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IN THE

Supreme Court of the State of Delaware

WILLIAM ALLEN, *Plaintiff Below, Appellant*, v. ENCORE ENERGY PARTNERS, L.P. ENCORE ENERGY PARTNERS GP LLC, SCOTT W. SMITH, RICHARD A. ROBERT, DOUGLAS PENCE, W. TIMOTHY HAUSS, DAVID BAGGETT, JOHN E. JACKSON, MARTIN G. WHITE, and VANGUARD NATURAL RESOURCES LLC, *Defendants Below, Appellees*.	**No. 534, 2012** APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 6379-VCP (CONSOLIDATED INTO CONS. C.A. NO. 6347-VCP)

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NATURE OF PROCEEDINGS

Plaintiff Below, Appellant William Allen ("Plaintiff") challenges the exchange ratio in a merger of two publicly-traded master limited partnerships ("MLPs"): Encore Energy Partners, L.P. ("Encore" or "the Partnership") and Vanguard Natural Resources, LLC ("Vanguard"). Although Plaintiff concedes that the exchange ratio is within the range of fair consideration, that it was agreed to in reliance on the fairness opinion of an independent financial advisor, and that a majority of Encore's units were voted in favor of the merger, Plaintiff claims that the exchange ratio could have been even higher if a committee of Encore's independent directors had negotiated differently or more vigorously. In essence, Plaintiff alleges a breach of the duty of care—a type of claim categorically precluded by the applicable Second Amended and Restated Agreement of Limited Partnership of Encore Energy Partners, L.P. (the "Partnership Agreement").[1]

Because Plaintiff's breach of fiduciary duty claims are contractually foreclosed, Plaintiff attempts to recast his claims of inadequate sales process and price as claims for breach of contract and the duty of good faith. The Court of Chancery saw through this unconvincing disguise, and on August 31, 2012, the Court entered its Memorandum Opinion granting the Defendants' Motion to Dismiss the Verified Consolidated Second Amended Class Action Complaint ("Second Amended Complaint" or "SAC") because the allegations in the Second Amended Complaint show that Plaintiff's claim is barred by the Partnership Agreement.[2] That decision is correct and should be affirmed.

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[1] Because Plaintiff relies on the Partnership Agreement (*see, e.g.*, SAC ¶¶ 72-76, A454-455), it has been incorporated by reference into the Second Amended Complaint and may be considered in ruling on the motions to dismiss. *See Gantler v. Stephens*, 2008 WL 401124, at *6 (Del. Ch. Feb. 14, 2008), *rev'd on other grounds*, 965 A.2d 695 (Del. 2009) (on a motion to dismiss, the Court may consider documents that are "'integral to or are incorporated by reference into the complaint'") (quoting *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del Ch. 1999)).

[2] *See Gerber v. Enter. Prods. Hldgs., LLC,* 2012 WL 34442 (Del. Ch. Jan. 6, 2012); *Brinckerhoff v. Enbridge Energy Co., Inc*., 2011 WL 4599654 (Del. Ch. Sept. 30, 2011); *In re K-Sea Transp. P'rs L.P. Unitholders Litig*., 2011 WL

On December 1, 2011, Encore merged with a wholly-owned subsidiary of Vanguard (the "Merger"). In the Merger, each Encore common unit was exchanged for 0.75 Vanguard common units (the "Exchange Ratio"). SAC ¶ 3, A437-438. Before the Merger, Vanguard[3] owned Encore's general partner, Encore Energy Partners GP LLC ("Encore GP") and approximately 46% of Encore's common units. SAC ¶¶ 2, 5, 14, 16, A437-441.

Plaintiff, a purported former Encore unitholder (and now a Vanguard unitholder), alleges that Encore GP, Vanguard, and the members of Encore GP's board of directors (the "Board")—Scott W. Smith, Richard A. Robert, Douglas Pence, W. Timothy Hauss, David Baggett, John E. Jackson, and Martin G. White (the "Director Defendants")[4]—breached the Partnership Agreement by negotiating and recommending the Merger at an unfair price and by driving down the price of Encore common units prior to Vanguard's offer to enter into the Merger. SAC ¶¶ 5-12, A438-440. The allegations in the Second Amended Complaint, however, fail as a matter of law because they are precluded by Defendants' use of a conflicts committee process outlined in

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2410395 (Del. Ch. June 10, 2011); *Lonergan v. EPE Hldgs., LLC*, 5 A.3d 1008 (Del. Ch. 2010).

[3] Vanguard owned a 100% interest in Encore GP and an approximately 46% interest in Encore's common units. SAC ¶¶ 14, 16, A440-441. A graphical illustration of the structure of Encore is set forth on pages 25 and 26 of the joint proxy/prospectus filing regarding the Merger on Schedule 14A, filed on October 31, 2011 (the "Proxy") with the Securities and Exchange Commission ("SEC") by Vanguard. B235-236. Contrary to Plaintiff's assertions, the trial court correctly considered the Proxy and its contents when issuing the motion to dismiss because Plaintiff incorporated the Proxy by reference in the Second Amended Complaint, and because the Proxy is one of Encore's public filings. SAC ¶¶ 7, 41-45, 47-52, 54-55, 58, 61, A438-439, 446-451; *see also Gantler*, 2008 WL 401124, at *6; *Beal Bank, S.S.B. v. West Point Int'l, Inc.*, 2007 WL 1662669, at *3 (Del. Ch. May 30, 2007); *In re GM (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006) (observing that on a motion to dismiss the court may take judicial notice of a company's public filings).

[4] Defendants Smith, Robert, Hauss, and Pence are referred to collectively as "Encore's Vanguard Directors" because they are also Vanguard officers, employees, or directors.

the Partnership Agreement to evaluate and recommend the Merger with assistance from independent legal and financial advisors.

The Partnership Agreement eliminates any fiduciary duties or other duties that the Defendants might owe to Encore's unitholders under Delaware common law and supplants them with limited contractually-defined obligations. Partnership Agreement § 7.9(e), B108. In place of the traditional common law or statutory fiduciary duties, a contractual standard of "good faith" controls. *Id*. §7.9(b), B107.

The Partnership Agreement provides specific procedures for dealing with transactions that present potential conflicts of interest, like the Merger. *Id*. § 7.9(a), B106-107. One of the permitted procedures is obtaining "Special Approval" (as defined under the Partnership Agreement) of the conflict-of-interest transaction by a conflicts committee. If Special Approval is obtained, then, by operation of the terms of the Partnership Agreement, the transaction shall be permitted and deemed approved by all partners, and it shall not constitute a breach of the Partnership Agreement or of any duty stated or implied by law or equity. *Id.* Additionally, when the conflicts committee or the Board relies on the opinion or advice of an expert, the Partnership Agreement mandates a ***conclusive*** presumption that they acted in good faith. *Id*. § 7.10(b), B108.

Here, Plaintiff pleads facts demonstrating that all of these provisions of the Partnership Agreement apply to the Merger and that Defendants followed the Partnership Agreement's conflicts committee process to a "T." Plaintiff pleads that:

- the Board referred Vanguard's offer to a conflicts committee composed of the independent directors Baggett, Jackson, and White (the "Encore Conflicts Committee" or "Conflicts Committee") for evaluation because a majority of the directors of Encore GP (Encore's Vanguard Directors) are also employees of Vanguard (SAC ¶¶ 20-23, 52, A442, 448);

- the Encore Conflicts Committee unanimously determined that the Merger was fair and reasonable to Encore's unitholders (*id*. ¶¶ 6-8, 52, 54-55, 76, A438-439, 448-450, 454-455); and

- the Encore Conflicts Committee relied on the advice of its financial advisor Jefferies & Company, Inc. ("Jefferies") to conclude that the Merger was fair and reasonable to Encore's unitholders (*id*. ¶¶ 7, 54, A438-439, 449).

As explained below, these allegations demonstrate that Plaintiff's claim that the Exchange Ratio could have been higher is not actionable. Moreover, even absent the conclusive presumption, Plaintiff has not pleaded facts giving rise to an inference that any Defendant breached an applicable contractual duty of good faith. Therefore, the Court of Chancery correctly dismissed the Second Amended Complaint, and its decision must be affirmed.

SUMMARY OF ARGUMENT

1. *Denied.* The Court of Chancery properly held that the Second Amended Complaint does not plead facts from which it could be inferred that the Conflicts Committee did not act in good faith, i.e. in a manner that it believed to be in the best interests of the Partnership. Contrary to Plaintiff's claims, the Court of Chancery did not hold that objective facts are not probative of the subjective beliefs of the Conflicts Committee or that Plaintiff had to make particularized allegations regarding the state of mind of each Conflicts Committee member. Instead, the Court of Chancery found that Plaintiff did not allege sufficient facts from which one reasonably could infer that the Conflicts Committee members subjectively believed they were acting against the Partnership's interests. Plaintiff also faults the Court of Chancery for looking at various statements in the Proxy as probative of the Conflicts Committee's subjective beliefs, but Plaintiff relies on the Proxy as proof of facts that they argue imply bad faith. Accordingly, Plaintiff cannot object to the Court of Chancery's evaluation of that document.

2. *Denied.* The Court of Chancery properly held that the contractual standard of good faith applicable under the Partnership Agreement is that the Conflicts Committee must have "believe[d] that [its] determination or other action [wa]s in the best interests of the Partnership." Partnership Agreement § 7.9(b), B107. Plaintiff's assertion that it was error for the Court of Chancery to paraphrase this standard as requiring that the Defendants act against the Partnership's interests, as opposed to including "intentional dereliction of duty or conscious disregard for one's responsibilities," is irrelevant, as there are no allegations in the Second Amended Complaint that imply dereliction of duty. Plaintiff clearly pleads that the Conflicts Committee did, in fact, negotiate the Merger.

3. *Denied.* The Court of Chancery correctly held that, when the Conflicts Committee or the Board relies on the opinion or advice of an expert, the Partnership Agreement mandates a conclusive presumption that they acted in good faith. Partnership Agreement § 7.10(b), B108. Here, it is undisputed that the Conflicts Committee relied on the advice of its financial advisor, Jefferies, to conclude that the Exchange Ratio

was fair and reasonable to Encore's unitholders. Therefore, any claim of bad faith predicated on the assertion that the price was unfair fails as a matter of law.

4. *Denied.* The Court of Chancery correctly held that the Second Amended Complaint does not state a cause of action against Vanguard. As the Court of Chancery noted, Plaintiff's allegations that Vanguard caused Encore to make value-depressive disclosures are only relevant to their claims because Plaintiff alleges that such conduct affected the Exchange Ratio. Because the Exchange Ratio is conclusively presumed to be fair, Plaintiff cannot show that Vanguard caused them damages based on the pre-merger disclosures. Moreover, even if damages were recoverable, Plaintiff's allegations concerning the pre-merger disclosures are conclusory and therefore insufficient to state a cause of action.

COUNTER-STATEMENT OF FACTS

1. The Merger.

On December 31, 2010, Vanguard acquired control of Encore by purchasing Encore GP and a 46% interest in the Partnership from Denbury Resources Inc. SAC ¶ 29, A444. About three months later, on March 24, 2011, Vanguard delivered a formal proposal to the Board for Vanguard to acquire the remaining common units of Encore (the "Offer"). Proxy at 50, B261. Vanguard offered 0.72 Vanguard common units for each outstanding publicly-held Encore common unit. *Id.* The proposed merger would be structured as a merger between Encore and a wholly-owned subsidiary of Vanguard, with Encore's unitholders becoming Vanguard unitholders. *Id.*

In accordance with Section 7.9(a) of Encore's Partnership Agreement, Encore GP referred the proposal to a committee of independent directors of Encore GP, the Encore Conflicts Committee, to avoid potential conflicts among Encore's Vanguard Directors. *Id*. at 48-50, B259-261. The Conflicts Committee was authorized to study, review, and evaluate the proposal. *Id*. at 50-51, B261-262. As detailed on pages 50 to 64 of the Proxy, the Conflicts Committee engaged in a complete and independent review of the proposed merger prior to issuing its recommendation to approve the Merger. *Id.* at 50-64, B261-275. The Conflicts Committee engaged independent counsel, Bracewell & Giuliani LLP ("Bracewell & Giuliani"), to advise it with respect to the transaction. *Id.* at 50, B261. The Conflicts Committee also engaged Jefferies as its independent financial advisor to advise it with regard to the proposed merger. *Id.* at 51, B262.

After several months of negotiations and consideration, Vanguard and Encore announced on July 11, 2011 that they had executed a definitive merger agreement that would result in a transaction whereby Encore would become a wholly-owned subsidiary of Vanguard (the "Merger Agreement"). *Id.* at 58, B269. Under the terms of the Merger Agreement, Encore's public unitholders would receive 0.75 Vanguard common units in exchange for each Encore common unit. *Id.* at 2, B212. The terms of the Merger Agreement received "Special Approval" under the Partnership Agreement because they were approved unanimously by

the Conflicts Committee, who negotiated the Merger Agreement on behalf of Encore. *Id.* at 6, B216. In addition, as detailed on pages 73 to 80 (B284-291) and Annex C of the Proxy (B467-469), Jefferies analyzed a number of factors and concluded that the Exchange Ratio was fair from a financial point of view to the unaffiliated unitholders of Encore, and Jefferies issued a fairness opinion to that effect. Proxy at 73, B284.

The Merger closed on December 1, 2011 and Plaintiff concedes that a majority of unitholders approved the Merger. SAC ¶ 5, A438 ("Prior to the Merger, Vanguard owned approximately 46.0% of the Encore common units, rendering the outcome of the unitholder vote substantially assured. The Merger was ultimately approved by only one-third of Encore's unaffiliated public unitholders."). Indeed, ninety-seven percent (97%) of the units that voted at Encore's special meeting voted in favor of the Merger.[5]

2. The Encore Partnership Agreement.

As mentioned above, Encore was governed by its Partnership Agreement. Several provisions of that agreement control the viability of Plaintiff's claims. In short, those provisions replace traditional common law and fiduciary duties with a duty of good faith. They also provide a procedure for "Special Approval" of a merger which, if followed, results in a conclusive presumption that the parties satisfied their contractual obligations to act in good faith.

Article 14 of the Partnership Agreement allows Encore to merge or consolidate with other business entities. Partnership Agreement § 14.1, B129. Under that Article, Encore GP has no duty to consent to any merger proposed and "may decline to do so free of any fiduciary duty or obligation whatsoever to the Partnership, any Limited Partner or Assignee . . . [and] shall not be required to act in good faith or pursuant to any other standard . . . ." *Id.* § 14.2, B129-130. When Encore GP does

[5] *See* Encore Energy P'rs LP, Current Report (Form 8-K) (Dec. 2, 2011) (B471-93), which provides the results of the Encore unitholder vote approving the Merger that is discussed in paragraph 12 of the Second Amended Complaint. The Court may consider the Form 8-K because it is one of Encore's public filings. *Gantler*, 2008 WL 401124, at *6.

decide to consent to a merger, it must provide certain information to the limited partners per Section 14.2, and then the proposed merger is submitted to the limited partners for a vote pursuant to Section 14.3. B130-132. The Partnership Agreement deems a merger approved when, as here, a simple majority of the limited partners vote in favor of the merger.

The Partnership Agreement also sets forth procedures for considering transactions that involve potential conflicts of interest, such as the Merger. If those procedures are followed, such transactions are by operation of the Partnership Agreement (a) permitted, (b) deemed approved by all the partners of the Partnership, and (c) not a breach of any duty imposed upon any Defendant by the Partnership Agreement, law, or equity.

> Unless otherwise expressly provided in this Agreement . . . whenever a potential conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership . . . [or] any Partner . . . , on the other, any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest ***shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement . . . [or] of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval*** . . . .

Partnership Agreement §7.9(a), B106 (emphasis added). This safe harbor exists for transactions that receive "Special Approval," which is defined as "approval by a majority of the members of the Conflicts Committee." *Id.* § 1.1(b), B060; SAC ¶¶ 63, 71, A452, 454.

> [(1)] ***If Special Approval is sought, then it shall be presumed that, in making its decision, the Conflicts Committee acted in good faith*** . . . [(2)] in any proceeding brought by any Limited Partner . . . challenging such approval, the Person bringing or prosecuting such

> proceeding shall have the burden of overcoming such presumption . . . [and (3)] ***the existence of the conflicts of interest*** described in the Registration Statement are hereby approved by all Partners and ***shall not constitute a breach of this Agreement***.

Id. § 7.9(a), B107 (emphasis added).

The Partnership Agreement also sets forth the duties of the Conflicts Committee when considering a proposed transaction. The Partnership Agreement eliminates all fiduciary duties and any other duties Defendants might owe to Plaintiff or to the Partnership's unitholders under Delaware common law and supplants them with limited contractually-defined obligations. Section 7.9(e) of the Partnership Agreement states:

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

Id. § 7.9(e), B108 (emphasis added). Section 1.1(b) of the Partnership Agreement defines "Indemnitee" to include any "director, officer, [or] fiduciary" and "any Person who is or was serving at the request of [Encore GP]." B052. Thus, the Director Defendants are "Indemnitees" under the Partnership Agreement and any duties they might have other than a contractual duty of good faith are waived under § 7.9(e).

In place of the traditional common law or statutory fiduciary duties, the contractual standards imposed by the Partnership Agreement control.

When Defendants are not acting on behalf of Encore they do not

owe any duty to the Partnership or Encore's limited partners. Section 7.9(c) of the Partnership Agreement provides:

> Whenever the General Partner makes a determination or takes or declines to take any other action, or any of its Affiliates causes it to do so, in its individual capacity as opposed to in its capacity as the general partner of the Partnership . . . [they] are entitled to make such determination or to take or decline to take such other action free of any fiduciary duty or obligation whatsoever to the Partnership, any Limited Partner or Assignee . . . .[6]

Id. § 7.9(c), B107.

When the Defendants are acting on behalf of the Partnership, however, Encore GP—and the Board to the extent that Encore GP is acting through them—owe Encore the duties set forth in Section 7.9(b). That section states that when Encore GP or the Board act in their "capacity as the general partner of the Partnership" then they shall act "in good faith and shall not be subject to any other or different standards imposed by this Agreement, any Group Member Agreement, any other agreement contemplated hereby or under the Delaware Act or any other law, rule or regulation or at equity." Partnership Agreement § 7.9(b), B107. For "a determination or other action to be in 'good faith' for purposes of this Agreement, the Person or Persons making such determination or taking or declining to take such other action must believe that the determination or other action is in the best interests of the Partnership." *Id*. Therefore, when Encore GP or the Director Defendants are acting on behalf of Encore GP, Sections 7.9(b), (c), and (e) of the Partnership Agreement eliminate all duties they might owe other than a contractual duty that they act in what they believe is Encore's best interest.

Additionally, Section 7.8(a) mandates that no Defendant can be

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[6] Section 1.1(b) of the Partnership Agreement defines "Affiliate" as an entity "directly or indirectly . . . controlled by or . . . under common control with" the respective entity. B045. Thus, Vanguard and the Director Defendants are "Affiliates" of the Encore GP and any duties they might have other than a contractual duty of good faith are waived under §§ 7.9(b) and (c).

liable for monetary damages absent bad faith:

> [N]o Indemnitee shall be liable for monetary damages to the Partnership, the Limited Partners, the Assignees or any other Persons who have acquired interests in the Partnership Securities, for losses sustained or liabilities incurred as a result of any act or omission of an Indemnitee unless . . . the Indemnitee ***acted in bad faith or engaged in fraud, willful misconduct*** . . . .

Partnership Agreement § 7.8(a), B106 (emphasis added).

Finally, Section 7.10(b) of the Partnership Agreement (B108) adopts a ***conclusive presumption*** that actions taken by Encore GP and the Director Defendants in reasonable reliance on the opinion of any expert or advisor were taken in good faith:

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

3. <u>The Court of Chancery Dismisses the Amended Complaint.</u>

The Second Amended Complaint insufficiently pleads a single claim for relief, based on a purported contractual breach, challenging the consideration paid to the unaffiliated unitholders in the merger: A claim that "Defendants breached their contractual duties to Plaintiffs and the Class by proposing, approving and consummating a transaction that was not fair or reasonable and was undertaken in bad faith." SAC ¶ 79, A455. Elsewhere in the Complaint, Plaintiffs allege that: "[T]he Conflicts Committee of the Encore GP Board of Directors . . . was the sole protection for common unitholders' interests, and its failure to negotiate in

good faith as an effective bargaining agent for the common unitholders deprived them of a fair or reasonable value for the units." SAC ¶ 6, A438. The Conflicts Committee's putative bad faith action was to make the Exchange Ratio, which was accepted by Vanguard, its opening counteroffer. *Id*. ¶ 8, A439. Plaintiffs claim that they and "the other public unitholders of the Partnership[,] should be awarded damages for the inadequate price paid for their units" *Id*. ¶ 12, A440.

The Court of Chancery correctly found that these allegations do not state a claim for relief under the Partnership Agreement or Delaware law. First, the Court of Chancery found that "the Plaintiffs have not alleged facts from which one could infer that the Conflicts Committee made its decision in bad faith, i.e., with the subjective belief that their approval was contrary to the Partnership's best interests." Mem. Op. at 30. In other words, Plaintiff did not make allegations sufficient to state a claim for breach of the Partnership Agreement's contractual good faith standard. Second, the Court of Chancery went on to find that the Plaintiff did "not state a claim for breach of the implied covenant because Defendants' actions could not have frustrated Plaintiffs' reasonable expectations." Mem. Op. at 37. And third, the Court held that the conclusive presumption of Section 7.10(b) precluded Plaintiff's claims. Mem. Op. at 39.

ARGUMENT

1. The Court of Chancery Correctly Held That Plaintiff's Purported Claim for Breach of the Partnership Agreement Fails as a Matter of Law.

A. Question Presented.

Did the Court of Chancery correctly dismiss Plaintiff's sole cause of action for breach of the Partnership Agreement?

B. Standard and Scope of Review.

"This Court reviews *de novo* the grant of a motion to dismiss under Court of Chancery Rule 12(b)(6)." *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).

C. Merits of the Argument.

Dismissal of a complaint is proper under Court of Chancery Rule 12(b)(6) when the complaint fails to allege facts that would entitle the plaintiff to any relief. *See, e.g., Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65 (Del. 1995). Review of the claims' legal sufficiency at this stage is limited to the well-pleaded factual allegations in the complaint, viewing those facts and all reasonable inferences drawn from those facts in the light most favorable to Plaintiff. *LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 WL 5449838, at *3 (Del. Ch. Dec. 22, 2010). "The court need not, however, blindly accept as true all allegations, nor must it draw all inferences from them in the plaintiff's favor unless they are reasonable inferences." *Id*. (internal quotation marks and citation omitted); *see also Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011). The Court should disregard conclusory statements of fact or law not otherwise supported by specific factual allegations. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 140-41 (Del. 1997). "The court cannot be satisfied with mere conclusions, as it might, for example, in an auto-accident case, because in this sort of litigation the risk of strike suits means that too much turns on the mere survival of the complaint." *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996). Thus,

conclusory allegations that "the transaction is 'unfair' or 'coercive' or that disclosure is 'inadequate'" do not satisfy a plaintiff's pleading obligations. *Id*. (citing *Rabkin v. Philip A. Hunt Chem. Corp*., 498 A.2d 1099, 1105 (Del. 1985)). Under these well-established Delaware standards, the Second Amended Complaint was properly dismissed for failure to state a claim.

i. The Court of Chancery Correctly Held That a Contractual Duty of Good Faith Is the Only Standard Applicable to the Conflicts Committee's Decision to Recommend the Merger to Unitholders.

Appellant's November 20, 2012 Opening Brief ("Plaintiff's Opening Brief") consistently conflates three types of duties—contractual duties, fiduciary duties, and the implied covenant of good faith and fair dealing. The Court of Chancery, however, correctly held that, under the Partnership Agreement, the Conflicts Committee's decision to approve the Merger is subject only to an explicitly defined contractual duty of good faith.

Because Encore was a publicly-traded Delaware limited partnership, the Partnership Agreement and the Delaware Revised Uniform Limited Partnership Act (the "LP Act"), 6 *Del. C.* § 17-101, *et. seq.*, govern the rights and obligations of Encore limited partners, i.e., its unitholders. *See id*. § 17-201. Section 17-1101(d) of the LP Act states that "[t]o the extent that . . . a partner or other person has duties (including fiduciary duties) to a limited partnership . . . the partner's or other person's duties may be expanded or restricted or eliminated by provisions in the [LP] [A]greement . . . ."

The LP Act is based upon and reflects a strong policy favoring broad freedom of contract in connection with almost all aspects of the formation, operation, and termination of a Delaware limited partnership and, in particular, relationships among the partners. Delaware's LP Act imbues the parties to a Delaware limited partnership with "the power and discretion to form and operate . . . 'in an environment of private ordering' according to the provisions in the limited partnership agreement." *Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P*., 817 A.2d 160, 170 (Del. 2002) (quoting *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287

(Del. 1999)). The statute embodies the policies of "freedom of contract" and "maximum flexibility." *Id*. (quoting *Elf Atochem*, 727 A.2d at 290, 291 n.27). "This flexibility is precisely the reason why many choose the limited partnership form in Delaware." *Kahn v. Icahn*, 1998 WL 832629, at *2 (Del. Ch. Nov. 12, 1998), *aff'd*, 746 A.2d 276 (Del. 2000) (TABLE). As a result, courts afford significant deference to contractually bargained for rights and responsibilities set forth in partnership agreements. *See Twin Bridges L.P. v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007).

When evaluating the actions of Encore, Encore GP, Vanguard, the Conflicts Committee, and the Board, the only relevant determination is whether these Defendants complied with the terms of the Partnership Agreement. *See Lonergan*, 5 A.3d at 1020, 1025 (denying motion to expedite due to lack of a colorable claim for breach of common law duties because "[the defendant partnership] is a limited partnership, and the [Partnership Agreement] establishes a contractual standard of review that supplants fiduciary duty analysis"); *Brickell P'rs v. Wise*, 794 A.2d 1, 3–4 (Del. Ch. 2001) (holding that Partnership Agreement supplanted traditional fiduciary duties); *In re Inergy L.P. Unitholders Litig.*, 2010 WL 4273197, at *12 (Del. Ch. Oct. 29, 2010) (relying on Section 17-1101(d) to conclude that "the Partnership Agreement expressly replaces common law fiduciary duties and other standards of care with specific standards set forth in the Agreement."); *In re K-Sea*, 2011 WL 2410395, at *8 (concluding that limited Partnership Agreement "eliminated traditional fiduciary duties").

Here, the Partnership Agreement eliminated all default fiduciary duties and supplanted them with contractual procedures and obligations. *See supra* pp. 8-12 (discussing relevant provisions of Partnership Agreement). Thus, the relevant standard is not whether Defendants complied with the common law fiduciary duties that govern corporations, but whether they complied with the duties imposed by the Partnership Agreement. *See* 6 *Del. C.* § 17-1101(d); *see also Sonet v. Timber Co., L.P.*, 722 A.2d 319, 323 (Del. Ch. 1998) (observing that § 17-1101(d)'s "broad license to enhance, reform, or even eliminate fiduciary duty protections" creates "potentially infinite variations on modified fiduciary duties in the context of widely-held limited partnerships . . . ."). As set forth below, Defendants fully complied with the terms of the Partnership

Agreement and Plaintiff does not claim otherwise or plead any facts to the contrary.

(1) Because the Merger Received Special Approval, It Is Deemed Agreed to by All Partners and Does Not Breach Any Contractual Duties.

By obtaining "Special Approval" for the Merger, Defendants complied with the applicable terms of the Partnership Agreement and therefore cannot be held in breach of contract. When Vanguard proposed the Merger, it presented Encore with a situation in which part of its Board—the Vanguard Directors—had a conflict of interest. Section 7.9(a) of the Partnership Agreement provides four alternative methods for satisfying the contractual obligations set forth therein when a potential conflict of interest transaction arises. Defendants invoked one such method—the Special Approval process—and complied with its requirements. Because Defendants complied with the Special Approval process, the Merger is deemed fair and reasonable under the Partnership Agreement. Consequently, Plaintiff's allegation that the Merger was not fair and reasonable falls flat.

The Special Approval process forecloses Plaintiff's claim for breach of contract. If a transaction receives "Special Approval," it is "deemed approved by all Partners, and shall not constitute a breach of this Agreement . . . [or] of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity . . . ." Partnership Agreement § 7.9(a), B106. "Special Approval" is defined in the Partnership Agreement as "approval by a majority of the members of the Conflicts Committee acting in good faith." *Id*. at § 1.1(b), B060; SAC ¶ 73, A454.

It is uncontested that the Conflicts Committee conforms with the requirements of the Partnership Agreement; it is composed entirely of three directors who meet the independence, qualification, and experience requirements established by the Securities and Exchange Commission and by the New York Stock Exchange. Partnership Agreement at § 1.1(b), B049 (definition of "Conflicts Committee"). Nor can there be any doubt that the Conflicts Committee followed through with the Special Approval process; indeed, Plaintiff concedes that the Merger received Special

Approval under the Partnership Agreement. *E.g.*, SAC ¶¶ 2-12, A438-440. As explained in the Proxy, the Conflicts Committee approved the Merger after it "unanimously determined that the merger, the merger agreement, and the transactions contemplated thereby are fair and reasonable to, advisable to, and in the best interests of, Encore and the holders of Encore common units unaffiliated with Vanguard." Proxy Letter to Unitholders at 1, B205. Those "actions taken by the Encore Conflicts Committee constitute 'Special Approval' under Encore's" [P]artnership [A]greement." *Id*.

By obtaining Special Approval of the Merger, Defendants complied with Section 7.9(a) of the Partnership Agreement. Therefore, the Merger is deemed fair and reasonable and ***there is no breach of Defendants' contractual duties***. *See id.*

(2) The Conflicts Committee's Decision to Grant Special Approval Is Subject Only to a Contractual Standard of Good Faith.

Per Section 7.9(a), when "Special Approval is sought, then it shall be presumed that, in making its decision, the Conflicts Committee acted in good faith." Moreover, "in any proceeding brought by any Limited Partner or Assignee or by or on behalf of such Limited Partner or Assignee or any other Limited Partner or Assignee or the Partnership challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption." Partnership Agreement § 7.9(a), B107. Per Section 7.9(b) of the Partnership Agreement, "'good faith' for purposes of this Agreement . . . [means] the Person or Persons making such determination or taking or declining to take such other action must believe that the determination or other action is in the best interests of the Partnership." B107.

In the Opening Brief, Plaintiff tries several gambits aimed at avoiding or supplementing this standard, selectively quoting language in Sections 2.1 and 7.9 of the Partnership Agreement, claiming that Special Approval is a "substitute" for other standards, and making a confusing claim that the contractual standard is not a "standard of conduct." Pl.'s Br. at 22-24. These arguments are unavailing. The Partnership Agreement is

crystal clear: "***Except as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties***, to the Partnership or any Limited Partner or Assignee." Partnership Agreement § 7.9(e), B108 (emphasis added). Therefore, to state a claim for breach of the Partnership Agreement, Plaintiff must plead facts that are sufficient to overcome a presumption that the Conflicts Committee acted in a manner that it believed was in the best interests of the Partnership. Plaintiff acknowledge this in his Opening Brief, stating that: "The proper formulation of Plaintiff's task under the Partnership Agreement on a Rule 12(b)(6) motion would directly track the language of the Partnership Agreement: 'Has Plaintiff pled sufficient facts, drawing all reasonable inferences in his favor, to overcome the presumption that Defendants believed they were acting in the best interests of the Partnership and its public unitholders?'" Pl.'s Br. at 21-22.

ii. The Court of Chancery Correctly Held That the Complaint Does Not Allege Facts Implying That the Conflicts Committee Breached Its Contractual Duty of Good Faith.

The premise of Plaintiff's purported cause of action is that the Exchange Ratio could have been higher if the Conflicts Committee had negotiated differently, and that this equates to a breach of the contractual duty of good faith. *See* SAC ¶¶ 2, 6, 12, 53, 76, and 79, A437-440, 448, 454-455. Plaintiff's claim fails as a matter of law, however, because (1) Plaintiff admits that the Exchange Ratio is within the range of fair compensation and (2) even without that admission, the Partnership Agreement adopts a conclusive presumption that the Conflicts Committee recommended the Merger as offering fair consideration in good faith reliance on Jefferies' fairness opinion.

(1) The Court of Chancery Correctly Held That Section 7.10(b) of the Partnership Agreement Provides a Conclusive Presumption That the Conflicts Committee Acted in Good Faith in Determining That the Merger Exchange Ratio Was Fair and Reasonable.

The only duty imposed by the Partnership Agreement—to act in good faith—is conclusively presumed here. The Partnership Agreement provides that actions taken by the Board on advice of legal counsel and financial advisors are "conclusively presumed to have been done or omitted in good faith and in accordance with such advice or opinion." Partnership Agreement §7.10(b), B108. Taking this into account, the Court of Chancery correctly found that "the only reasonable inference from the allegations of the Complaint in this regard is that Encore GP relied on [its] investment banker's opinion . . . [; t]herefore, Section 7.10(b) provides Encore GP with a conclusive presumption that it acted in good faith in exercising its discretion to use the Special Approval process." Mem. Op. at 39.

The Proxy, upon which Plaintiff relies,[7] contains an eight-page

[7] Plaintiff's assertion that the Court of Chancery erred "[b]y crediting the Proxy as proof of what the Conflicts Committee actually believed and therefore as evidence concerning the ultimate issue in the case – bad faith" is incorrect. The very quote Plaintiff relies on as support for this argument demonstrates its flaw. Plaintiff quotes *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59, 70 (Del. 1995) for the proposition that "[w]hen a proxy statement . . . ***is not put forth by plaintiffs as an admission of the truth of the facts referred to therein***, the defendants may not use it at the pleading stage for purposes other than disclosure issues or perhaps to establish formal, uncontested matters." Pl.'s Br. 18-19 (quoting *In re Santa Fe Pac.*, 669 A.2d at 70) (emphasis added). Here, Plaintiff does rely on the Proxy as proof of certain facts that they find helpful to their claim. Plaintiff may not, however, cherry pick the parts of the Proxy they want the Court to consider. Plaintiff's argument is that the Proxy shows that the Conflicts Committee acted in bad faith. Therefore, the Court of Chancery appropriately looked at the Proxy as a whole.

summary of the analysis that Jefferies provided to the Conflicts Committee in the Section titled "Opinion of the Encore Conflicts Committee's Financial Advisor." Proxy at 73-80, B284-291. Jefferies performed numerous analyses of both Vanguard and Encore—including analyses based on comparable public companies, comparable transactions, dividend discounts, and discounted cash flow. *See id*. Plaintiff does not plead that Jefferies employed methods that are not generally accepted in the valuation field, or that the Conflicts Committee did not rely on Jefferies' analyses in good faith. *See In re 3Com S'holders Litig*., 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009) ("There are limitless opportunities for disagreement on the appropriate valuation methodologies to employ, as well as the appropriate inputs to deploy within those methodologies."); *In re Inergy*, 2010 WL 4273197, at *16 ("Indeed, none of [plaintiffs' expert's] criticisms of [defendants' financial advisor's] work lead me to believe that Plaintiffs are likely to prove that [the special committee] did not reasonably rely on [its financial advisor's] opinions.").

Plaintiff acknowledges that the Conflicts Committee's financial advisor Jefferies provided an opinion that the Merger was fair and reasonable to Encore's unitholders (SAC ¶¶ 54-57, A449-450). That opinion provides a basis for the Conflicts Committee's decision to provide "Special Approval" of the Merger. In fact, at oral argument, Plaintiff's counsel argued that Plaintiff "could have argued that the price is unfair and Jefferies was incompetent and that there was no basis for relying on the Jefferies analysis. That's not at all what plaintiffs argue." *See* Tr. of May 25, 2012 Oral Argument on Defendants' Mot. to Dismiss at 46 ("Hr'g Tr."), A540. And, they have not challenged on appeal the Court's conclusion that Jefferies supplied the Conflicts Committee with a valid fairness opinion on which it was entitled to rely.

Inexplicably, however, Plaintiff almost completely ignores Section 7.10(b) and the conclusive presumption of good faith it creates in light of the Jefferies fairness opinion. The only mention that Section 7.10(b) gets is in footnote 4 of Plaintiff's Opening Brief (page 27), where Plaintiff asserts that "Jefferies 'did not participate in negotiations,' did not provide advice concerning 'the determination of the specific Exchange Ratio, or any other aspects of the Merger' and did not provide any other services 'other than the delivery of this opinion.'" In other words, Plaintiff acknowledges that the Conflicts Committee "relied on the fairness opinion

by Jefferies," but tries to avoid the conclusive presumption of good faith that this reliance imparts by arguing that the Conflicts Committee failed to bargain with Vanguard in any meaningful way. Pl.'s Br. at 27. In particular, Plaintiff asserts that Jefferies "did not participate in negotiations," and therefore, "the Conflicts Committee cannot justify its negotiating strategy on the basis of professional advice from Jefferies." Pl.'s Br. at 27-28. Plaintiff's allegations fail on two counts. First, the Partnership Agreement does not require Defendants to prove that the Conflicts Committees' financial advisors participated directly in negotiations; Plaintiff fashions that supposed standard from whole cloth. Second, the Conflicts Committee indeed acted in accordance with Jefferies' financial analysis and relied upon it during negotiation, triggering the contractually-imposed presumption of good faith. *See* Partnership Agreement § 7.10(b), B108.

The Court of Chancery correctly found that because Vanguard's offer presented a potential conflict of interest for the Vanguard Directors, Encore GP appropriately utilized the procedures laid out in Partnership Agreement Section 7.9(a) by referring the offer to its Conflicts Committee. Pl.'s Br. at 8. Ultimately, the Conflicts Committee—relying on its counsel and Jefferies—decided to make a counteroffer (the "Counteroffer"). Proxy at 52-53, B263-254. Plaintiff implies that Jefferies did not provide advice and opinions on which the Counteroffer was based, but the Proxy that forms the basis for the Second Amended Complaint tells a different story:

> On June 14, 2011, the Encore Conflicts Committee met with its advisors at Jefferies' offices to hear Jefferies' preliminary analysis, from a financial point of view, of the [Offer] . . . Jefferies reviewed with the Encore Conflicts Committee Jefferies' preliminary valuation materials, which included overviews of both Encore and Vanguard, historical and projected distributable cash flow for Vanguard and Encore on a stand-alone and combined basis, accretion/dilution analyses with respect to Vanguard and Encore at the proposed exchange ratio, a pro forma merger analysis, other valuation metrics and selected equity analyst views of Encore.

Id. "Based in part on their review of the Jefferies materials," the Conflicts Committee decided to inform Vanguard that the Vanguard offer was insufficient and that an exchange ratio of 0.75—the Counteroffer—might be acceptable, "subject to confirmation by Jefferies that the exchange ratio was fair from a financial point of view, and provided that a mutually acceptable merger agreement could be reached." *Id*. at 53, B264. Because the Counteroffer was made by the Conflicts Committee in reliance upon the advice or opinion of Jefferies, it must be conclusively presumed to have been made in good faith per Section 7.10(b) of the Partnership Agreement. *See Lonergan*, 5 A.3d at 1022 ("The complaint's conclusory allegations about an inadequate deal process do not imply arbitrary or bad faith conduct[.]"); *In re K-Sea* , 2011 WL 2410395, at *5 ("the actions taken by the [conflicts committee] to vet the Proposed Transaction went above and beyond what the [limited partnership agreement] required. For example, the Committee obtained a fairness opinion from [its financial advisor] relating to the merger . . . ."); *In re Inergy*, 2010 WL 4273197, at *12 (rejecting conclusory allegations of bad faith conduct as insufficient to negate committees' "Special Approval" where range of offers and counteroffers for exchange ratio was between .75 and .8); *Brinckerhoff v. Enbridge*, 2011 WL 4599654, at *8-9 (dismissing complaint upon finding that, pursuant to partnership agreement, "[general partner] is conclusively presumed to have acted in good faith when it acts in reliance" on an investment banker's opinion); *Gerber,* 2012 WL 34442, at *12-14 (dismissing complaint after construing identical provision in MLPA and holding that general partner "is conclusively presumed to have acted in good faith in entering into the" transaction because a financial advisor rendered opinion to conflicts committee that the transaction exchange ratio was fair).

Moreover, even if the conclusive presumption arising from the Conflicts Committee's reliance on Jefferies opinion is just limited to the opinion that the Exchange Ratio is fair, that is enough to preclude Plaintiff's claims. Plaintiff's allegations about why the negotiation was inadequate are all premised on the claim that it resulted in an unfair price. SAC ¶¶ 2, 6, 12, 53, 76, and 79, A437-440, 448, 454-455. In Plaintiff's Opening Brief, Plaintiff explains the inference that he says the Court of Chancery should have drawn:

> that the experienced businessmen on the Conflicts Committee opened with a counteroffer just 4% higher than Vanguard's opening bid, disregarded the much higher valuations supported by their own financial advisor's analysis, ignored the run-down in Vanguard's unit price, and accepted an offer below Encore's unaffected trading price, not because they were "ineffectual negotiators," . . . but because they wanted to accommodate Vanguard or preferred to avoid the hard work of a true arm's length negotiation.

Pl.'s Br. at 17. Because the conclusive presumption of good faith eliminates the premise that the merger consideration was unfair, Plaintiff is left with no basis for a claim that the Conflict Committee acted in bad faith. Similarly, all the damages Plaintiff seeks are "damages for the inadequate price paid for their units." SAC ¶ 12, A440. Without an allegation of unfair price, Plaintiff has no damages, and therefore, no claim. Accordingly, the conclusive presumption requires dismissal of the Second Amended Complaint with prejudice.

(2) Even Without the Conclusive Presumption, Plaintiff Has Admitted That the Exchange Ratio Was in the Range of Fair Consideration, and Therefore, Plaintiff Has Not Pleaded Bad Faith.

Plaintiff claims that the Court of Chancery erred by holding that "the Conflicts Committee's undisputed failure to meaningfully bargain on behalf of Encore's public unitholders and its approval of the Merger at a significant discount to Encore's unaffected trading price was insufficient to plead bad faith." Pl.'s Br. at 3. Assuming solely for the sake of argument that the conclusive presumption of good faith does not preclude Plaintiff's claims, Plaintiff's claims are still insufficient to state a cause of action for breach of the Partnership Agreement because Plaintiff failed to plead facts giving rise to an inference that the Conflicts Committee did not act in good faith. At the end of the day, Plaintiff's argument is that the Exchange Ratio was "indefensible on its face;" that it was so bad that it could only be the product of bad faith. Pl.'s Br. at 27. This assertion is

totally undermined by Plaintiff's own allegations and admissions showing that the Exchange Ratio was fair.

Although Plaintiff repeatedly states that the Exchange Ratio was unfair, he has admitted that it is in the range of fair ratios. A chart in Plaintiff's Opening Brief (at 9) and the Second Amended Complaint (¶ 57) shows the Exchange Ratio is within the range of fair consideration derived from various metrics. And, as the Court of Chancery noted, Plaintiff's "argument is that the Conflicts Committee should have done more to negotiate a deal ***at the higher range Jefferies identified as fair***." Mem. Op. at 29 n.70 (citing Hr'g Tr. at 46, A540) (emphasis added). In other words, Plaintiff argues that the Exchange Ratio is fair, but that the Conflicts Committee could have done better. To support this claim of unfair price, Plaintiff cherry-picks the metrics from the analyses by Jefferies and Vanguard's financial advisor, RBC Capital Markets, LLC, that Plaintiff thinks could justify a more favorable exchange ratio. Plaintiff completely ignores several metrics that are incompatible with his claim that the price should have been higher—like the fact that the Exchange Ratio matches (approximately) the historical average exchange ratio between Encore and Vanguard for the period since Vanguard bought control of Encore GP. Proxy at 83-85, B294-296.

Moreover, Plaintiff's claim that the Exchange Ratio was a 10% discount to Encore's trading price is completely inaccurate—it relies on comparing Encore's price before the Vanguard offer was announced (what Plaintiff calls an unaffected price) with Vanguard's price months later (presumably an affected price).

Plaintiff's only real complaint here is that there was not a significant merger premium paid. But, given that there was no change of control—Vanguard indirectly controlled Encore's holdings before and after the Merger—there is no justification for a merger premium alleged in the Complaint.

At the end of the day, Plaintiff's claims that the Exchange Ratio could have been higher—when it is conceded and conclusively presumed that the consideration is fair—simply are insufficient to imply bad faith.[8]

(3) Plaintiff's Argument That the Court of Chancery Erred by Not Acknowledging That "Dereliction of Duty" Could Constitute Not Acting in Good Faith Is Irrelevant Because There Are No Such Allegations in the Complaint.

Plaintiff asserts that "[t]he Court of Chancery erred by holding that breach of the contractual duty of 'good faith' under the Partnership Agreement required a showing that Defendants 'were acting *against*' the interests of the Partnership, thereby excluding intentional dereliction of duty or conscious disregard for one's responsibilities." Pl.'s Br. at 3. This alleged point of error is completely irrelevant given that the Complaint does not contain any allegations of "dereliction of duty." Plaintiff repeatedly alleges that the Conflicts Committee did not "meaningfully" negotiate, Pl.'s Br. at 3, 8, & 25, acknowledging that it did actually negotiate. "Dereliction of duty," therefore, is not alleged, and there was no reason for the Court of Chancery to consider whether such a claim would be sufficient to allege a breach of the contractual good faith standard set out in the Partnership Agreement.

[8] The only case Plaintiff cites to support his claim, *Brinckerhoff v. Texas Eastern Products Pipeline Co, LLC.*, 986 A.2d 370 (Del. Ch. 2010), does not support Plaintiff's claim to have pleaded a cause of action. *Brinckerhoff* involved a motion to approve a settlement, and in that matter, the Court of Chancery expressed concerns because there were allegations that the financial advisor's opinion did not attribute any value to a significant asset (a derivative claim) that the special committee had allegedly recognized was valuable. There are no such allegations here, and as mentioned above, Plaintiff has conceded the reliability of the Jefferies opinion.

(4) Plaintiff Does Not Plead That Vanguard Breached Any Owed Duty or Plead Any Damages Caused by Vanguard.

Plaintiff claims that "[t]he Court of Chancery erred by holding that the Conflicts Committee's approval of the Merger eliminated Vanguard's liability for bad faith conduct, without any showing that the Conflicts Committee considered or evaluated such conduct." Pl.'s Br. at 3. This assertion mischaracterizes the Court of Chancery's holding.[9] The Court of Chancery correctly held that Plaintiff's allegations that Vanguard caused Encore to make value-depressive disclosures do not give rise to a separate cause of action challenging the Exchange Ratio. As the Court of Chancery stated, "[a]lthough they alleged two different categories of wrongdoing, Plaintiffs have claimed only one breach of the Partnership Agreement. The sole count of the Complaint avers that: 'Defendants breached their contractual duties to Plaintiffs and the Class by proposing, approving and consummating a transaction that was not fair or reasonable and was undertaken in bad faith.'" Mem. Op. at 24 (citing SAC ¶ 79, A455).

Plaintiff's allegations about "value-depressive" policies or announcements are only relevant to his claims because Plaintiff states that these policies affected the Exchange Ratio. Because the Exchange Ratio is conclusively presumed to be fair and is admitted to be within the range of fair consideration, Plaintiff cannot show any damages for a claim of

[9] Plaintiff also makes various allegations about Vanguard that are not relevant: that Vanguard's offer to enter into the Merger was opportunistically timed, that Vanguard would not consider selling its Encore interests to other parties, and that Vanguard did not voluntarily implement a majority of the minority vote for the Merger. As a matter of law, none of these claims give rise to a cause of action. As discussed above, pursuant to Section 7.9(c), Vanguard and the Vanguard Directors do not owe any duties to Encore when they are not acting on Encore's behalf and are acting on their own behalf or on behalf of Vanguard. Partnership Agreement § 7.9(c), B107. When choosing when or if to make an offer to buy the outstanding shares of Encore, Vanguard and the Vanguard Directors were acting on behalf of Vanguard and were "free of any fiduciary duty or obligation whatsoever to [Encore], any Limited Partner or Assignee . . . ." *Id.*

breach of the Partnership Agreement based on the pre-merger disclosures discussed.

Moreover, even if there were recoverable damages relating to Plaintiff's allegations about pre-merger disclosures, those allegations are not sufficient to state a cause of action for breach of the relevant contractual good faith duty. Plaintiff does not make any nonconclusory allegations to support his vague assertions. Plaintiff essentially accuses Defendants of fraud without making a single allegation that would support a fraud claim or show bad faith on Defendants' part. But, this Court does not have to "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party." *Clean Harbors, Inc. v. Safety-Kleen, Inc.*, 2011 WL 6793718, at *3 (Del. Ch. Dec. 9, 2011) (citation omitted).

First, Defendant Smith's statement that "we are excited about this acquisition and the prospect of managing a great set of assets for the long-term benefit of the Encore unitholders" does not give rise to an inference that he was trying to "drive down Encore's unit price." Pl.'s Br. at 4. Defendant Smith made that statement in a January 3, 2011 press release issued by Encore after Vanguard acquired its Encore interests. *See* Encore Energy P'rs LP, Current Report (Form 8-K) (Jan. 3, 2011), B495-584; Pl.'s Br. at 4-5. Plaintiff claims that this statement "strongly implied that [Vanguard] did not have plans to buy Encore's publicly-held units" and that it caused a drop in Encore's unit price. SAC ¶¶ 30-31, A444; Pl.'s Br. at 4-5. These allegations are conclusory and implausible and thus do not state a cause of action.

The fact that on January 3, 2011 Defendant Smith felt that he and his colleagues at Vanguard were "excited about this acquisition and the prospect of managing a great set of assets for the long-term benefit of the Encore unitholders" does not imply that Vanguard "did not have plans to buy Encore's publicly-held units." SAC ¶ 30, A444; Pl.'s Br. at 4-5. Before the Merger, Smith and his colleagues at Vanguard controlled Encore and managed Encore's assets. Since the Merger, Smith and his colleagues at Vanguard continue to control those assets; now they just do so directly, with Vanguard as the owner of the assets and with former Encore unitholders as current Vanguard unitholders. Moreover, even if Defendant Smith's comment did imply that Vanguard would not purchase

Encore, there is no basis in the Complaint for inferring that (1) one should expect such a statement to "drive down" Encore's unit price, (2) Defendant Smith made the statement in bad faith, or (3) that the statement actually caused a unit-price decline.

Second, Encore GP's announcements of its 4Q10 financial results and forward-looking production estimates do not support a cause of action for breach of the duty of good faith. By claiming that Vanguard caused Encore GP to make announcements regarding two "value depressive policies" in its February 22, 2011 press release, Plaintiff again tries to recast what is at best a claim for breach of the inapplicable common-law duty of care as a cause of action for bad faith. Encore Energy P'rs LP, Current Report (Form 8-K) (Feb. 23, 2011) (the "Feb. 23 Form 8-K"), B586-605; SAC ¶¶ 32-39, A444-446; Pl.'s Br. at 5. But, there is no nonconclusory basis in the Second Amended Complaint for inferring that either of these components of the February 22, 2011 press release was intended to drive down Encore's unit price or actually did so.

The first portion of the February 22, 2011 press release that Plaintiff objects to is the announcement that Encore had made a business decision to increase capital expenditures to drill more wells. Feb. 23 Form 8-K, B586-605, B594 ("The increase in capital expenditures is to provide long-term value to unitholders by maintaining well production and reducing the decline rate"). This increase in capital expenditures was expected to cause a decrease in distributable cash flow and reflected a decision to provide "long-term value to unitholders . . . at the expense of near-term cash flows." SAC ¶ 39, A446; Pl.'s Br. at 5. In other words, it was expected to result in a short term decrease in distributions, but it was also expected to help ensure that distributions would continue to be paid over a longer period. Plaintiff assumes in the Second Amended Complaint and in Plaintiff's Opening Brief that this is a negative, but he does not provide any basis for such a conclusion. Nor does he provide any basis for inferring that this business decision was meant to, or did, drive down Encore's unit price or otherwise damage Plaintiff. Plaintiff alleges only that "[t]he issuance of the February 22 Release caused Encore's units to decline in value by 5.4%." SAC ¶ 37, A445; Pl.'s Br. at 5. The February 22, 2011 press release, however, announced Encore's financial results for 2010, so it contains literally hundreds of pieces of information, including that Encore's "net loss for the fourth quarter of 2010 was $14.2 million."

Feb. 23 Form 8-K, B586-605, B593. There is no basis to infer that an announcement that Vanguard intended to provide long-term value to unitholders contributed to any price decline or was a bad faith or fraudulent attempt to decrease Encore's unit price.

The second portion of the February 22, 2011 press release that Plaintiff objects to consists of Encore's production forecasts. Encore estimated in the February 22, 2011 press release that its production in 2011 would be down versus production in 2010 (one reason it wanted to increase capital expenditures and drill more wells). Feb. 23 Form 8-K, B586-605, B594. Although production in the first two quarters of 2011 was below the 2010 average as forecasted, Plaintiff points out that the reduction was not as great as predicted. *Compare id*. at B592 (average production for 2010 was 8,766 BOE per day), *with*; SAC ¶ 38, A445 (1Q11 production was "8,463 BOE/D"; 2Q11 production was "8,534 BOE/D"). Plaintiff claims that Encore's forward-looking production estimates "far exceeded" Encore's forecasts because production turned out to be 1 to 7 percent higher per quarter than forecasted. SAC ¶ 38, A445; Pl.'s Br. at 5. As with Plaintiff's complaints about Encore's decision to increase capital expenditures, there is no basis in the Second Amended Complaint for inferring that this forward-looking production estimate was intended to drive down Encore's unit price or that it actually affected Encore's unit price.

Despite Plaintiff's claim to the contrary, their allegation that "by taking steps to drive down the price of Encore common units . . . Defendants breached Defendants' duty of good faith" is not sufficient to state a cause of action for bad faith, fraudulent conduct with "specificity." SAC ¶ 76, A455. Therefore, Plaintiff's conclusory claims of intentional fraud were properly dismissed.

iii. <u>The Court of Chancery Correctly Held That Plaintiff Cannot State a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing.</u>

The Court of Chancery correctly found that "[t]he implied covenant is a limited gap-filling tool to infer contractual terms to which the parties would have agreed had they anticipated a situation they failed to address; it is not a "free-floating duty" or "a substitute for fiduciary

duty analysis." Mem. Op. at 31 (citing *Nemec*, 991 A.2d at 1127-28); *see also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005); *Lonergan*, 5 A.3d at 1017). It "cannot be invoked to override the express terms of the contract." Mem. Op. at 31 (quoting *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009)). To the extent that Plaintiff "seeks to re-introduce fiduciary review through the backdoor of the implied covenant, [he] fails to state a colorable claim." *Lonergan*, 5 A.3d at 1019. As the Court of Chancery correctly noted, the Partnership Agreement:

> indicate[s] an intent contrary to the implied condition of obtaining objectively fair value that Plaintiffs contend inheres in the meaning of Special Approval. Among other things, the Partnership Agreement: (1) limits the Conflicts Committee members' duties to a subjective good faith standard; (2) neither requires nor prohibits the consideration of any particular factors by the Conflicts Committee in granting Special Approval, which also need not be unanimous; (3) expressly—presume[s] that, in making its decision, the Conflicts Committee acted in good faith; (4) offers the General Partner a conclusive presumption of good faith whenever it acts upon the advice of legal counsel or financial advisors reasonably believed to be competent to opine on the relevant matter (but who, implicitly, might not actually have been competent); (5) exculpates Defendants in any case from all monetary liability unless they—acted in bad faith or engaged in fraud, willful misconduct or, in the case of a criminal matter, acted with knowledge that the . . . conduct was criminal, and (6) expressly and unambiguously waives common law fiduciary duties.

Mem. Op. at 35 (citing Partnership Agreement §§ 7.9(b) (B107), 1.1 (B060), 7.9(a) (B106-107), 7.10(b) (B108), 7.8(a) (B106), and 7.9(e) (B108)).

Moreover, any attempt to use the implied covenant of good faith and fair dealing to avoid the conclusive presumption that the Conflicts Committee acted in good faith fails as a matter of law because the

conclusive presumption applies to causes of action under the implied covenant as well. As Vice Chancellor Noble recently ruled when considering a clause similar to the Section 7.10(b) conclusive presumption of good faith in the Partnership Agreement: "[T]he question squarely before the Court is: can a plaintiff plead that a defendant breached the implied covenant when the defendant is conclusively presumed by the terms of a contract to have acted in good faith? The answer is, no." *Gerber*, 2012 WL 34442, at *12. This is because the conclusive presumption applies to all claims involving allegations of a breach of the duty of good faith. "That would include good faith claims arising under the duty of loyal[t]y, ***the implied covenant***, and any other doctrine." *Id*. (emphasis added).

The Court of Chancery, therefore, correctly found that the Second Amended Complaint does not state a cause of action for breach of the implied covenant of good faith and fair dealing.

CONCLUSION

For the foregoing reasons, the Court of Chancery's August 31, 2012 decision granting Defendants-Below, Appellees' motion to dismiss should be affirmed in all respects.

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Dated: December 20, 2012

CERTIFICATE OF SERVICE

I, Kathaleen St. J. McCormick, Esquire, do hereby certify that on December 20, 2012, I caused a copy of the foregoing document to be served on the following counsel in the manner indicated below:

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