EFiled: Oct 28 2010 5:20PM EDT
Transaction ID 34076877
Case No. 4589-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re ATLAS ENERGY RESOURCES, LLC, UNITHOLDER LITIGATION	:	Consolidated C.A. No. 4589-VCN

MEMORANDUM OPINION

Date Submitted: July 20, 2010
Date Decided: October 28, 2010

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NOBLE, Vice Chancellor

I. INTRODUCTION

A publicly-traded limited liability company negotiated merger with its controlling unitholder, a widely-held corporation. The limited liability company agreement eliminated the traditional fiduciary duties of the company's directors and officers, replacing them with a contractually-defined duty of good faith. It also provided a mechanism for resolving conflicts of interest between affiliates of the company (such as the parent) and the company itself. The company established a special committee to negotiate with the controlling unitholder on behalf of the company, and the merger was ultimately approved by a majority of the minority unitholders. Plaintiffs, who represent minority unitholders as a class, accuse the controlling unitholder and the limited liability company's Board of Directors and certain officers of breaching their fiduciary duties to the minority. They argue that the merger should be analyzed under entire fairness and that it would be found lacking under such a review because it was not the result of a fair process and did not result in a fair price. This memorandum opinion addresses the defendants' motion to dismiss.

II. BACKGROUND

A. *Parties*

Plaintiffs Operating Engineers Construction Industry and Miscellaneous Pension Fund and Montgomery County Employees' Retirement Fund were, at all material times, unitholders of Nominal Defendant Atlas Energy Resources, LLC ("Energy").[1]

Energy, a Delaware limited liability company,[2] was created in 2006 to own and operate the natural gas and oil assets and the investment partnership assets management business of Defendant Atlas America, Inc. ("America"), a Delaware corporation. America has been in the oil and gas industry since 1968. Energy, which owns over 7,600 oil and gas wells in Pennsylvania, Ohio and Tennessee, and operates drilling properties in northern Michigan, went public at a price of $21 per unit.[3] Its Class B units traded on the New York Stock Exchange, and, as of April 27, 2009, there were approximately 63 million Class B units outstanding. America then held approximately 30 million (47.3%) of Energy's Class B units. A wholly owned subsidiary of America, Atlas Energy Management ("Manager"), owns all of Energy's Class A units and is responsible for its day-to-day operations.

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[1] Amended Verified Consolidated Class Action Complaint ("the Complaint" or "Compl.") ¶¶ 11-12. The factual background is taken from the well-pleaded allegations of the Complaint and the documents incorporated into it.
[2] *Id.* at ¶ 13.
[3] *Id.* at ¶¶ 13-15

Together, America and Manager controlled over 48% of Energy's voting interests as of April 27, 2009.

In addition to America's holdings of Energy and Atlas Energy Management, it owns significant stakes in Atlas Pipeline Partners LP and Atlas Pipeline Holdings LP, which provide services to Energy.

The Individual Defendants are officers and directors of Energy. Defendant Edward E. Cohen ("E. Cohen") has served as Energy's Chairman of the Board and Chief Executive Officer since its formation.[4] He has also been the Chairman of the Board and Chief Executive Officer of America since its formation in September 2000. He has been Chairman of the Managing Board of Atlas Pipeline Partners GP, LLC, the general partner of Atlas Pipeline Partners LP, since its formation in 1999, and Chairman of the Board and Chief Executive Officer of Atlas Pipeline Holdings GP, LLC, the general partner of Atlas Pipeline Holdings LP, since its formation in January 2006.

Defendant Jonathan Z. Cohen ("J. Cohen") is the son of E. Cohen and has been Vice Chairman of Energy's Board since its formation.[5] He has also been the Vice Chairman of America's Board since its formation. He has been a senior officer of Resource America since 1998, serving as Chief Executive Officer since 2004, President since 2003, and a Director since 2002. He has served as the Vice

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[4] *Id.* at ¶ 16.
[5] *Id.* at ¶ 17.

Chairman of the Managing Board of Atlas Pipeline Partners GP, LLC, since its formation, and Vice Chairman of the Board of Atlas Pipeline Holdings GP, LLC, since its formation. He also has served as Chief Executive Officer, President, and a Director of Resource Capital Corp. since its formation in 2005.

Defendant Richard D. Weber ("Weber") has been the President, Chief Operating Officer, and a Director of Energy since its formation.[6] He is currently the President of America.

Defendant Matthew A. Jones ("M. Jones") has been the Chief Financial Officer of Energy since 2005.[7] He was a director of Energy from 2006 until his resignation from the Energy Board on July 22, 2008. He had been the Chief Financial Officer of America since 2005.

Defendants Walter C. Jones ("W. Jones") and Ellen F. Warren ("Warren") have been Directors of Energy since its formation, and, after the merger, joined America's Board of Directors.[8]

Defendant Bruce M. Wolf ("Wolf") has been a Director of Energy since its formation. He was a Senior Vice President of America from 1998 to 1999, and

[6] *Id.* at ¶ 18.
[7] *Id.* at ¶ 19.
[8] *Id.* at ¶ 20-21.

served as Secretary and General Counsel of Atlas Energy Group from 1980. He joined America's Board of Directors after the merger.[9]

Defendant Jessica K. Davis ("Davis") has been a Director of Energy since March 23, 2009 and, after the merger, joined America's Board of Directors.[10]

Defendant Daniel C. Hertz ("Hertz") has been the Senior Vice President of Corporate Development for Energy, America Atlas Pipeline Partners LP, and Atlas Pipeline Holdings LP since 2007. He joined America and Atlas Pipeline Partners in January 2004.[11]

B. *The Merger*

Energy was established to develop natural gas production in the Marcellus Shale, a gas-rich geological formation located in parts of the Appalachian Mountains from Virginia to New York.[12] It quickly grew into one of the largest producers in the Marcellus Shale. For 2008, it reported EBITDA of $312.4 million (a 57% increase over 2007), net income of $148.8 million (a 22% increase), and total revenue of $787.4 million (a 36% increase).[13] For both the third and fourth quarters of 2008, it paid distributions of $0.61 per unit.[14] Energy's quarterly cash distributions had grown or remained level in each quarter since the company's

[9] *Id.* at ¶ 22.
[10] *Id.* at ¶ 23.
[11] *Id.* at ¶ 24.
[12] *Id.* at ¶ 13.
[13] *Id.* at ¶ 30.
[14] *Id.* at ¶ 31.

formation. The company's growth was driven by its strong position in the Marcellus Shale. The company reported that vast tracts of resource-rich land remained untapped and that it had already positively identified trillions of gallons of natural gas reserves.[15] Its distribution for the first quarter of 2009 was due to be announced on April 27, 2009.[16]

On January 27, 2009, members of Energy and America's management made a presentation to America's Board of Directors.[17] The presentation covered the challenges facing both companies as a result of continued poor economic conditions. E. Cohen explained that America was exploring various potential strategic opportunities for Energy, including a possible merger between Energy and America. A week later, on February 3, America, without input from Energy's Board, developed five strategic alternatives for Energy (the "Five Alternatives"). These included:

- Retaining the companies' existing configurations and their existing investment and cash distribution policies.
- Retaining the companies' existing configurations, but ceasing Energy's cash distributions so that the cash could be reinvested in development of the Marcellus Shale or put toward debt reduction.

[15] *Id.* at ¶ 32.
[16] *Id.* at ¶ 112.
[17] *Id.* at ¶ 53.

- Continuing America as a publicly traded corporation but converting Energy from a publicly-traded limited liability company to a publicly traded corporation and eliminating cash distributions to Energy's unitholders.
- Retaining the companies' existing configurations but pursuing a joint venture between Energy and a third party that would provide cash to invest in developing the Marcellus Shale.
- A merger between America and Energy that would eliminate cash distributions to Energy's unitholders so that the combined cash of the two companies could be used to invest in developing the Marcellus Shale.[18]

On March 13 and 17, 2009, the Energy Board met with members of Energy's management including E. Cohen, J. Cohen, Herz, and Weber.[19] The members of management discussed the effects of deteriorating economic conditions on Energy and told the Board that they were considering possible strategic alternatives, some of which involved transactions with America. The Board authorized the Conflicts Committee to consider the alternatives, although Wolf recused himself from the committee because he had an ownership interest in America. In notes taken around this time, Davis, who had not yet been appointed to Energy's Board, wrote:

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[18] *Id.* at ¶ 54.
[19] *Id.* at ¶ 55.

> So we've just begun an internal investigation appointing a committee that will investigate whether we should stay an LLC (no) where our job is to hand out money, become a C-corp where we don't hand out money, or merge the company with Atlass [sic] America (yes) . . . .[20]

Soon after, the Energy Board formed a Special Committee, comprised of Warren, W. Jones, and Davis (who had been appointed to Energy's Board following the death of another director),[21] to consider formally the Five Alternatives.[22] The Special Committee met on March 23 to engage legal and financial advisors. Among the candidates for financial advisor was KeyBanc Capital Markets, which stated that it believed Energy was "unique among Production MLPs in that its asset base should warrant a premium valuation . . . due to the emergence of the Marcellus Shale."[23] Another candidate, UBS Securities LLC ("UBS") recognized that its work for the committee would need to be completed quickly because "the pending April declaration date for the first quarter distribution in 2009 adds urgency to the deliberations."[24] Ultimately, the Special Committee engaged K&L Gates LLP ("K&L Gates") as its legal advisor and UBS as its financial advisor.[25]

[20] *Id.* at ¶ 97.
[21] *Id.* at ¶ 23.
[22] *Id.* at ¶ 57.
[23] *Id.* at ¶ 76.
[24] *Id.* at ¶ 115.
[25] *Id.* at ¶¶ 57, 120.

On April 2, the Special Committee met with Weber and K&L Gates.[26] Weber gave a presentation in which he discussed Energy's business plan, prospects, and possible financial scenarios. Later that day, the Special Committee approached J. Cohen to explore the possibility of a merger between Energy and America.

On April 7, America's management, including J. Cohen and Herz, and America's advisors, J.P. Morgan Securities, Inc. and Wachtell, Lipton, Rosen & Katz ("Wachtell"), met with the Special Committee's advisors, K&L Gates and UBS. America's management informed the Special Committee's advisors that America was not interested in either selling its assets or converting Energy into a publicly traded corporation.[27] The next day, K&L Gates and UBS informed the Special Committee of America's positions. Several days later, the Special Committee concluded that a merger with America was the proper alternative for Energy.[28]

Over the next three weeks, negotiations over terms of a merger between America and Energy progressed quickly. On April 17, the Special Committee considered including a "majority of the minority" condition in the merger agreement, but America indicated it would not accept such a condition and it did

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[26] *Id.* at ¶ 58.
[27] *Id.* at ¶ 59.
[28] *Id.* at ¶ 60.

not appear in the final agreement. On April 19, Wachtell, acting on behalf of America, presented the Special Committee with an outline of possible legal terms of a taxable merger transaction with Energy in which Energy's public unitholders would receive shares of America in exchange for their units. America's financial advisors proposed an exchange ratio of 0.96 shares of America for each outstanding unit of Energy, representing a greater than 13% discount to Energy's trading price at the time.[29] The Special Committee rejected this price and eventually agreed to an exchange ratio of 1.16 shares of America per share of Energy, which equaled a 0.3% premium over Energy's then-current trading price.

On April 27, 2009, Energy and America announced they had entered into a definitive merger agreement.[30] If approved, Energy's public unitholders would receive the agreed-upon 1.16 shares of America in exchange for each of their units. Energy would become a wholly owned subsidiary of America, which was renamed Atlas Energy, Inc. The merger agreement also provided that Energy's cash distributions would cease during the pendency of the merger, beginning with the distribution that was to have been announced on April 27.[31]

Soon after the merger was announced, E. Cohen explained why he had been in favor of it:

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[29] *Id.* at ¶ 71.
[30] *Id.* at ¶ 65.
[31] *Id.* at ¶¶ 67-68.

> I want to emphasize that the overwhelming important driver for the merger is Atlas' desire, I would say obligation—Atlas' obligation and desire to accelerate and expand [the] most important and most exciting natural gas play and an area where Atlas should be, and we're determined that we will be the leading independent player.[32]

Further, he stated that:

> Upon closing of the recently announced merger with Atlas America, Atlas Energy intends to commence [a] horizontal Marcellus Shale well drilling program solely for its own account. The company intends to drill at least 24 horizontal Marcellus Shale wells for its own account during 2010.[33]

Approval of the merger required approval by a majority of all Energy common unitholders, a majority of America's shareholders, and 51% of Energy's creditors.[34] This was achieved and the merger was consummated on September 29, 2009.[35] The Board of the surviving Atlas Energy, Inc., consisted of E. Cohen, J. Cohen, and the ten outside directors of America and Energy who were serving when the merger was consummated.[36] These included Defendants Davis, W. Jones, Warren, and Wolf.

III. CONTENTIONS

Plaintiffs contend that America, as controlling unitholder, breached its fiduciary duties and other common law duties to the minority unitholders by negotiating the merger through an unfair process that resulted in terms that were

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32 *Id.* at ¶ 49.
33 *Id.* at ¶ 50.
34 *Id.* at ¶ 69.
35 *Id.* at ¶ 65.
36 *Id.* at ¶ 66.

unfair to the minority. Plaintiffs further accuse the Individual Defendants of breaching their fiduciary duties by agreeing to the merger. They argue that no provision of the Energy's limited liability company agreement (the "LLC Agreement") eliminates America's fiduciary duties to the minority, and that Article 12 of the LLC Agreement imposes full traditional fiduciary duties of care and loyalty on Energy's directors and officers. Because, in Plaintiffs' view, Defendants were subject to full fiduciary duties, they argue that the merger should be reviewed, and found lacking, under the entire fairness standard.

Specifically, Plaintiffs say that the merger undervalued Energy's units because it failed to include a premium for the elimination of Energy's cash distributions and to account fully for the value of Energy's Marcellus Shale assets. They argue that America took advantage of its knowledge and control of Energy to time the merger in order to acquire Energy at an historically low price.

With regard to process, Plaintiffs accuse America and certain Individual Defendants of dictating the terms of the merger. For example, they argue that America and the affiliated Individual Defendants (those other than the members of the Special Committee) dictated the timing of the merger and forced the Special Committee to agree to eliminate Energy's cash distributions and to agree to the merger despite the absence of a "majority of the minority" condition from the merger agreement. They accuse Energy's affiliated directors generally and

E. Cohen, J. Cohen, and Herz specifically, of limiting the information available to the Special Committee and of improperly influencing the committee's decision.

Plaintiffs argue that the Special Committee acquiesced in America's demands in violation of their duties to Energy's minority unitholders and otherwise failed to negotiate in good faith. They also accuse the Special Committee of adopting the merger without considering Energy's other strategic options, such as a joint venture with a third party.

Finally, they argue that all the Individual Defendants breached their fiduciary duties by approving the merger based on a less than complete investigation of its terms.

On the other hand, Defendants contend that the Complaint should be dismissed because it fails to allege the breach of any applicable fiduciary duty by any Defendant with regard to the approval of this merger. With regard to America, they argue that, regardless of any fiduciary duties that may apply to it as Energy's controlling unitholder, the LLC Agreement provides a mechanism to resolve the conflict of interest. With regard to the Individual Defendants, they argue that the LLC Agreement completely eliminated Energy's directors' and officers' fiduciary duties and replaced them with a contractually defined duty of good faith that Plaintiffs have not adequately alleged was breached.

Finally, Defendants argue that the Court should not import the corporate law concept of entire fairness into the limited liability company merger context where the LLC Agreement imposes contractual protections that make the protections of entire fairness unnecessary.

IV. DISCUSSION

The Court may a grant motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6) only if the plaintiffs would be unable to recover under "any reasonably conceivable set of circumstances susceptible of proof."[37] The Court accepts the truth of all well-pled facts as alleged in the complaint and draw all inferences in a light most favorable to the plaintiffs.[38] To survive this motion, the plaintiffs must have pleaded enough facts to suggest plausible, ultimate entitlement to the relief sought.[39] The Court is not required to accept conclusory allegations unsupported by specific, factual allegations, nor must it accept every strained interpretation of the plaintiff's allegations, but instead must only accept those reasonable inferences that "logically flow from the face of the complaint."[40]

The parties focused their briefs on the question of what fiduciary duties applied to each Defendant for purposes of considering, negotiating, and approving the merger. This is understandable because Plaintiffs' case can only survive the

[37] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 167 (Del. 2006) (citation omitted).
[38] *Desimone v. Barrows*, 924 A.2d 908, 928 (Del. Ch. 2007).
[39] *Id.* at 929.
[40] *Gen. Motors (Hughes)*, 897 A.2d at 167.

motion to dismiss if, at the threshold, Defendants had a duty to Plaintiffs. Plaintiffs argue that traditional fiduciary duties of care and loyalty applied to all the Defendants. In response, Defendants contend that the LLC Agreement contractually eliminated all Defendants' traditional fiduciary duties and contractually imposed different duties on them for purposes of negotiating and entering the merger.

"Limited Liability Companies are creatures of contract, 'designed to afford the maximum amount of freedom of contract, private ordering and flexibility to the parties involved.'"[41] One aspect of this flexibility is that parties to a limited liability agreement can contractually expand, restrict, modify, or fully eliminate the fiduciary duties owed by the company or its members, subject to certain limitations.[42] By contrast, in the absence of explicit provisions in a limited liability company agreement to the contrary, the traditional fiduciary duties owed by corporate directors and controlling shareholders apply in the limited liability company context.[43]

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[41] *R & R Capital, LLC v. Buck & Doe Run Valley Farms, LLC,* 2008 WL 3846318 (Del. Ch. Aug. 19, 2008) (quoting *In re Grupo Dos Chiles, LLC,* 2006 WL 668443, at *2 (Del.Ch. Mar.10, 2006)).

[42] 6 *Del. C.* §§ 18-1101(c), (e). A limited liability company agreement cannot validly eliminate either certain statutory mandates or the implied contractual covenant of good faith and fair dealing.

[43] *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *8-*11 (Del. Ch. Apr. 20, 2009) (citations omitted); see also *Kelly v. Blum*, 2010 WL 629850, at *11 (Del. Ch. Feb. 24, 1010) (Contractual alterations of traditional fiduciary duties must be explicit.).

Thus, the Court must construe each identified provision of the LLC Agreement to determine (1) whether it applies to a particular Defendant in these circumstances; (2) if so, whether the provision imposes on that Defendant a duty that differs from that Defendant's traditional fiduciary duties; and (3) whether Plaintiffs have stated a claim for breach of any applicable duty. The Court turns first to Plaintiffs' claims that America breached its fiduciary duties as the controlling unitholder of Energy.

A. *Claims Against Defendant America*

1. America's Fiduciary Duties

When interpreting the LLC Agreement, the Court must, as with any contract, begin the analysis with an examination of the plain language.[44] The Court may look to extrinsic evidence of the parties' intent only if the contractual language is ambiguous, and it may not twist the contract's language to manufacture ambiguity.[45]

Defendants contend that the only conflict of interest created by the merger is between America, an Affiliate of Energy, and Energy itself, which, as they note,

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[44] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992).

[45] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997). Plaintiffs' briefs cite Energy's Prospectus, attached to the Opening Brief in Support of Defendants' Motion to Dismiss as Exhibit C, as evidence of the Agreement's meaning. Both because of general principles of construction and because the Agreement contains an integration clause stating that the Agreement "constitutes the entire agreement among the parties hereto. . . ," the Court will not consider the Prospectus or other extrinsic evidence of the meaning of the LLC Agreement's plain language. *See* LLC Agreement § 14.4.

had to approve the merger before it could go into effect. They argue that such a conflict is fully resolved under the procedures established in § 7.9(a) of the LLC Agreement. Plaintiffs, in contrast, define the conflict as between America, as Energy's controlling unitholder, and Energy's public unitholders. In that case, they say, § 7.9(a) would not apply, with the result that America's traditional fiduciary duties would remain in effect. Section 7.9(a) reads, in relevant part:

> [W]henever a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company or any Group Member, on the other, any resolution or course of action by the Board of Directors in respect of such conflict of interest shall be permitted and deemed approved by all Members, and shall not constitute a breach of this Agreement . . . or of any duty existing at law, in equity or otherwise, including any fiduciary duty, if the resolution or course of action in respect of such conflict of interest is (i) approved by Special Approval, (ii) approved by the vote of holders of a majority of the Outstanding Common Units (excluding Common Units held by interested parties), (iii) on terms no less favorable to the Company than those being generally available to or available from unrelated third parties or (iv) fair and reasonable to the Company, taking into account the totality of the relationships between the parties involved (including other transactions that may be particularly favorable to the Company).

The parties agree that America is an Affiliate of Energy for purposes of § 7.9(a).[46] Plaintiffs allege, and Defendants do not dispute, that America is also Energy's controlling unitholder.[47]

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[46] Opening Brief in Support of Defendants' Motion to Dismiss ("OB") at 14 n. 9. Plaintiffs' Response to Defendants' Motion to Dismiss ("RB") at 18.

[47] *See* OB at 1-3 ("On April 27, 2009, Atlas Energy . . . announced a merger by which it would become a wholly owned subsidiary of Atlas America, its chief unitholder."); RB 4-6; Compl. ¶ 46 (quoting Energy's December 2006 Prospectus: "contracts between us, on the one hand and

Delaware's case law clearly teaches that, "in the absence of provisions in the LLC agreement explicitly disclaiming the applicability of default principles of fiduciary duty, controlling members in a manager-managed LLC owe minority members the traditional fiduciary duties that controlling shareholders owe minority shareholders."[48] The Court is especially wary of eliminating such duties in the context of a publicly traded limited liability company without sufficient evidence within the contractual language of the parties' intent to do so. Thus, unless § 7.9(a) or some other provision of the LLC Agreement explicitly disclaims America's duties as controlling unitholder of Energy or mandates that the conflict presented by the merger be resolved contractually, America owes the Energy's minority unitholders traditional fiduciary duties of care and loyalty with regard to the merger.

Defendants rely upon *Brickell Partners v. Wise*[49] for the proposition that parties to a limited liability company or limited partnership agreement may contractually eliminate the conflict of interest in a transaction between a controlling party and the entity. This is undoubtedly true. The Court held in

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our manager and Atlas America and its affiliates, on the other, will not be the result of arm's length negotiations."). Even if Defendants were to contest America's status as Energy's controlling unitholder, Plaintiffs' allegations regarding America's voting interests in Energy and its control of Energy's Board and management sufficiently establish America's control of Energy for purposes of this motion to dismiss. *See Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) (holding that in the absence of a majority voting interest "[a] plaintiff must allege domination by a majority shareholder through actual control of corporate conduct.").

[48] *Kelly v. Blum*, 2010 WL 629850, at *12 (Del. Ch. Feb. 24, 2010) (internal quotations omitted).

[49] 794 A.2d 1 (Del. Ch. 2001).

Brickell that a conflict created when a limited partnership acquired a company owned by the general partner was validly resolved under a provision in the limited partnership agreement that read:

> *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,* the Operating Companies, any Partner or any Assignee, *on the other hand, any resolution or course of action 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. . . .*[50]

The relevant difference between the provision in *Brickell* and § 7.09(a) of the LLC Agreement, however, is that the *Brickell* provision explicitly addresses conflicts between the general partner and other partners, while § 7.09(a) does not mention Energy's unitholders, controlling or otherwise, at all. Defendants' reliance on *Brickell* is, therefore, misplaced.

Defendants also cite *Flight Options Int'l., Inc. v. Flight Options LLC* to show that a limited liability company agreement may establish contractual standards for governing conflicted transactions between the company and its affiliates that replace the company's "general fiduciary duties."[51] In that case, the Court observed that if the defendants were "subject to the full panoply of fiduciary duties . . . , the appropriate standard for review of their conduct would be 'entire

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[50] *Id.* at 2-3. (emphasis in original).
[51] 2005 WL 2335353, at *7-*8 (Del. Ch. Sept. 20, 2005).

fairness' . . . ."[52] In fact, the limited liability company agreement did provide that the company's members owed each other the same fiduciary duties that shareholders of a Delaware corporation have to each other. The agreement, however, also provided a standard of review governing conflicted transactions involving the controlling member: "[A]ll transactions between the Company on one the one hand, and any Affiliate of the Company on the other hand, will be on arms' length terms and conditions, including fair market values . . . ."[53] Noting that the members of the limited liability company were all sophisticated parties, the Court held that the provision was enforceable and that it limited the controlling members' fiduciary duties with regard to an interested transaction with the company to a duty to negotiate the transaction on arms' length terms, instead of imposing a duty to assure that the transaction would be entirely fair to the minority members.

Section 7.9(a) of the LLC Agreement differs materially from the provision quoted from the *Flight Options* limited liability company agreement. While the latter provision applied to "transactions" between the company and its affiliates, § 7.9(a) governs only "conflicts of interest" between Energy and its Affiliates, such as America. The contractual language of § 7.9(a) does not purport to resolve conflicts of interest between America and Energy's minority unitholders.

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[52] *Id.* at *7 n. 28.
[53] *Id.* at *7.

This Court recently addressed the import of a provision, similar to § 7.9(a) of the LLC Agreement in that it covered "conflicts of interest," in the context of construing a limited partnership agreement. In *Lonergan v. EPE Holdings LLC*,[54] the plaintiffs, limited partners, sought to enjoin a merger between the general partner and the limited partnership, but the limited partnership agreement both provided a contractual standard that governed conflicts of interest under the agreement, and also specifically eliminated the general partner's fiduciary duties to the limited partners.[55] The Plaintiffs claimed that the implied covenant of good faith and fair dealing required that the merger be reviewed under entire fairness. The Court rejected the plaintiffs' claims under the implied covenant as an attempt to revive fiduciary duties that had been eliminated by contract. It reviewed the merger under the contractual standard provided in the limited partnership agreement and held that the plaintiffs had failed to state a colorable claim that the merger process had not satisfied that contractual standard.[56]

The LLC Agreement differs from the limited partnership agreement in *Lonergan* in two determinative respects. First, the LLC Agreement does not eliminate America's fiduciary duties as the controlling unitholder of Energy. Although the LLC Act explicitly allows modification or elimination of members'

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[54] 2010 WL 3987173 (Del. Ch. Oct. 11, 2010).
[55] *Id.* at *7, *9-*10.
[56] *Id.* at *12.

fiduciary duties,[57] § 7.9(d) eliminates only directors and officers' fiduciary duties. Although Article 12 of the LLC Agreement eliminates directors' fiduciary duties (including those imposed by § 7.9(b)) when they decline to approve a merger, Article 12 does not mention the duties of Energy's members or eliminate any fiduciary duties when the Board acts to approve a merger. Because the LLC Agreement does not eliminate America's fiduciary duties, America owes Energy's minority unitholders "the traditional fiduciary duties that controlling shareholders owe minority shareholders."[58]

Second, Section 7.9(a) of the LLC Agreement, which provides a contractual standard of review when conflicts arise between Energy and Energy's Affiliates, does not apply to conflicts of interest between America (which the parties agree is

[57] 6 *Del. C.* § 18-1101(d) ("A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to . . . another member or manager. . . .").

[58] *Kelly v. Blum*, 2010 WL 629850, at *12 (Del. Ch. Feb. 24, 2010). Indeed, Defendants have not directly argued that the LLC Agreement specifically eliminates America's duties as Energy's controlling unitholder, and their general arguments that the LLC Agreement was never meant to impose fiduciary duties on any party (*see, e.g.,* Tr. of Oral Arg. (July 20, 2010) at 14) fail. That the LLC Agreement expressly eliminates the fiduciary duties of some individuals and entities does not lead to the conclusion that the fiduciary duties of others are eliminated by implication. Similarly, Defendants' argument that § 7.9(a) must eliminate America's fiduciary duties as controlling unitholder because any other interpretation would render part of the provision surplusage must also fail. Defendants contend that, because § 7.9(d) eliminates the fiduciary duties of Energy's directors and officers, the only duties left for § 7.9(a) to eliminate are America's. The Court must, if it can reasonably do so, construe the LCC Agreement in a way that gives meaning to all of its terms. S*ee Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010). The words "including fiduciary duties" may in fact be surplusage here: as Defendants note, the LLC Agreement eliminates fiduciary duties "not once, but three times . . . ." (RB at 11). That the phrase "including fiduciary duties" appears both in § 7.9(a) and § 7.9(d), however, is not justification to extend the application of § 7.9(a) to entities not specified in the text.

an Affiliate of Energy) and Energy's public unitholders. America owes fiduciary duties directly to the minority unitholders. The merger created a conflict between America's interest in acquiring the balance of Energy for the lowest possible price and the minority unitholders' interest in obtaining a high price for their units. Section 7.9(a) of the LLC Agreement simply does not address this conflict of interest and, thus, does not provide the standard of review applicable to this dispute. Because neither § 7.9(a) nor any other section of the LLC Agreement contractually defines the standard under which a merger between America and Energy should be assessed, the Court must review the merger, and America's duties with regard to it, under the standards prescribed by the common law.[59]

The Delaware Supreme Court held, in *Kahn v. Lynch*, that a negotiated merger between a corporation and its controlling shareholder must be evaluated

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[59] Defendants read § 7.9 to allow for resolution of all conflicts relating to an interested transaction. In short, they identify a conflict between America and Energy and contend that conflict is substantially the same as any conflict between America and the minority unitholders regarding the merger. They argue that the LLC Agreement provides a means for resolving all conflicts arising out of the same set of facts and reaches all stakeholders who may be affected by the conflict. They cite Energy's 2006 Prospectus as support for that interpretation: "Whenever a conflict arises between Atlas America, or manager or their affiliates on the one hand, and us *or any other unitholder*, on the other, our board of directors will resolve that conflict." (Prospectus at 141) (emphasis added). The language referring to unitholders does not appear in the LLC Agreement, however, and, as extrinsic evidence, the Court may only consider the Prospectus if § 7.9(a) is ambiguous. The Court need not decide, for purposes of the pending motion to dismiss, whether the LLC Agreement is ambiguous, especially where the parties have not focused on the issue of ambiguity. Here, it is sufficient that Plaintiffs have advanced a plausible interpretation of § 7.9(a)'s text that supports their claim.

Furthermore, if § 7.9(a) is ambiguous and the Court's analysis may be informed by the words of the Prospectus (or other extrinsic evidence), the question of whether the text of the LLC Agreement is clear enough to accomplish the objective attributed to it by the Defendants need not be resolved by the Court in the context of the pending motion to dismiss.

under entire fairness regardless of any safeguards the deal includes to protect the minority's interest.[60] Although the standard of review that applies to tender offers involving a subsidiary and its parent remains subject to doubt, the instruction of *Lynch* and its more recent progeny that, in the context of a negotiated merger, "protective device[s] such as independent committee approval or majority-of-the-minority stockholder approval cannot alter the standard of review," is well established.[61] This is so because, regardless of the safeguards a board may employ to protect the interests of the minority, such a merger is characterized by what this Court has termed "inherent coercion."[62] A controlling party has advantages over the minority with regard to information, timing, and the ability to "influence, however subtly, the vote of [the ratifying] minority."[63] Because a parent's merger with its subsidiary is "entirely suffused with the parent's coercive power," a court must review the transaction under entire fairness to assure that the parties "are assiduous in fulfilling their fiduciary duties."[64]

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[60] *Kahn* v. *Lynch Comm. Sys., Inc.,* 638 A.2d 1110, 1116 (Del. 1994); *see also Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 500 (Del. Ch. 1990) (applying the entire fairness standard in the context of a stock-for-stock parent-subsidiary merger).
[61] *In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2705147, at *4-*6 (discussing the multiple alternative standards of judicial review that can apply in the context of tender offers by a controlling shareholder seeking to acquire the corporation); *see also In re Pure Resources, Inc., S'holders Litig.*, 808 A.2d 421, 437 (Del. Ch. 2002) ("If anything, later cases have extended the rule in *Lynch* to a broader array of cases involving controlling shareholders.")
[62] *Pure Resources,* 808 A.2d at 433.
[63] *Lynch*, 638 A.2d at 1116-17, quoting *Citron*, 584 A.2d at 502.
[64] *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1144 (Del. Ch. 2006).

Defendants urge the Court not to import the concept of entire fairness into this case because it concerns a limited liability company instead of a corporation. Emphasizing that limited liability companies are creatures of contract, they argue that the protections provided by the common law to minority shareholders are unnecessary because parties are able to define the protections they desire by contract. Had the LLC Agreement expressly addressed the duties and the conflict of interest at issue in this case, Defendants would have been correct.

Just as a merger between a parent and its corporate subsidiary inherently threatens the interests of minority shareholders, a merger between a parent and its publicly held limited liability company subsidiary inherently threatens the rights of minority unitholders. The difference is that, in the context of a limited liability company, the parties can specify by contract the protections, or lack thereof, that they want the minority to have against such threats. If they do so, a court will respect the parties' freedom of contract and will not apply the default standard of review.

As with limited partnership agreements,[65] however, parties to a limited liability company agreement bear the risk that they have drafted it incompletely. The LLC Agreement neither eliminates the fiduciary duties that the common law imposes by default on America, nor provides a contractual standard of review that

[65] *See Lonergan*, 2010 WL 3987173, at *8.

governs the conflict of interest arising out of those duties. America owes the public unitholders of Energy the same fiduciary duties a controlling shareholder would owe minority shareholders in the corporate context. Under *Lynch* and its progeny, the Court must evaluate America's merger with Energy under entire fairness in order to assure that America has been assiduous in fulfilling those duties.

2. <u>Evaluation of Plaintiffs' Claims under the Entire Fairness Standard</u>

The conclusion that a transaction must be reviewed under entire fairness "normally will preclude dismissal of a complaint on a Rule 12(b)(6) motion to dismiss."[66] Nonetheless, the Court must determine whether Plaintiffs' allegations suggest that the merger was not entirely fair; that is, that the merger was not characterized by fair price and fair dealing.[67]

With regard to price, Plaintiffs allege, *inter alia*, that the exchange ratio at which Energy's public unitholders received America stock under the merger agreement undervalued Energy and did not adequately compensate unitholders for the loss of cash distributions.[68] They argue that the final exchange ratio, which represented a 0.3% premium on Energy's then-current trading price of $14.35 per unit (and which had been negotiated up from America's initial offer, equivalent to

[66] *Orman v. Cullman*, 794 A.2d 5, 42 (Del. Ch. 2002).
[67] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703, 711 (Del. 1983).
[68] *See* Compl. ¶¶ 70-82.

$12.43 per unit, a discount of more than 13% relative to Energy's trading price on the day America made the offer) was "grossly inadequate."[69] Plaintiffs allege that Energy had been, at the time, trading at an historic low, and contend that the ratio did not account for the company's future prospects.[70] Among other specific allegations, Plaintiffs note that one candidate to become the Special Committee's financial advisor had evaluated Energy as, "unique among Production MLPs in that its asset base should warrant a premium valuation . . . due to the emergence of the Marcellus Shale."[71] They further allege that UBS, which was ultimately selected as the Committee's financial advisor, had charted "the then current exchange ratio of Energy units versus America stock with a 15% and 30% premium at 1.27x and 1.44x, respectively . . . ."[72] In light of the 0.3% premium they ultimately received, Plaintiffs have alleged facts suggesting that Energy's outstanding units were worth materially more than what the unitholders received under the merger agreement.

With regard to process, Plaintiffs allege that America, through its directors and officers who were also part of Energy's Board or its management, withheld material information from the Special Committee and improperly influenced its

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[69] Compl. ¶¶ 70.
[70] *Id.* at ¶ 70.
[71] *Id.* at ¶ 76.
[72] *Id.* at ¶ 71.

deliberations.[73] They further allege that America imposed "'take it or leave it' conditions and eviscerate[ed] the Energy's Board's power to negotiate or resist."[74] For example, Plaintiffs assert that America forced the Special Committee to accept § 4.15 of the merger agreement, which eliminated cash distributions to Energy's unitholders during the pendency of the merger.[75] They allege that America framed the Five Alternatives without input from Energy, limiting Energy's choices from the outset, and then presented the Five Alternatives to Energy in such a way as to make a merger between the two companies appear to be the Special Committee's only choice.[76]

Plaintiffs next allege that America had existing relationships with "the same players" at UBS who served as the Special Committee's financial advisors and that America exerted its influence over those UBS employees to feed information to the Special Committee selectively and to cause UBS to issue an improperly favorable fairness opinion on the merger's terms.[77] Plaintiffs' allegations regarding process are somewhat weaker and less specific than the allegations regarding price, but the Court must consider "all relevant factors" when conducting a review for entire fairness.[78]

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[73] *See, e.g.*, Compl. ¶¶ 92, 98.
[74] *Id.* at 85.
[75] *Id.* at ¶¶ 86, 99. The merger agreement is attached to the Complaint as Exhibit J.
[76] *Id.* at ¶¶ 95, 97.
[77] *Id.* at ¶¶ 104-110.
[78] *Weinberger*, 457 A.2d at 711.

Taken together, Plaintiffs' allegations as to price and process, which the Court must take as true for purposes of Defendants' motion, adequately suggest that the merger was not entirely fair to Energy's public unitholders. Thus, the Court denies Defendants Motion to Dismiss with regard to Plaintiffs' claim for breach of fiduciary duty by America.

B. *Claims Against the Individual Defendants*

The Court next addresses Plaintiffs' claims against Energy's directors and officers, beginning with analysis of the duties Individual Defendants owed to Plaintiffs with regard to the merger under the terms of the LLC Agreement.

1. <u>Duties of the Individual Defendants</u>

Section 7.9(d) of the LLC Agreement provides, "Except as expressly set forth in this Agreement or required by law, none of the Directors, nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Company or any Member." This language unambiguously eliminates the traditional fiduciary duties of Energy's directors and officers. Thus, the only duties owed by the Individual Defendants are those set forth elsewhere in the LLC Agreement or imposed by the implied covenant of good faith and fair dealing.[79]

[79] *See Lonergan*, 2010 WL 3987173, at *7 (construing a similar provision in a limited partnership agreement).

Section 7.9(b) imposes the following contractual duty of good faith on Energy's directors and officers unless another provision of the LLC Agreement expressly provides otherwise:

> Whenever the Board of Directors or any Director or Officer makes a determination or takes or declines to take any other action . . . then, unless another express standard is provided for in this Agreement, the Board of Directors or such other Director of Officer shall make such determination or take or decline to take such other action in good faith . . . . In order for a determination or other action to be in "good faith" for the purposes of the Agreement, the Person or Persons making such determination or taking or declining to take such other action must believe that the determination is in the best interest of the Company.[80]

Section 7.9(b) contractually imposes on Energy's officers and directors a fiduciary duty to act in good faith in all cases unless a different provision of the LLC Agreement specifically imposes a different duty. For purposes of the LLC Agreement, an act is in good faith if the actor subjectively believes that it is in the best interests of Energy. Thus, while under Delaware's common law, "the objective elements of good faith dominate the subjective element,"[81] under § 7.9(b), only the subjective intent of Energy's officers and directors matters when determining whether they acted in good faith.

Plaintiffs argue that Section 7.9(b)'s limited and subjective definition of good faith, which is narrower than Delaware's common law conception of good

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[80] LLC Agreement § 7.9(b).

[81] *Desimone v. Barrows*, 924 A.2d 908, 951 (Del. Ch. 2007)(quoting Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law,* 31 Del. J. Corp. L. 1, 23 (2006)).

faith, is unenforceable. They contend that the contractual definition of good faith eliminates the implied covenant of good faith and fair dealing from the LLC Agreement, which is impermissible under the Delaware LLC Act.[82]

This argument misconstrues the role of the implied covenant of good faith and fair dealing, which is "a limited and extraordinary legal remedy" that addresses only events that could not reasonably have been anticipated at the time the parties contracted.[83] The covenant does not, therefore, dictate to parties the terms they must or must not include in a contract, but instead protects a party from arbitrary conduct that was objectively unanticipated by the terms of the contract and that frustrates the "fruits of the bargain that the asserting party reasonably expected."[84] More specifically, where the parties have contractually agreed to eliminate fiduciary duties, they may not invoke the implied covenant as a back door through which such duties may be reimposed after the fact.[85] Section 7.9(d) of the Agreement uses unambiguous language to eliminate the fiduciary duties of Energy's directors and officers. Section 7.9(b), just as clearly, imposes a standard

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[82] 6 *Del. C.* § 18-1101(c).
[83] *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010) ("Delaware's implied duty of good faith and fair dealing is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not . . . .").
[84] *Id.* at 1126. (describing the role of the implied covenant).
[85] *Lonergan*, 2010 WL 3987173, at *8 ("To use the implied covenant to replicate fiduciary review would vitiate the limited reach of the concept of the implied duty of good faith and fair dealing." (internal quotations omitted).

of subjective good faith upon them.[86] That Defendants would rely upon the provision is not "reasonably unanticipated," and Plaintiffs cannot invoke the implied covenant to override these provisions. Thus, an Energy director or officer satisfies the duty to act in good faith under § 7.9(b) of the LLC Agreement if she subjectively believes her conduct is in the best interest of Energy and its unitholders.

Plaintiffs argue, however, that regardless of the standard imposed by § 7.9(b) on most conduct under the LLC Agreement, Article 12 of the agreement specifically imposes different fiduciary duties on them when they act to approve a merger. Article 12, "Merger, Consolidation or Conversion," does, in fact, alter the fiduciary duties of Energy's directors and officers in one context: § 12.2 provides that "the Board of Directors shall have no duty or obligation to consent to any merger . . . and may decline to do so free of any fiduciary duty or obligation whatsoever to the Company or any Member . . . ." Thus, the Directors owe no duty, except to act in accordance with the implied covenant of good faith and fair dealing, when they act to decline a merger. In addition, Plaintiffs contend that the absence of any reference in § 12.2 to the duties that the Board owes when they act to *approve* a merger indicates that Energy's directors are subject to full traditional fiduciary duties in that context. Defendants counter that § 12.2 eliminates the duty

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[86] 6 *Del. C.* §§ 18-1101(c), (e).

of good faith imposed by § 7.9(b) when the Board of Directors declines to enter a merger, but leaves the duty imposed by § 7.9(b) in effect when the Board of Directors approves a merger.

Defendants' reading of Article 12 is the proper one. Section 7.9(b) of the LLC Agreement defines the duty of good faith that is imposed on Energy's directors and officers unless a different duty is specified. Section 12.2 does not specify that any particular duty applies to directors deciding to approve a merger. Reading the various provisions of the LLC Agreement in harmony, the Court concludes that § 7.9(b)'s duty to act in good faith applies to Energy's Board of Directors' and officers' conduct with regard to negotiating and adopting the merger agreement.

Thus, to state a claim for breach of the contractually defined fiduciary duty against the Individual Defendants, Plaintiffs must present allegations that Individual Defendants negotiated and ultimately approved the merger with America in a manner they subjectively believed was not in the best interests of Energy and its unitholders. The Court will consider Plaintiffs' allegations against each Individual Defendant, beginning with those who served on the Special Committee.

2. Analysis of the Individual Defendants' Conduct under the Duty of Subjective Good Faith Created by § 7.9(b)

a. *Defendants Warren, W. Jones, and Davis*

Defendants Warren, W. Jones, and Davis comprised the Special Committee that Energy's Board formed to consider the Five Alternatives. Each was an independent director with respect to America, and Plaintiffs have not attacked their independence except to note that each was promised a seat on the Board of Directors of the surviving company if Energy merged with America.[87] Plaintiffs allege that the Special Committee did not give due consideration to any strategic option for Energy besides the merger with America, and they cite notes taken by Defendant Davis suggesting that she, even before joining Energy's Board of Directors or the Special Committee, viewed a merger with America as the best option for Energy.[88] Plaintiffs say that throughout the process of considering, negotiating and approving the merger, the Special Committee briefly considered various options (from pursuing third party ventures as an alternative to the merger to suggesting inclusion of a majority of the minority provision in the merger agreement once negotiations were underway), but was ultimately constrained from pursuing them by America's dominant negotiating position.

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[87] Compl. ¶ 49.
[88] *Id.* at ¶ 97.

While allegations that the Special Committee failed even to look at all of its options or to negotiate the best deal available might suffice to state a colorable claim for breach of the traditional fiduciary duties of care and loyalty, they do not suggest the type of subjective bad faith required to state a claim under the duty imposed by § 7.9(b) of the LLC Agreement. Even the allegation that the Special Committee's independence was compromised by America's offer to guarantee the Independent Directors seats on the surviving company's Board of Directors does not suggest that the Special Committee believed it was acting *against* Energy's interest, since there is no allegation that the guaranteed seats on the Atlas Energy, Inc. Board caused the Special Committee members to agree to a merger they subjectively believed was not in Energy's best interest.[89]

Only one allegation directly addresses the Special Committee members' subjective motivations and approaches a suggestion they believed they were acting against the best interests of Energy's unitholders, but even that allegation is not sufficient to sustain Plaintiffs' claims against the Special Committee members. Section 4.15 of the merger agreement, executed on April 27, 2009, suspended all of Energy's future cash distributions to unitholders, beginning with the distribution due to be announced that very day. Plaintiffs accuse the Special Committee of

[89] *See id.* at ¶ 48; *see also, e.g., Krim v. ProNet, Inc.*, 744 A.2d. 523, 528 n.16 (Del. Ch. 1999) ("[T]he fact that several directors would retain board membership in the merged entity does not, standing alone, create a conflict of interest.").

deciding to eliminate Energy's cash distributions to unitholders despite their knowledge that eliminating the distributions would harm certain unitholders.[90] Plaintiffs say the Special Committee improperly caved to America's insistence that distributions be eliminated and that the merger be approved on or before April 27, 2010, when Energy would have been obligated to announce distributions based on first quarter earnings.[91] Plaintiffs allege that the Special Committee members made the decisions in spite of their knowledge that a March 23, 2009, presentation by UBS (when it was seeking appointment as the Special Committee's financial advisor) had indicated that "one of the cons" of eliminating distributions was that such an action would have "[n]egative implications for unitholder base."[92] Specifically UBS had noted that "[c]ertain funds are prohibited from holding no-distribution paying units" and identified the possibility that units would produce "[p]otentially insufficient cash flow to offset taxable income."[93]

Although Plaintiffs' complaint, understandably, did not include any "pros" that UBS might have mentioned along with the one negative consequence Plaintiffs identified, standing alone, these allegations are of the type that might be sufficient to defeat a motion to dismiss. Here, however, they do not stand alone. Plaintiffs' allegation that "America even indicated that any continuation of cash

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[90] Compl. ¶¶ 111, 120.
[91] *Id.* at ¶ 67.
[92] *Id.* at ¶ 120.
[93] *Id.*

distributions would result in an even lower exchange ratio," demonstrates that the Special Committee was forced to weigh the consequences of ceasing distributions against the possibility of getting a worse deal for all unitholders.[94] That the Special Committee members chose one alternative over the other does not suggest that they acted with the subjective bad faith necessary to support a claim that they breached the duty of good faith imposed on them by § 7.9 of the LLC Agreement. Indeed, none of Plaintiffs allegations suggests the members of the Special Committee were being insincere when they, in Plaintiffs' words, "determined by unanimous vote that the Merger was advisable, fair and reasonable to and in the best interests of Energy and its public unitholders, and recommended the Merger to the full Energy Board."[95] Thus, the Court will dismiss Plaintiffs' claims against Defendants Warren, W. Jones, and Davis.

b. *Defendants E. Cohen, J. Cohen, Weber, M. Jones, Wolf, and Herz*

Plaintiffs likewise fail to state claims against the remaining Individual Defendants. Although Plaintiffs accuse certain defendants of conduct that might constitute breach of traditional fiduciary duties, they do not allege that the Individual Defendants engaged in conduct with the subjective belief that it was contrary to Energy's best interests.

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[94] *Id.* at ¶ 112.
[95] *Id.* at ¶ 64.

According to the Complaint, for example, E. Cohen single-mindedly pursued a merger between America and Energy. Plaintiffs believe that other alternatives may have benefited Energy more, but they do not allege that E. Cohen shared their belief and yet pursued a merger nevertheless. Plaintiffs accuse E. Cohen of advocating eliminating Energy's cash distributions for months before the merger was proposed, but their allegations show that he first did so in the context of discussing the effects of the economic downturn on Energy and America, and that he later explained that his intent was for the surviving Atlas Energy, Inc. to use the cash of both companies to develop the Marcellus Shale.[96] Such allegations do not show that E. Cohen acted with subjective bad faith towards Energy or its unitholders. Plaintiffs do not allege that E. Cohen believed other than that Development of the Marcellus Shale would ultimately benefit Atlas Energy, Inc, and thus, Energy's unitholders (through their ownership interest in the surviving company). Whether that belief was correct is not relevant under the standard prescribed by the LLC Agreement, absent some allegation that E. Cohen intended to harm Energy or its unitholders. As with their allegations regarding elimination of the cash distributions, Plaintiffs' contentions that E. Cohen steered specific information to or otherwise influenced, the Special Committee to approve the merger do not suggest that he believed his efforts were harming Energy or its

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[96] *Id.* at ¶¶ 50, 53.

unitholders. It is clear that E. Cohen pursued the merger zealously; Plaintiffs have not alleged that he acted with subjective bad faith.

Plaintiffs' allegations against the other Independent Directors are similar in character to, but less specific than, those against E. Cohen. They describe the reasons each Defendant was conflicted, but acknowledge the actions the Energy Board took to alleviate those conflicts. While Wolf, previously a member of the Conflicts Committee, held a financial interest in America, he recused himself with regard to proposed transactions involving America. Although Plaintiffs correctly note that Defendants E. Cohen, J. Cohen, Weber, M. Jones, and Herz had fiduciary duties to America to get the best deal for that company in any merger with Energy, these directors dealt with the conflict by appointing the independent directors to the Special Committee and giving the Special Committee the authority to negotiate on Energy's behalf. As with their allegations against E. Cohen, Plaintiffs' allegations against the other Individual Defendants that they failed to present certain alternatives to the Special Committee or that they tried to influence the Special Committee to approve the merger do not suggest that they did so under the belief that they were acting against Energy's best interests. Because Plaintiffs' allegations against the remaining Individual Directors do not show that they acted in violation of the duty imposed on them by § 7.9(b) of the LLC Agreement, the claims against Defendants E. Cohen, J. Cohen, Weber, M. Jones, Wolf, and Herz will be dismissed.

V. CONCLUSION

For the reasons set forth above, the Court denies Defendants' Motion to Dismiss as to Count I of the Complaint, which alleges claims against America, but the Court grants Defendants' Motion to Dismiss as to Count II of the Complaint, which alleges claims against the Individual Defendants. An implementing order will be entered.