approved Sale')", A-80 (Compl. Ex 1 (OA) § 8.06(a)) (emphasis added); that the Board "shall determine in its sole discretion the manner in which such Approved Sale shall occur", A-80 (Compl. Ex. 1 (OA) § 8.06(a)); and that each Member (including Plaintiffs) "will consent to and raise no objections to the proposed transaction, and will take all other actions reasonably necessary or desirable to cause the consummation of such Approved Sale *on the* *terms proposed by the Board*", A-80 (Compl. Ex. 1 (OA) § 8.06(b)) (emphasis added).[9]

This language sufficiently addresses the sale of the Company to leave no "gap" as to that matter. *See also Miller*, 2018 WL 656378, at *10. We use the word "matter" intentionally, because determining whether a "gap" exists depends on how finely one parses the steps of any activity. No contract can contain every detail of every contractual activity. Thus, it cannot be that failing to specify some detail leaves a "gap." But what if the contract fails to address some particular "issue"? Or some entire "subject matter"?

This Court's language in *Gerber* provides guidance on the scale of measurement required by defining hypothetical negotiations over *filling* a "gap" as what the parties would have done "had they thought to negotiate with respect to that *matter*." 67 A.3d at 418 (emphasis added). Here, the Operating Agreement expressly addressed the subject matter of how to sell the Company. Indeed, as the Court of Chancery held, the limitations to which the parties did agree—such as limiting the Board's discretion to independent third-party sales only—made it clear that they had seriously considered the matter of how the Company could be sold,

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[9] Plaintiffs have breached the last of these provisions. Defendants continue to reserve their right to seek damages from Plaintiffs for this breach.

removing the risk of "abuse . . . for self-interested reasons" that might "thereby deprive the other party of the benefit of its bargain", and leaving neither any "gap" in the Operating Agreement nor any unqualified grant of discretion that might require closer scrutiny. *Miller*, 2018 WL 656378, at *11.

2. The Court of Chancery properly rejected Plaintiffs' narrow view of the Board's discretion under the Operating Agreement.

Plaintiffs, of course, want to parse contractual activities as finely as possible to try to create a "gap." They therefore argue that, while the Operating Agreement does address sales of the Company, the discretion given the Board extends only to the choice of a structure or form of a sale, and not to "marketing or pricing", Plaintiffs' Br. at 15, or how to "test the market", Plaintiffs' Br. at 17.

This is the same reading of the Operating Agreement that the Vice Chancellor rejected as "unreasonable." *Miller*, 2018 WL 656378, at *10. This rejection was correct for at least three reasons.

First, it is correct that Section 8.06(a) of the Operating Agreement vests sole discretion in the Board with respect to any "Approved Sale." A-80 (Ex. 1 (OA) at § 8.06(a)). In the first sentence of that Section, the Operating Agreement defines what an "Approved Sale" is. It is "a sale of all of the Membership Interests or equity interests in the LLC to any independent third party." A-80 (Compl. Ex. 1 (OA) § 8.06(a)). That sentence puts absolutely no restriction on *anything* about such a sale except that it be for all of the equity in the Company and be to an independent third party. Otherwise, it asks only "*[i]f* the Board approves a sale . . . ." A-80 (Compl. Ex. 1 (OA) § 8.06(a)) (emphasis added).[10] That "if" contains a world of discretion for the Board. It does not, for example, include "if the Board approves a sale in an open-market process" or "if the Board approves a sale after testing the market."

Second, the next sentence of Section 8.06 does not narrow the Board's discretion any further than "if" the Board decides on an "Approved Sale", either. That sentence provides expressly that "the manner in which such a sale shall occur" is for the Board to "determine in its sole discretion" (subject "to the remainder of this Section 8.06"). Plaintiffs, relying on *Butler v. Butler*, 222 A.2d 269 (Del. 1966), try to argue that the list of examples following "in its sole

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[10] Plaintiffs misunderstand the importance of the limitation of "Approved Sales" to sales to "independent third parties." *See* Plaintiffs' Br. at 19-20. The point is that this is a limit on what is otherwise the Board's sole discretion. That means that the parties to the Operating Agreement addressed the matter of the Board's discretion at the time of contracting. They chose not to limit the Board's discretion in additional ways. This means there is no "gap" created by a "failure" of the Operating Agreement to describe particular sales processes that might be used in the exercise of that discretion. Plaintiffs' distinction between "self-*dealing* insider transactions" and "self-*serving* third-party transactions" is similarly incorrect. Trumpet was not sold "walking down the street" for "$10.00." Plaintiffs' Br. at 19. As Plaintiffs admit, it was sold in a bidding process involving some tough negotiation tactics by the Board that resulted in a higher sales price. *See supra* at 12-16.

discretion the manner in which such sale shall occur" prove that the discretion itself is narrow. *See* Plaintiffs' Br. at 18. This is not correct.

In *Butler*, this Court applied the "rule" of *ejusdem generis* to help interpret a statute. 222 A.2d at 271-72. That rule is "that where general words follow or are included with specific words in an enumeration describing a legal subject, the general words are construed to include only objects similar in nature to those described by the specific words." *Id.* (citing 2 Norman J. Singer, Sutherland Statutory Construction § 4909 (3rd ed. 1943)). If applied to the second sentence of Section 8.06(a) of the Operating Agreement, this *might* mean that the words "or otherwise" at the end of that sentence should be interpreted to include only examples "similar in nature to" the words "a sale of assets, merger, [or] transfer of Membership Interests."

In no way, however, could application of this rule limit whether or under what conditions the Board could pursue an "Approved Sale." Instead, by analogy to one of Plaintiffs' other citations, *Pauls v. State*, 554 A.2d 1125 (Del. 1989), where this Court held that the use of the term "includes" indicated that "the list of objects is merely illustrative, not exclusive", it is more likely that the term "or otherwise" should be read to emphasize the breadth of the Board's discretion with respect to a sale, not as limiting that discretion to the mere mechanics of the transaction.

Third, it is impossible to read Section 8.06(a) as precluding the Board from pursuing a privately negotiated sale as an "Approved Transaction." The entire Section presumes that Members of Trumpet may not have any idea that a sale may occur until after the Board approves a specific transaction. It therefore requires that, after such approval, the Board "notify the members in writing" with "a description of the Approved Sale setting forth the reasonable details, terms, and conditions thereof." A-80 (Compl. Ex. 1 (OA) § 8.06(a)).

Indeed, Plaintiffs' interpretation would violate this Court's instructions, from a different case cited by Plaintiffs, to "read a contract as a whole and . . . give each provision and term effect, so as not to render any part of the contract mere surplusage." *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) (cited in Plaintiffs' Br. at 18-19) (citing *Energy Partners, Ltd. v. Stone Energy Corp*., 2006 WL 2947483, at *13 (Del. Ch. Oct 11, 2006)). The notice provisions in the Operating Agreement underscore that sales *not* on the "open market" must be among the "Approved Sales" the Board could pursue. Section 2.08 of the Operating Agreement sets out in detail the information to which Members are entitled. It does not require disclosure of an ongoing sales process to anyone except to the extent of requiring prior approval by the Class E interests for any sale of the Company. *See, e.g.,* A-61 to A-62 (Compl. Ex. 1 (OA) §§ 3.05(a)(ii)-(v)). *See generally* A-57 to A-59 (Compl. Ex. 1 (OA) § 2.08). If the only sales permitted were those made through an "open-market process", it would make no sense to limit the required notice to Members this way.

3. Plaintiffs' new argument, that the Board's discretion is limited to conduct occurring after it approves a transaction, is wrong.

In a further effort to limit the broad discretion of the Board in Section 8.06(a) of the Operating Agreement, Plaintiffs make a new argument (not made below) to this Court in their opening brief. They now contend that such discretion applies only *after* the Board has approved a sale, and not to the marketing, negotiation or pricing of a transaction *before* Board approval. *See* Plaintiffs' Br. at 15-17. This new interpretation, however, ignores the express language of the Operating Agreement.

Section 8.06(a) contemplates that the Board might *not* approve a sale. It starts with the proposition of "[i]f the Board approves a sale . . . ." A-80 (Compl. Ex. 1 (OA) § 8.06(a)). Section 8.06(b) emphasizes this by also starting with the proposition of "[i]f the Board consents to an Approved Sale . . . ." A-80 (Compl. Ex. 1 (OA) § 8.06(b)). This conditional language would be incomprehensible if the Board had discretion only as to a transaction that it had *already* approved. Once again applying the instructions of *Kuhn Construction, Inc.* to read the contract "as a whole" and to give "each provision and term effect", 990 A.2d at

396-97, this means that the only possible interpretation is that the Board has discretion both before *and* after it approves—or does not approve—a sale.

4. Plaintiffs' arguments ignore the elimination of fiduciary duties by the Operating Agreement.

The language of the Operating Agreement discussed above indicates why the Court of Chancery was correct that Section 8.06(a) shows that the Board had sole discretion as to "Approved Sales" of the Company. Because the parties had addressed the Board's discretion and decided to limit it in just one way—to sales to independent third parties—there was no "gap" to be filled in the Operating Agreement as to how to sell Trumpet otherwise. To follow Plaintiffs' contrary interpretation would be "to override the express terms of the contract." *Miller*, 2006 WL 2947483, at *11 (quoting *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009)). *See also Miller*, 2006 WL 2947483, at *11 (quoting *Policemen's Annuity & Ben. Fund of Chi. v. DV Realty Advisors LLC*, 2012 WL 3548206, at *12 (Del. Ch. Aug. 16, 2012), *aff'd*, 75 A.3d 101 (Del. 2013)) ("[I]f the scope of discretion is specified, there is no gap in the contract as to the scope of the discretion, and there is no reason for the Court to look to the implied covenant to determine how discretion should be exercised.").[11]

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[11] Because the discretion in the Operating Agreement is not "unqualified", *see, e.g., Miller*, 2018 WL 656378, at *11, this also undermines Plaintiffs'

The Court of Chancery also properly underscored that "the OA waives any fiduciary duties that Trumpet's members or managers would otherwise have owed one another." *Miller*, 2018 WL 656378, at *10 (footnote omitted); *accord id.* at *4, 13. The elimination of such fiduciary duties *itself* meant that there could not be a "gap" of the kind that is actually the primary focus of Plaintiffs' arguments—a supposed lack of a provision requiring the Board to obtain "the best price reasonably available", Plaintiffs' Br. at 3, 16, 22; *accord, e.g.,* B-33 (Tr. at p. 29) (Plaintiffs' counsel defining the "hole" in the Operating Agreement as the lack of a covenant "that in a change-of-control transaction, the board is going to follow a process designed to solicit the best price reasonably available . . . .").

Plaintiffs' wording of this issue echoes typical descriptions of the "best price" rule first identified in this Court's *Revlon* decision: "to obtain the best available price in selling the company." *E.g., Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (citing *Revlon*, 506 A.2d at 182). But the *Revlon* rule is not a matter of good faith and fair dealing. It is an expression of a board's obligation to "perform its *fiduciary* duties in the service of a specific objective: maximizing the sale price of the enterprise." *Malpiede v. Townson*, 780 A.2d

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subsequent arguments about heightened scrutiny for "arbitrary and unreasonable" behavior arising from the exercise of unlimited discretion, *see, e.g.,* Plaintiffs' Br. at 28. *See also infra* at 41-43.

1075, 1083 (Del. 2001) (emphasis added). In Plaintiffs' view, because the Operating Agreement did not include provisions for specifying a sales process that would lead to "the best price" for Trumpet, it contained a "gap." But the elimination of fiduciary duties in the Operating Agreement expressly indicated that the Board would *not* have a *Revlon* obligation to obtain "the best price" in a sale. Therefore, the absence of provisions addressing how that result would be pursued could not be a "gap" needing to be filled by an implied duty of good faith and fair dealing.

The court below noted that it would be wrong to "re-introduce fiduciary review through the backdoor of the implied covenant." *Miller*, 2018 WL 656378, at *13 (quoting *Longeran v. EPE Holdings, LLC*, 5 A.3d 1008, 1019 (Del. Ch. 2010)). Plaintiffs' goal is to do exactly that. This would destroy the Legislature's express intent both "to give the maximum effect to the principle of freedom of contract", 6 Del. Code § 18-1101(b), and to permit the "elimination of any and all duties . . . including fiduciary duties" in Delaware limited liability companies, *id.* § 18-1101(e); *accord id.* § 18-1101(c), as the parties did here.

III. The Court of Chancery did not "err[] in rejecting Plaintiff's reasonable expectations that the Board would undertake at least some level of market check, and that HCP would not seek to undermine efforts to obtain a fair price for Trumpet."

A. Questions presented.

Did the Court of Chancery "err[] in rejecting Plaintiff's reasonable expectations that the Board would undertake at least some level of market check, and that HCP would not seek to undermine efforts to obtain a fair price for Trumpet?" Plaintiffs' Br. at 21. *See also id* at 3.

B. Scope of review.

De novo review applies, but the standard the Court should apply in that *de novo* review is the narrow and strict one set forth in decisions such as *Gerber*, 67 A.3d at 421, *Nemec*, 991 A.2d at 1126, and *Dunlap*, 878 A.2d at 441. *See supra* at 18-19.

C. Merits of argument.

The Court of Chancery determined that it was not "clear from what was *expressly agreed upon*" in the Operating Agreement that the parties "would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Gerber*, 67 A.3d at 418 (emphasis added) (quotation omitted). *See Miller*, 2018 WL 656378, at *9 n.126, n.144(quoting same language from *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986)). It held that "Plaintiffs have failed to point to any provision in the OA that" even "suggests" that the parties would have agreed to the implied covenant Plaintiffs have sought through litigation. *Miller*, 2018 WL 656378, at*12. This is correct. And because nothing in the Operating Agreement even "suggests" the covenant Plaintiffs wished the court below to imply, it certainly is not *clear* that the parties would have agreed at the time of contracting to that covenant.

1. Plaintiffs have not been clear or consistent as to what the implied covenant they seek would say.

The first problem with Plaintiffs' argument concerning their "reasonable expectations" for a "market check" and for barriers that would prevent the "undermin[ing]" of "efforts to obtain a fair price for Trumpet" is that this does not make clear what covenant they actually wanted to insert into the Operating Agreement. At oral argument, however, Plaintiffs' counsel had stated clearly that the implied covenant Plaintiffs wanted was an express *Revlon* duty provision "to solicit the best price available" in "a change-of-control transaction." B-33 (Tr. at 29). As one of the exchanges with the Vice Chancellor went:

> Q: You need to tell me what's in the hole. What would it have said?
>
> A: The hole would have said that *in a change-of-control transaction, the board is going to follow a process designed to solicit the best price reasonably available*. They're going to go out to the marketplace and get information out into the marketplace and then solicit offers to come in to sell [] the company; not just the very first offer that comes down the road.

> [Q] Court: . . . . by soliciting offers, you're telling me that there would have had to be a public solicitation of offers for change in control.
>
> A: You have to get the information out there, Your Honor. And if that's a public – if that's how the Court defines a public process, yes. You have to get the information out to the marketplace.

B-33-34 (Tr. at 29-30) (emphasis added).

But obviously Plaintiffs could not reasonably expect to receive *Revlon* fiduciary duty protections when they had agreed to the elimination of all fiduciary duties in the Operating Agreement. Nor, given *that* agreement, is there anything in the Operating Agreement's language that makes it clear that the Company or its Class D and E investors would then have accepted a proposal to insert the equivalent of some of those duties back into the parties' contract.

So in Point II(C)(1) of their briefing (despite their paraphrasing of *Revlon* elsewhere), Plaintiffs try to recharacterize their request as two implied covenants, one to "take reasonable steps to test the market and find a fair price for Trumpet" and one to "not actively impede attempts to obtain a fair price." Plaintiffs' Br. at 24. The only portions of the Operating Agreement to which Plaintiffs point to demonstrate that all parties would have agreed to these provisions at the time they signed the Operating Agreement are, first, general references to the payment waterfall favoring the senior classes; and, second, the provision in Section 8.06(a) that automatically required Plaintiffs and other Members to agree to any sale approved by the Board. Plaintiffs' Br. at 24. But neither of these make it *clear* that all parties would have agreed to what Plaintiffs now propose. In fact, they seem to support the opposite inference—that senior classes of investors would *not* have agreed to weaken their control or their opportunity to obtain a quick preferred return.

Plaintiffs therefore also argue that the two covenants they propose were "so fundamental that the parties did not see the need for them." Plaintiffs' Br. at 23 (citing *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017)). But there are several additional problems with this. First, covenants concerning pricing are not something that parties tend to leave out because they do "not see the need for them." Second, if there is no *Revlon* duty to obtain a higher price (whether described as "best" or "fair"), then preventing attempts to get that higher price to which no one is entitled cannot be something "fundamental" to the contract, either.[12] Third, the *Dieckman* opinion does not support Plaintiffs' views. The

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[12] Significantly, Plaintiffs have not alleged that Defendants acted solely to injure Plaintiffs. To the contrary, they allege that Defendants had a good reason for the actions they took—they wanted to get their preferred return on investment quickly. *See, e.g.*, A-14, A-21 (Compl. ¶¶ 27, 52). Advantageous timing is a proper motivation that does not support an implied covenant claim. *See, e.g.*, *Nemec*, 991 A.2d at 1127 (choosing to redeem stock from retirees at a time advantageous to current employees did not support implying a covenant of good faith and fair dealing to prevent such timing).

point in *Dieckman* was that there is no need for parties to state expressly that "deceptive" and "misleading" conduct to create a "false appearance" hiding a conflict of interest is forbidden. *See id.* at 361, 369. *See also id.* at 360 (plaintiffs alleged defendants used "false and misleading statements" in a proxy to "secure . . . approval" of the conflicted transaction); *cf., e.g., Gerber*, 67 A.3d at 423 (cited in Plaintiffs' Br. at 25) (defendant could not properly assert that a fairness opinion barred plaintiff's objection to a merger wiping out derivative claims when the opinion failed to address those claims at all). The Complaint here alleges no such fraudulent behavior (as the Court of Chancery correctly noted, *see Miller*, 2018 WL 656378, at *12).

2. Plaintiffs' argument about "overlapping duties" makes no sense.

Plaintiffs also argue that because fiduciary duties and contractual duties can overlap, the elimination of fiduciary duties by the Operating Agreement could not have "eroded the reasonableness of Plaintiffs' expectations." Plaintiffs' Br. at 25. Plaintiffs cite no authority for their argument. It also makes no sense.

The Operating Agreement's elimination of fiduciary duties means that it would have been unreasonable for Plaintiffs to assume that *Revlon* "best price" protections would apply to their lower class investments. It would therefore have been unreasonable for them to anticipate the insertion of an implied contractual covenant duplicating those protections as well. And, most significantly, nothing about this makes it *clear* that everyone would have agreed at the time of negotiation of the Operating Agreement to such an implied covenant.

3. Plaintiffs' argument about "Section 8.06(a)'s notice requirements" does not indicate how the language of the Operating Agreement makes it *clear* that all parties would have agreed to the implied covenant Plaintiffs seek.

As noted earlier, the very limited notice provisions of the Operating Agreement support the conclusion that the Board had discretion to engage in a private sales process for the Company. *See supra* at 29-30. But in addition to disagreeing that the Board had such discretion, Plaintiffs separately attack the conclusion that "[i]f the parties had expected that Trumpet would be sold only via an open-market process, there would have been no need to include a provision in the OA requiring the Board to notify Trumpet's members when it approved a sale of the company." *Miller*, 2018 WL 656378, at *12 (cited in Plaintiffs' Br. at 27).

Plaintiffs cite no authority of any kind for their disagreement with the Court of Chancery. Instead, they argue that it "misunderstood" what sort of an "open-market process" they meant. Although their briefing below did not say so, they now say they did not expect "a front-page-news process that no member could possibly miss", but only that "the Board would inform itself as to the fair value of Trumpet by shopping it to the market some way, and that HCP would not undermine the non-HCP Board Members' efforts to obtain competing offers . . . ." Plaintiffs' Br. at 27. But Plaintiffs' own allegations show that the Board did "shop" the Company to the market "in some way." Otherwise there could not have been two actual bidders. And Plaintiffs identify no effort by a "non-HCP Board Member[]" to obtain a competing offer. Indeed, they concede that Mr. Miller did not seek to have FFL be a bidder; he wanted it to show interest only so he could argue for a higher price for the Company generally, *see* A-22 (Compl. ¶ 56)—and, in fact, a higher price is what happened.

Finally, nowhere do Plaintiffs recognize that it is not whether or not they had expectations that determines whether they would be entitled to have a court insert a covenant about those expectations into a contract containing a "gap." It is whether all parties would have *agreed* to such a covenant "had they thought to negotiate with respect to that matter." *Gerber*, 67 A.3d at 418.

IV. HCP's conduct was not "arbitrary and unreasonable" and did not "deprive[] Plaintiffs of the fruits of their bargain".

A. Questions presented.

Was "HCP's conduct . . . arbitrary and unreasonable and deprive[] Plaintiffs of the fruits of their bargain?" Plaintiffs' Br. at 4, 28.

B. Scope of review.

De novo review applies, but the standard the Court should apply in that *de novo* review is the narrow and strict one set forth in decisions such as *Gerber*, 67 A.3d at 421, *Nemec*, 991 A.2d at 1126, and *Dunlap*, 878 A.2d at 441. *See supra* at 18-19.

C. Merits of argument.

Plaintiffs' argument that "HCP's conduct was arbitrary and unreasonable", or "deprived" them of "the fruits of their bargain", is essentially a repetition of various allegations in the Complaint. *See* Plaintiffs' Br. at 28-32. Repetition does not convert those allegations into a valid claim.

Plaintiffs' logic is apparently that everything they allege occurred was contrary to their "reasonable expectations." But it was not reasonable for Plaintiffs to believe, having signed the Operating Agreement, that they would be entitled to *Revlon* "best price" protections after the elimination of all fiduciary duties, or that they would be entitled to have their lower-tier investments treated the same as Class D and Class E investments after agreeing to the preferences favoring those two classes. They offer no legal authority to support the supposed reasonableness of these expectations or any of the other few arguments in Point III of their brief.

Plaintiffs' attack on the Court of Chancery for noting that the Board made efforts to increase the price for Trumpet also lacks any basis. *See* Plaintiffs' Br. at 33. *Plaintiffs* made those allegations. *See, e.g.,* A-17 to A-18, A-20 to A-23, A-25 to A-26 (Compl. ¶¶ 40-41, 48-49, 61, 69-70, 73). Similarly, *Plaintiffs* made the allegation that one of them—Mr. Miller—did not even seek a letter of intent from FFL, but only an indication of interest. *See* A-22 (Compl. ¶ 56). It therefore makes no sense that Plaintiffs attack the Court of Chancery for noting that "no other offers were before the Board" when, after hardball negotiating tactics against MTS, that bidder raised its price. *See* Plaintiffs' Br. at 33.

Finally, while Plaintiffs argue that the Board "actively undermined attempts to obtain competing offers", Plaintiffs' Br. at 33, they point to no fact for that proposition. In the end, Plaintiffs consciously agreed to subordinate some of their investments in Trumpet to newer, preferred classes of ownership, and did so knowing they had no fiduciary duty protections in a subsequent sale. They got that for which they bargained. They simply want this Court to rewrite that deal. But this Court has never been in the business of "imply[ing] terms to 'rebalanc[e] economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract.'" *Gerber*, 67 A.3d at 421 (citing *Nemec*, 991 A.2d at 1128). It should not change that policy now.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court affirm the decision of the Court of Chancery dismissing Plaintiffs' claims.

Dated: May 22, 2018

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CERTIFICATE OF SERVICE

I, Paul J. Loughman, Esquire, do hereby certify that on May 22, 2018, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below.

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