IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re ATLAS ENERGY RESOURCES, LLC UNITHOLDER LITIGATION	**FEBRUARY 18, 2010** Consolidated C.A. No. 4589-VCN **PUBLIC VERSION**

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Dated: February 18, 2010

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Defendants Atlas America, Inc. ("Atlas America"), Edward E. Cohen, Jonathan Z. Cohen, Richard D. Weber, Matthew A. Jones, Walter C. Jones, Ellen F. Warren, Bruce M. Wolf, Jessica K. Davis, and Daniel C. Herz (the "Individual Defendants") and nominal defendant Atlas Energy Resources, LLC ("Atlas Energy") (collectively, "Defendants"), respectfully submit this Opening Brief in support of their Motion to Dismiss the Amended Verified Consolidated Class Action Complaint (the "Amended Complaint"), pursuant to Court of Chancery Rule 12(b)(6).

PRELIMINARY STATEMENT

On April 27, 2009, Atlas Energy, a limited liability company, announced a merger by which it would become a wholly owned subsidiary of Atlas America, its chief unitholder (the "Merger"). The Merger was a "stock-for-stock" deal whereby Atlas Energy unitholders received shares of Atlas America, a publicly traded, widely held corporation with *no* controlling shareholder. Reaction to the Merger was overwhelmingly positive: the equity of Atlas Energy jumped 25% within the first week of the Merger's announcement, and on September 25, 2009, Atlas Energy unitholders approved the Merger, with 99.5% of all votes cast — including a majority of all unaffiliated unitholders and over 98% of voting unaffiliated unitholders — favoring the transaction. The Merger closed on September 29, 2009, with shares of the combined company having more than doubled in value since the Merger was announced.

Plaintiffs, purportedly on behalf of a class of former unaffiliated Class B unitholders of Atlas Energy, challenge the Merger. Although Plaintiffs sought expedition and moved for a preliminary injunction blocking the Merger, after receiving and reviewing a substantial documentary record, they withdrew that motion. Likewise, conceding that the final joint Proxy Statement provided unitholders with all material information necessary to a fully informed vote, Plaintiffs have dropped from the Amended Complaint the disclosure claims pressed in their original action. But now, having reaped the benefits of the transaction, Plaintiffs

nevertheless persist in pursuing this action, claiming that the Merger was tainted by conflict and unfair to the very same group of unitholders who voted overwhelmingly to approve it.

This action, however, cannot be sustained as a matter of law. Plaintiffs apparently rely on the argument that, because this transaction involves a controlling unitholder — Atlas America — the Merger must be evaluated by reference to traditional corporate fiduciary law. Thus, the Amended Complaint sets forth claims based upon an "entire fairness" rubric and brings claims *only* for breaches of fiduciary duty. But Atlas Energy was not a corporation at all. It was a limited liability company governed by an LLC Agreement that: (a) expressly addressed the possibility of conflicts between Atlas America and Atlas Energy or its unitholders; (b) set forth a contractual conflict resolution mechanism to be followed whenever such conflicts arose; and (c) explicitly eliminated fiduciary duties. The LLC Agreement was publicly filed and made available to all purchasing unitholders, and Delaware law is clear that contractual provisions govern LLC transactions and are to be fully honored. Plaintiffs' theory, on the other hand, would require overturning well-settled Delaware law and invalidating Atlas Energy's LLC Agreement. Because Defendants fully complied with the provisions of the LLC Agreement — and Plaintiffs do not allege otherwise — the Amended Complaint must be dismissed.

BACKGROUND[1]

A. The Parties

Nominal Defendant Atlas Energy[2] was a publicly traded Delaware limited liability company headquartered in Moon Township, Pennsylvania that operated as an energy holding

[1] Solely for the purposes of this Motion to Dismiss, Defendants accept as true the facts set forth in Plaintiffs' Amended Complaint. *See La. Mun. Police Employees' Ret. Sys.* v. *Fertitta*, 2009 WL 2263406, at *9 n.38 (Del. Ch. July 28, 2009).

[2] It is unclear why Plaintiffs have chosen to name a nominal defendant in a class action. Plaintiffs are pursuing class and not derivative claims, thus Atlas Energy should be dismissed as an improper party.

company whose wholly owned subsidiaries developed and produced natural gas and oil. Am. Compl. ¶¶ 13, 27; Atlas Energy Resources, LLC, Annual Report (Form 10-K), at 1 (Mar. 2, 2009) ("Energy 2008 10-K," attached hereto as Exhibit A). Prior to the Merger, Atlas Energy membership units traded on the New York Stock Exchange. Am. Compl. ¶ 14. Atlas Energy regularly paid cash distributions to its unitholders, subject to available liquidity. *Id.*; Energy 2008 10-K at 25. Among other assets, Atlas Energy had a significant interest in the so-called Marcellus Shale, a geological formation in the Northeastern United States containing natural gas reserves. Am. Compl. ¶¶ 1, 28, 51.

Atlas America, an energy holding company, was (and remains) a publicly traded Delaware corporation headquartered in Moon Township, Pennsylvania. Atlas America, Inc., Annual Report (Form 10-K), at 1 (Mar. 2, 2009) ("America 2008 10-K," attached hereto as Exhibit B). Atlas America common stock was publicly traded on the NASDAQ. *Id.* at 3. Atlas America wholly owned Atlas Energy Management, Inc., which in turn owned 100% of Atlas Energy Class A units and managed Atlas Energy's day-to-day operations. Am. Compl. ¶¶ 14-15; Energy 2008 10-K at 5, 19. Prior to the Merger, Atlas America also owned approximately 47.3% of the Atlas Energy Class B units. Am. Compl. ¶ 15. As a result of its ownership of nearly half of the Class B units, Atlas America received approximately half of any cash distributions made by Atlas Energy. *Id.* ¶¶ 1, 15. Through its control of Class A units, Atlas America was also entitled to significant additional distributions tied to the distributions to Class B holders. *Id.* ¶ 15; Atlas Energy Resources, LLC, Amended Registration Statement (Form S-1/A) (Dec. 5, 2006) ("S-1" or "Prospectus," attached hereto as Exhibit C), at 10-13.[3] Upon the

[3] This Court may consider the contents of the Prospectus on a motion to dismiss. *See, e.g., Robotti & Co., LLC* v. *Liddell*, 2010 WL 157474, at *6 (Del. Ch. Jan. 14, 2010) (considering the contents of a publicly filed prospectus on motion to dismiss, rejecting plaintiffs' argument that consideration of a prospectus required conversion to summary judgment).

closing of the Merger, Atlas America acquired the Class B units it did not already own, cancelled the Class A units and was renamed Atlas Energy, Inc. Am. Compl. ¶ 65.

The Individual Defendants were members of the board of directors and/or management of Atlas Energy. *Id.* ¶¶ 16-24. Defendants Warren, Davis, and W. Jones, who were Atlas Energy directors unaffiliated with Atlas America, were also members of the Special Committee that considered the Merger. *Id.* ¶ 57. Defendants Herz, J. Cohen, E. Cohen, and M. Jones were also members of the board of directors and/or management of Atlas America. *Id.* ¶¶ 16, 17, 19, 24.

Prior to the closing of the Merger, Operating Engineers Construction Industry and Miscellaneous Pension Fund and Montgomery County Employees' Retirement Fund ("Plaintiffs") allegedly were unitholders of Atlas Energy. *Id.* ¶¶ 11-12. Their combined 21,500 units, at the time they became lead plaintiffs, accounted for roughly 0.064% of the total publicly owned units of Atlas Energy. *See* Tr. of Oral Argument at 7 (No. 4553) (June 15, 2009) ("Hearing Tr.," attached hereto as Exhibit D). Plaintiffs purport to bring this action on behalf of themselves and all other former Class B unitholders of Atlas Energy (aside from Defendants and their affiliates). Am. Compl. at 1.

B. Atlas Energy's Structure as a Limited Liability Company

Atlas America has been in the energy industry for more than four decades. Am. Compl. ¶ 13. In June 2006, Atlas America created Atlas Energy to own and operate, by and through one or more of its wholly owned subsidiaries, Atlas America's significant oil and natural gas assets; the two companies have since been closely related and commonly managed. *Id.*

After formation of Atlas Energy, one of Atlas America's primary assets — other than cash on hand — consisted of its ownership interest in Atlas Energy.[4]

Shortly after its formation, Atlas Energy became a publicly traded limited liability company and approximately 17% of its equity was made available to investors in an initial public offering (the "IPO"). *Id.* In conjunction with the IPO, Atlas America and Atlas Energy, together with any future purchasers of Atlas Energy's public units, were parties to an Amended and Restated Operating Agreement (the "LLC Agreement," attached hereto as Exhibit E), a 78-page contract that set forth in detail the procedures and provisions governing the operation of Atlas Energy going forward. Am. Compl. ¶¶ 8, 26, 45, 125-131. A complete copy of the LLC Agreement was annexed to the Prospectus, which was made available to interested investors and filed in connection with the IPO. *Id.* ¶ 46.[5] In addition to explaining in detail Atlas America's and Atlas Energy's shared assets and common management, the Prospectus summarized the key contractual provisions of the governing LLC Agreement. It also informed investors that by purchasing common units of Atlas Energy, they were "deemed to have agreed to be bound by all of the terms of [the] limited liability company agreement." Prospectus at 14.

The Prospectus highlighted, among other things, two features of Atlas Energy's LLC structure. First, the Prospectus explained that under the LLC Agreement, Atlas Energy would be governed by standards different from those applicable to Delaware corporations and that any conflicts of interest — including those with Atlas America — would be resolved through a contractual mechanism created by the LLC Agreement. Thus, the directors and

[4] Atlas America also has ownership interests in Atlas Pipeline Partners, L.P., Atlas Pipeline Holdings, L.P., and Lightfoot Capital Partners LP and Lightfoot Capital Partners GP, LLC. America 2008 10-K at 3.

[5] The Court may also take judicial notice of the LLC Agreement on a motion to dismiss. *See, e.g., Kahn* v. *Portnoy*, 2008 WL 5197164, at *4 n.16 (Del. Ch. Dec. 11, 2008) (taking judicial notice of an LLC agreement).

officers of Atlas Energy were not subject to traditional Delaware fiduciary duties but, rather, would "not have any liability to [Atlas Energy] or [its] unitholders for decisions made in good faith, which is defined so as to require that they believed the decision was in our best interests." Prospectus at 37; *see also* LLC Agreement § 7.9(b). The LLC Agreement also established a specific contractual mechanism, which, as the Prospectus plainly explained, provided that "[w]henever a conflict arises between Atlas America, our 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; *see also* LLC Agreement § 7.9(a). Where this mechanism is followed, the LLC Agreement provides that "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." LLC Agreement § 7.9(a). Accordingly, all prospective investors were informed that, where a conflict transaction was approved by the board of directors, "unitholders will not be able to assert that such approval constituted a breach of fiduciary duties." Prospectus at 143.

Second, in order to put prospective investors on notice that "conflicts of interest may arise" with Atlas America, the Prospectus forthrightly disclosed the close relationship between Atlas America and Atlas Energy, noting Atlas America's large position in Atlas Energy and the significant overlap between the two companies' management. Am. Compl. ¶ 46; Prospectus at 143; *see also id.* at 14 ("Atlas America and its affiliates will own approximately 82.7% of our common units and all of our Class A units upon completion of this offering. This will give Atlas America the ability to determine virtually all matters submitted to a unitholder vote."); *id.* at 37 ("Members of our board of directors and Atlas America and its affiliates, including our manager, may have conflicts of interest with us."); Energy 2008 10-K at 36 (same).

Further underscoring that Atlas America's equity position in Atlas Energy was *not* that of a traditional general partner bound by fiduciary standards of conduct, the Prospectus explained that:

> We are unlike publicly-traded partnerships whose business and affairs are managed by a general partner with fiduciary duties to the partnership. While our manager will manage our day-to-day operations pursuant to the management agreement, subject to the oversight of our board of directors, we have no general partner with fiduciary duties to us. Our manager's duties to us are contractual in nature and arise solely under the management agreement. As a consequence, our manager will not owe a fiduciary duty to us similar to that owed by a general partner to its limited partners or a board of directors to a corporation.

Prospectus at 143.[6]

Following the IPO, as noted, Atlas America owned approximately 81% of the common units of Atlas Energy, in addition to 100% of the Class A units. Am. Compl. ¶¶ 40-41; Prospectus at 8. Subsequent issuances of stock — issuances accompanied by the same disclosures — left Atlas America holding 47.3% of the common units from May 2008 to September 29, 2009, the date the Merger closed. Am. Compl. ¶ 40.

C. The Present Posture of This Litigation

Following approximately four months of analysis and negotiation, including the use of a Special Committee of independent directors advised by its own legal and financial advisors, on April 27, 2009, Atlas America and Atlas Energy executed a merger agreement and jointly announced that they had agreed to merge in a "stock-for-stock" deal, pursuant to the terms of which public Atlas Energy unitholders would receive 1.16 shares of Atlas America stock per unit. *Id.* ¶ 65. The ratio was slightly above the then-trading ratio of Atlas Energy

[6] That management agreement was also publicly filed and provided to potential unitholders. *See* Atlas Energy Resources, LLC, Report of Unscheduled Material Events or Corporate Changes (Form 8-K), Ex. 10.3 (Dec. 22, 2006) ("Management Agreement," attached hereto as Exhibit F).

common units to Atlas America common stock. *See* Bloomberg Screenshots of Atlas Energy and Atlas America, Apr. 24, 2009 — Sept. 25, 2009 (attached hereto as Exhibit G). The reaction of the investment community to the terms of the deal was overwhelmingly positive. Units of Atlas Energy rose more than 25% in the week following the announcement of the merger — all the more remarkable since that day shareholders also learned that Atlas Energy was eliminating its cash distributions — and were trading 96% higher on September 25, 2009, the date unitholders approved the Merger at a Special Meeting. *Id.*

Atlas Energy unitholders expressed similarly uniform approval. At the Special Meeting, 99.5% of all Atlas Energy unitholders approved the Merger, including 98.65% of the unaffiliated unitholders who voted. *See* Atlas Energy Resources, LLC, Report of Unscheduled Material Events or Corporate Changes (Form 8-K), Ex. 99.1 (Sept. 30, 2009) (the "Energy 8-K," attached hereto as Exhibit H); Report of Inspector of Election at Special Meeting of Atlas Energy Unitholders (Sept. 25, 2009), at 2 ("Voting Results," attached hereto as Exhibit I). Only 180,682 units in *total* voted against the Merger, a figure that represents a mere 0.29% of units eligible to vote and just 0.54% of the total unaffiliated units. Voting Results at 2. Thus, not only did the Merger pass by an overwhelming majority of the unaffiliated units *voting*, but also by a majority of *all* outstanding unaffiliated units.[7]

On July 1, 2009, Plaintiffs filed a "Verified Consolidated Class Action Complaint" challenging both the Merger and the related disclosures. In particular, Plaintiffs complained that the deal was struck at an unfair price pursuant to an unfair process, and that Defendants' initial draft Proxy Statement failed to disclose material information regarding the

[7] *See In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) (taking judicial notice of shareholder voting results on a motion to dismiss).

negotiation process and the analyses conducted by UBS, the financial advisor to Atlas Energy's Special Committee. Notably, Plaintiffs did not even acknowledge the existence of the LLC Agreement, much less allege that its provisions had been breached.

Plaintiffs originally sought injunctive relief in advance of the unitholder vote on the Merger, moving for expedited proceedings and demanding that Defendants produce extensive documents and make numerous witnesses available for depositions in a matter of weeks. After this Court scheduled a preliminary injunction hearing for September 4, 2009, Defendants completed document production on an expedited basis, producing over 30,000 pages including, among other things, documents detailing the process followed by the Special Committee and extensive financial information about the companies, including documents going to the ability of Atlas Energy to maintain cash distributions. With the benefit of this full discovery record, on the eve of depositions Plaintiffs abruptly advised the Court that they were withdrawing their motion for a preliminary injunction and requested that the hearing be removed from the calendar. *See* Letter from Pltffs to V.C. Noble (Aug. 7, 2009). Plaintiffs opted instead to pursue their lawsuit as an equally meritless damages claim founded upon the entire fairness doctrine.

On October 16, 2009, Defendants filed an opening brief in support of their motion to dismiss Plaintiffs' complaint. On December 15, 2009, the very day Plaintiffs' opposition papers were due pursuant to the Court's scheduling order, Plaintiffs filed the Amended Complaint. Plaintiffs' allegations, however, changed little. Their chief complaint about the Merger continues to be that it reflects an unfair price, purportedly because it fails to compensate Plaintiffs for the loss of the quarterly distribution that had been regularly paid to unitholders of the LLC and because it does not offer a sufficient premium. Am. Compl. ¶¶ 7, 70-83. Plaintiffs further allege that the Merger is the product of an unfair process, apparently because of the

allegedly inherent — and, as noted above, fully disclosed — conflicts of certain of the Individual Defendants, many of whom work for and/or serve as directors of both Atlas America and Atlas Energy or are allegedly beholden to Atlas America. *Id.* ¶¶ 5, 84-124. Plaintiffs also complain that Atlas America, which as the chief unitholder and manager of Atlas Energy actually stood to *gain* significantly if cash distributions were continued, improperly "Demanded and Obtained a Cessation of Energy's Cash Distributions." *Id.* ¶¶ 111-120. And, Plaintiffs complain that the Merger Agreement does not provide for a "majority of minority vote provision" — a threshold not required by the LLC Agreement, but nonetheless achieved. *Id.* ¶¶ 121-124.

Plaintiffs' Amended Complaint does differ from the original complaint in two important respects. First, Plaintiffs finally address the LLC Agreement that establishes Defendants' duties and obligations. But rather than address the provisions governing conflict transactions — provisions that were quoted at length in Defendants' initial motion to dismiss and which, significantly, eliminate fiduciary duties — Plaintiffs contend, incorrectly, that the LLC Agreement required Defendants to observe traditional fiduciary duties. In other words, in response to Defendants' Motion to Dismiss, Plaintiffs have opted to rest on their view that this action should be analyzed like a corporate fiduciary duty case, despite the existence of an LLC Agreement expressly stating otherwise. Thus, their Amended Complaint mistakenly, and repeatedly, invokes the concept of "entire fairness" and breaches of "fiduciary duty." *See, e.g.*, Am. Compl. ¶¶ 4, 6-9, 25, 70, 125, 127, 129-131, 133, 135, 137-39, 141-45. Second, Plaintiffs have withdrawn their disclosure claims, conceding (as they must) that Defendants' final joint Proxy Statement provided unitholders with all material information necessary to a fully informed vote on the Merger. Notwithstanding that concession, Plaintiffs curiously allege that certain of the Defendants acted in bad faith by depriving the Special Committee of material information with respect to the Merger. *Id.* ¶¶ 6, 99, 107-108. The Amended Complaint leaves unstated how

it could have risen to the level of bad faith for Defendants not to have given the Special Committee information that Plaintiffs have conceded was immaterial and unnecessary for a fully informed unitholder vote on the deal.

ARGUMENT

Plaintiffs' Amended Complaint must be dismissed unless this Court is willing to overturn nearly a decade of Delaware LLC jurisprudence and hold, contrary to well-settled law and statute, that Delaware LLCs are no longer permitted to eliminate fiduciary duties. Absent such an extraordinary and unprecedented holding, Plaintiffs have failed to state a claim. They have brought an action challenging a merger they know full well to be governed by the LLC Agreement, but they have failed to cite the applicable provisions of that LLC Agreement. And — incredibly — Plaintiffs nowhere allege that the LLC Agreement was breached. Indeed, despite its 62 pages and 145 numbered paragraphs, the Court will search in vain for any allegation in the Amended Complaint which so much as *mentions* the sections of the Atlas Energy LLC Agreement specifically governing conflict transactions and specifically setting forth the duties of the board.

Instead, in an effort to plead around the inconvenient reality that Defendants fully complied with their obligations under the LLC Agreement and that the LLC Agreement expressly eliminates fiduciary duties, Plaintiffs pretend that this is a straightforward corporate fiduciary "entire fairness" case. To this end, Plaintiffs disregard the fact that the LLC Agreement eliminates fiduciary duties and replaces them with contractual requirements; specifically, that the LLC Agreement provides a process, fully followed here, to address the board's review of conflict transactions between Atlas America and Atlas Energy. Accordingly, Plaintiffs' unfair process and unfair price claims fail under a straightforward and well-settled legal principle: an "entire fairness" claim founded upon principles of corporate fiduciary duty

law cannot lie in the alternative entity context when no such "duties and obligations" are imposed by the governing LLC Agreement and where the express provisions of that agreement eliminate fiduciary duty claims. *Fisk Ventures, LLC* v. *Segal*, 2008 WL 1961156, at *8 (Del. Ch. May 7, 2008).

Plaintiffs, of course, are well aware of the operative LLC Agreement. A complete copy was attached to the Prospectus, which all unitholders — including Plaintiffs — received prior to investing. Moreover, Plaintiffs specifically addressed the relevant sections of the LLC Agreement during oral argument on lead plaintiff motions, when they conceded that they had made the tactical decision to avoid pleading contractual claims based on the LLC Agreement. *See* Hearing Tr. at 8. Indeed, Plaintiffs expressly disavowed any contract claim, calling it "dangerous" and a "concession to the defendants" (*Id.*) — presumably in acknowledgement of the certain failure of any such claim given Defendants' strict compliance with the terms of the LLC Agreement.

Plaintiffs' feeble attempt to rescue their flawed action by scattering snippets of the discovery record in their Amended Complaint does not change this result. Nothing in the discovery record changes the fact that this is an LLC case, not one of entire fairness involving traditional fiduciary duties. And *nothing* in the discovery record suggests that the LLC Agreement was not followed; tellingly, Plaintiffs do not allege otherwise.

Despite Plaintiffs' strained attempts to apply corporate fiduciary law in the alternative entity context, the analysis here is simple and straightforward. The Merger between Atlas America and Atlas Energy is governed by a contract, Defendants followed the terms of that contract to the letter, and Plaintiffs do not allege that the contract has been breached.

I. PLAINTIFFS' CLAIMS FOR BREACH OF FIDUCIARY DUTY MUST BE DISMISSED BECAUSE DEFENDANTS FULLY COMPLIED WITH THE LLC AGREEMENT'S PROVISIONS GOVERNING CONFLICT TRANSACTIONS.

It is well-settled Delaware law that "[c]ontractual language defines the scope, structure, and personality of limited liability companies." *Fisk Ventures, LLC* v. *Segal*, 2008 WL 1961156, at *1 (Del. Ch. May 7, 2008); *see also R&R Capital, LLC* v. *Buck & Doe Run Valley Farms, LLC*, 2008 WL 3846318, at *1 (Del. Ch. Aug. 19, 2008) ("For Shakespeare, it may have been the play, but for a Delaware limited liability company, *the contract's the thing.*") (emphasis in original). Plaintiffs' claims, therefore, cannot be assessed without reference to the relevant language of the LLC Agreement itself. *Fisk*, 2008 WL 1961156, at *8 ("In the context of limited liability companies, which are creatures not of the state but of contract, those duties or obligations must be found in the LLC Agreement or some other contract."); *see also Brickell Partners* v. *Wise*, 794 A.2d 1, 4 (Del. Ch. 2001) (resolving, on a motion to dismiss, claims arising out of conflict transaction in the limited partnership context by reference to the Partnership Agreement itself). Indeed, it defies any sort of rational legal strategy to acknowledge the existence of an operative LLC Agreement, file a complaint challenging a transaction governed by that LLC Agreement, but ignore the applicable provisions of that LLC Agreement altogether.

Limited liability companies, such as Atlas Energy, "are primarily creatures of contract, and the parties have broad discretion to design the company as they see fit in an LLC agreement." *Kahn* v. *Portnoy*, 2008 WL 5197164, at *1 (Del. Ch. Dec. 11, 2008). Here, the parties designed an LLC Agreement that expressly addressed conflicts between Atlas Energy and any of its affiliates, including, as the Prospectus made clear, Atlas America. The potential for such conflicts was, of course, not a secret. Given the close relationship, common assets and

overlapping management of Atlas America and Atlas Energy, the unitholders have been aware since Atlas Energy's formation that conflicts were likely to arise. *See, e.g.*, Prospectus at 141 ("Conflicts of interest exist and may arise in the future as a result of the relationships between members of our board of directors and Atlas America and its affiliates, including our manager, on the one hand, and us and our unitholders, on the other hand."); *id.* at 7 ("[P]ersonnel of Atlas America currently involved in managing our assets will manage and operate our business.").[8]

The unitholders were also well aware that the Atlas Energy board was afforded wide discretion to resolve any conflict that arose with Atlas America. *See* Prospectus at 141 ("*Whenever a conflict arises* between Atlas America, our 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.") (emphasis added). The LLC Agreement set forth the procedures governing the board's action in its approval of a conflict transaction. Section 7.9, titled "Resolution of Conflicts of Interest: Standards of Conduct and Modification of Duties," contained a detailed and specific process applicable "*whenever* a potential conflict of interest exists or arises between *any* Affiliate,"[9] subject to no exception:

> 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, of any Group Member Agreement, of any agreement contemplated herein or therein, or of *any duty existing at law, in equity or otherwise, including any fiduciary duty*, if the resolution

[8] Where an LLC agreement is negotiated with the knowledge that certain directors will "find themselves in a position of inherent conflict," it is "with this in mind that the LLC Agreement must be construed." *Flight Options Int'l, Inc.* v. *Flight Options, LLC*, 2005 WL 2335353, at *7 (Del. Ch. Sept. 20, 2005).

[9] Plaintiffs allege that Atlas America controlled Atlas Energy (*see, e.g.*, Am. Compl. ¶¶ 1, 4); thus they cannot dispute that Atlas America was an "Affiliate" of Atlas Energy as defined by the LLC Agreement. LLC Agreement § 1.1 (defining "affiliate" as one which "directly or indirectly through one or more intermediaries" controls another). In any event, the Prospectus made clear that this provision governs conflicts with Atlas America. *See* Prospectus at 141 ("Whenever a conflict arises between Atlas America, our 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.").

> or course of action . . . 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 generally being provided 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 . . . .

LLC Agreement § 7.9(a) (emphases added).

Thus, under the terms of Section 7.9(a), applicable here, resolution of a potential conflict via any of the four enumerated options constitutes compliance with the LLC Agreement and the board's action approving such conflict "shall be permitted and deemed approved by all Members, and shall not constitute a breach of [any agreement], or of any duty existing at law, in equity or otherwise, including any fiduciary duty." LLC Agreement § 7.9(a); *see also* Prospectus at 143 (where a conflict transaction is approved by the board of directors, "unitholders will not be able to assert that such approval constituted a breach of fiduciary duties").

Three of these options are relevant to this motion. The first option, "Special Approval," is defined as "approval by a majority of the members of the Conflicts Committee."[10] *Id.* § 1.1; *see also* Prospectus at 127-28 ("Any matters approved by the conflicts committee in good faith will be *conclusively* deemed to be fair and reasonable to [Atlas Energy], approved by all [Atlas Energy] unitholders and not a breach of obligation to [Atlas Energy] or to [Atlas

[10] The Conflicts Committee, in turn, is defined as a "committee of the Board of Directors composed entirely of two or more Directors who are not (a) Officers or employees of the Company or any Subsidiary of the Company, (b) managers, directors, officers or employees of any Affiliate of the Company or (c) holders of any ownership interest in the Company Group other than Common Units, and who also meet the independence standards established by the Exchange Act and the rules and regulations of the Commissions thereunder and by the National Securities Exchange on which the Common Units are listed for trading, which standards are applicable to members of audit committees of boards of directors." LLC Agreement § 1.1. Here, the membership of the Conflicts Committee, two of whom comprised a majority of the Special Committee that reviewed the Merger, was disclosed in the Prospectus and met NYSE and SEC standards for independence. Prospectus at 127.

Energy] unitholders.") (emphasis added). The board's action also complies with the LLC Agreement where it garners the "the vote of holders of a majority of the Outstanding Common Units (excluding Common Units held by interested parties)" — that is, where it achieves support by a majority of unaffiliated unitholders. LLC Agreement § 7.9(a)(ii). Finally, the board's approval of a conflict transaction is valid under the contract where the disinterested members of the board determine it to be "fair and reasonable to the Company," under the terms of subsection (iv) of Section 7.9(a). Approval pursuant to subsection (iv) "shall be presumed" to have been made "in good faith." LLC Agreement § 7.9(a). Notably, consistent with the careful framework of the LLC Agreement, Atlas America (or any other interested party) does not play a deciding role in any of these approval mechanisms.

Against this contractual backdrop, it is clear that Defendants complied with the approval procedures established by Section 7.9(a) and applicable here, and Plaintiffs have not pleaded facts suggesting otherwise. Nor have they claimed (or could they) that the conflict resolution mechanism prescribed by Section 7.9(a) is invalid. Indeed, it is clear from the very facts alleged in Plaintiffs' Amended Complaint that Defendants complied with the contractual provisions governing resolution of a potential conflict in not one, but *three* respects.

First, the Merger secured Special Approval when the Special Committee — which included a "majority of the members of the Conflicts Committee" — voted unanimously in favor of the transaction. LLC Agreement §§ 1.1, 7.9(a); *see also* Agreement and Plan of Merger by and among Atlas Energy Resources, LLC, Atlas America, Inc. *et al.* (Apr. 27, 2009) ("Merger Agreement," Exhibit A to the Proxy, attached hereto as Exhibit J), Whereas Clause (the Special Committee, "the members of which constitute a majority of the members of the ATN Conflicts Committee, . . . has, by unanimous vote of all of its members," determined that the merger was "advisable, fair and reasonable to and in the best interests of" both Atlas Energy and its public

unitholders). Second, the disinterested members of the board of Atlas Energy determined that the transaction was "advisable, fair and reasonable to and in the best interests of" both Atlas Energy and its public unitholders. *Id.*; Am. Compl. ¶ 64. Third, the Merger was approved by a vote of the majority of the unaffiliated public unitholders. *See* Voting Results at 2. Each of these events was a matter of public record at the time the Amended Complaint was filed.

The conflict resolution process prescribed by the LLC Agreement and followed by Defendants here is virtually identical to the contractual provision at issue in *Brickell*. In *Brickell*, the plaintiff — a limited partner of El Paso, an oil and natural gas company — challenged a so-called "conflict" transaction whereby El Paso acquired a company owned by its general partner, asserting breach of fiduciary duty claims based on an allegedly unfair process and unfairly high price. *Brickell*, 794 A.2d at 2. Relying on a conflict resolution provision of El Paso's Partnership Agreement similar to Section 7.9(a) of the LLC Agreement, Vice Chancellor Strine dismissed the complaint because defendants had obtained Special Approval. As here, El Paso's Partnership Agreement defined Special Approval as approval by a majority of the members of a conflicts committee. The court observed that the limited partnership agreement provided — in much the same language that the LLC Agreement uses here — that "whenever a potential conflict of interest . . . arises between" certain parties, including those alleged to have had a conflict, "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, of the Operating Companies Agreements, of any agreement contemplated herein or therein, or of any duty stated or implied by law or equity," if Special Approval is obtained. *Id.* at 2-3 (emphases omitted). Noting that "the plain and unambiguous language of [the conflicts provision] of the Partnership Agreement displaces traditional fiduciary duty principles," the Court held that Special Approval was "conclusive evidence of the fairness and reasonableness of

a conflict transaction, and bars any challenge to the transaction based on the Agreement, other contracts, or default principles of law or equity." *Id.* at 4.

The Court's analysis in *Brickell* is squarely applicable to the present action, and the facts here compel the same result. The process by which Defendants sought and obtained approval of the Merger by the board fully complies with the requirements of Section 7.9(a). Likewise, subsequently a majority of the unaffiliated unitholders approved the Merger, an additional option under Section 7.9(a). As this Court has recognized, where an LLC establishes specific standards governing conflict transactions between "the Company and its affiliates," that standard — and not "general fiduciary duties" — applies. *See Flight Options Int'l, Inc.* v. *Flight Options, LLC*, 2005 WL 2335353, at *7-*8 (Del. Ch. Sept. 20, 2005). Absent allegations that Defendants failed to comply with the procedures set forth in Section 7.9(a), Plaintiffs have failed to state any claim arising out of Defendants' conduct in connection with the Merger. Accordingly, Plaintiffs' Amended Complaint must be dismissed.

II. PLAINTIFFS' FIDUCIARY DUTY CLAIMS ARE BARRED BY THE LLC AGREEMENT, WHICH UNAMBIGUOUSLY ELIMINATES FIDUCIARY DUTIES.

Faced with the insurmountable obstacle of Defendants' full compliance with an unambiguous contract, Plaintiffs opt instead to plead claims for breach of fiduciary duty, as if ignoring the very existence of the applicable provisions of the LLC Agreement might somehow cause this Court to treat Atlas Energy as a corporation. Plaintiffs' gambit fails, however, because in addition to affirmatively setting forth conflict resolution procedures which *do* govern, the LLC Agreement also expressly eliminates fiduciary duties in this context. Absent a duty, of course, there can be no breach. *See Fisk*, 2008 WL 1961156, at *8 ("The *sine qua non* of pleading an actionable breach is demonstrating that there was something to be breached in the first place. In

other words, before the Court can start worrying about whether or not there was a breach, the Court needs to determine that there was a *duty*.") (emphasis in original).

For a duty to apply to any party to the Atlas Energy LLC Agreement, it must be set forth in that agreement. LLC Agreement § 7.10(a) ("The duties and obligations owed to the Company and to the Members by the Officers and Directors shall be as set forth in this Agreement."); *see also Fisk*, 2008 WL 1961156, at *8 ("In the context of limited liability companies, which are creatures not of the state but of contract, those duties or obligations must be found in the LLC Agreement or some other contract."); *Kahn*, 2008 WL 5197164, at *1 ("As the company in this case is an LLC, the fiduciary duties of the directors are defined in the LLC agreement."). And under Delaware LLC law, "the statutes make it abundantly clear that any common law fiduciary duties can be waived." Hon. Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L. J. 221, 227 (Summer 2009). The Delaware Code provides:

> To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

6 Del. C. § 18-1101(c) (2004).

Here, the LLC Agreement contains no express imposition of fiduciary duties and, to the contrary, makes "abundantly clear" that — as contemplated by Delaware law — fiduciary duties are eliminated. First, as set forth in detail above, the LLC Agreement provides a contractual mechanism by which the directors are to review conflict transactions between Atlas America and Atlas Energy — like the transaction completed here — and expressly states that

compliance with this process precludes any fiduciary duty claim. LLC Agreement § 7.9(a). The Prospectus explained exactly what this means: where a conflict transaction is approved pursuant to Section 7.9(a), "unitholders will not be able to assert that such approval constituted a breach of fiduciary duties." Prospectus at 143.

Second, in regard to the directors and officers, the contract eliminates fiduciary duties that would attach in the corporate context and expressly supplants them with a good faith standard:

> *Whenever* the Board of Directors or any Director or Officer makes a determination or takes or declines to take any other action, whether under this Agreement, any Group Member Agreement or any other agreement contemplated hereby or otherwise, then, unless another express standard is provided for in this Agreement, the Board of Directors or such Director or Officer shall make such determination or take or decline to take such other action *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. . . . To the extent that the foregoing provisions have, or are construed to have, the effect of restricting, eliminating or otherwise modifying the duties and liabilities, including the fiduciary duties, of the Directors or Officers otherwise existing at law, in equity or otherwise, such provisions and any such restriction, elimination or modification (i) are, and shall be deemed to have been, approved and agreed to by the Members (ii) *are intended and agreed to replace and supersede such other duties and liabilities.*

LLC Agreement § 7.9(b) (emphases added). To reinforce that its contractual standards are intended to replace fiduciary duties, the Agreement further 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 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 Directors or any other Indemnitee otherwise existing at law or in equity, *are agreed by the Members to replace such other duties and liabilities of the Directors or such other Indemnitee.*

LLC Agreement § 7.9(d) (emphases added).[11] Thus, not once, but twice, the LLC Agreement makes explicit that the good faith standard is the only "dut[y] and obligation[] owed" and is specifically intended to replace any fiduciary or other duties that might apply in different contexts.

In short, not only is there no imposition of fiduciary duties by the LLC Agreement, but the parties to the LLC Agreement in this case could not have made their intentions to eliminate fiduciary duties any more plain. Indeed, if the Atlas Energy LLC Agreement does not constitute a clear abrogation of fiduciary duties, it is unclear whether the goals of the Delaware LLC Act can be effectuated at all. *See* 6 Del. C. § 18-1101(c) (2004); *see also id.* § 18-1101(b) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."); *Forsythe* v. *ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247, at *6 (Del. Ch. Oct. 9, 2007) ("[T]he Partnership Agreement, not the common law, provides the proper standard of liability. 'Where the parties have a more or less elaborated statement of their respective rights and duties, absent fraud, those rights and duties, where they apply by their terms, and not the vague language of a default fiduciary duty, will be the metric for determining breach of duty.'") (citations omitted). Moreover, Plaintiffs — who as unitholders were well aware that fiduciary duties were supplanted by the terms of the LLC Agreement — should not be allowed to pretend otherwise now. *See* Prospectus at 143 ("[O]ur directors and officers do not owe us the same

[11] In direct contravention of the LLC Agreement's terms, Plaintiffs allege that the Individual Defendants "owe[] fiduciary duties" to Atlas Energy unitholders. Am. Compl. ¶ 25. Likewise, notwithstanding the plain language of Section 7.9(d) of the LLC Agreement, Plaintiffs assert that Defendants' "duties were not modified by Energy's LLC Agreement." *Id.* ¶ 26. This Court, however, is not required to accept as true Plaintiffs' blatant mischaracterizations. *See In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *3 (Del. Ch. Sept. 1, 1992) ("[T]he Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegation that flows from it.").

duties that the directors and officers of a corporation organized under DGCL would owe to their corporation."); *see also Miller* v. *Am. Real Estate Partners, L.P.*, 2001 WL 1045643, at *8 (Del. Ch. Sept. 6, 2001) ("This court has made clear that it will not be tempted by the piteous pleas of limited partners who are seeking to escape the consequences of their own decisions to become investors in a partnership whose general partner has clearly exempted itself from traditional fiduciary duties."). Put simply, the fiduciary duties cited by Plaintiffs do not exist.

Faced with the unequivocal elimination of fiduciary duties in Section 7.9 of the LLC Agreement, Plaintiffs simply ignore that section of the contract, resorting instead to a strained argument that Section 12 of the LLC Agreement imposes fiduciary duties upon the Atlas Energy board in situations where, as here, the board approves a merger. Plaintiffs' claim is that (1) Section 12.2(a) expressly states that fiduciary duties do not apply to a decision to *decline* a merger; (2) Section 12.2(b) does not mention duties at all with respect to a decision to *approve* a merger; and (3) therefore, Section 12.2(b) imposes fiduciary duties on the Atlas Energy board where a decision is made to approve a merger. This argument is without merit.

As a threshold matter, Plaintiffs' assertion that Section 12 alone governs the merger because "[n]o other provisions of Energy's LLC Agreement apply in the context of the elimination of the fiduciary duties in connection with the acceptance of a merger" is simply false. Am. Compl. ¶ 130. As set forth above, Section 7.9 squarely addresses the issue central to Plaintiffs' Complaint — "Resolution of Conflicts of Interest: Standards of Conduct and Modification of Duties." *See supra* at 15. Article 12, on the other hand, sets forth general procedural and technical requirements in the event of a merger, consolidation or conversion. In a complaint challenging the conduct of directors in approving a conflict transaction, it is inexcusable for Plaintiffs to pretend that Section 7.9 does not exist. *Falkenberg Capital Corp.* v. *Dakota Cellular, Inc.*, 925 F. Supp. 231, 236 (D. Del. 1996) ("[I]t is not necessarily true that a

court considering a Rule 12(b)(6) motion in the context of a contract dispute must accept as true the construction of the contract proffered by the plaintiff."); *see also Flight Options*, 2005 WL 2335353, at *7 (noting that where one section of an LLC Agreement is "targeted at transactions between the Company and its affiliates," it is "more specific with respect to assessing the conduct of the [parent-designated] managers in a related party transaction" than are general provisions).

Moreover, Plaintiffs' reference to Section 12 is unavailing. First, the purpose of Section 12.2(a) is not to eliminate fiduciary duties — something already accomplished by Section 7.9(b) — but rather to eliminate, in situations where the board rejects a potential merger, the contractual good faith standard imposed by Section 7.9(b). As explained above, Section 7.9(b) states clearly that "unless another *express standard* is provided for in this Agreement," the board shall act "in good faith," defined as acting "in the best interests of the Company." LLC Agreement § 7.9(b) (emphasis added). Section 12.2(a) is an example of such an "express standard" having been provided. That provision states that, where the board makes a decision not to pursue a merger, it "shall not be required to act in good faith," the standard set forth in Section 7.9(b). LLC Agreement § 12.2(a). In other words, read together, Sections 7.9(b) and 12.2(a) require that the Atlas Energy board be governed by a contractual good faith standard, except in situations where it decides to refuse a merger; in those instances, the contractual good faith standard will not apply.

Section 12.2(b), in contrast, which sets forth a list of the items required in a Merger Agreement, does not address the board's duties and obligations. Any duty or obligation, of course, must be spelled out in the LLC Agreement. *See* LLC Agreement § 7.10(a); *Fisk*, 2008 WL 1961156, at *8. Far from identifying a specific duty, Section 12.2(b) is silent. It certainly does not provide "another express standard," as required by Section 7.9(b) if a standard other

than good faith is to apply. Thus, because Section 12.2(b) does not expressly impose a standard other than good faith, and because the sole purpose of Section 12.2(a) is to create a limited exception to the good faith requirement set forth in Section 7.9, Section 12 in no way alters the clear elimination of fiduciary duties reflected in Section 7.9. In any event, the provisions of Section 12 applying to mergers were fully complied with and the Plaintiffs do not allege otherwise. In consenting to the Merger, the board complied with the requirements of Section 12.2 in full — first by approving the Merger Agreement, and then by submitting the Merger Agreement to a vote of all unitholders. *See* LLC Agreement §§ 12.2(b), 12.3(a). And since the Merger Agreement was a "conflict transaction," the board approved it prior to the vote pursuant to the procedures and standards set forth in Section 7.9. *See supra* Points I, II.

Plaintiffs' claims for breach of fiduciary duty, therefore, must also be dismissed because Plaintiffs have failed to identify any such duty imposed by the LLC Agreement in the context of the board's approval of a conflict transaction, and because Defendants abided by the terms of the LLC Agreement. To read fiduciary duties into a contract expressly waiving such duties would not only turn contract law on its head, it would also fly in the face of Delaware's strong public policy in favor of privately ordered alternative entities. *See TravelCenters of Am., LLC* v. *Brog et al.*, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008) ("[L]imited liability companies are creatures of contract, 'designed to afford the maximum amount of freedom to contract, private ordering and flexibility to the parties involved.'") (citation omitted); *see also R&R Capital*, 2008 WL 3846318, at *4 ("Indeed, the [LLC] Act itself explicitly provides that "[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.") (citations omitted). Furthermore, it would seriously undermine the expectations of the parties to impose fiduciary duties where investors were specifically made aware that they would be unable to bring any

claim for a breach of fiduciary duty. *See* Prospectus at 143. Having clearly relied on the plain terms of the LLC Agreement in structuring the board's review of the Merger — indeed, the first Whereas Clause of the Merger Agreement specifically warrants that the transaction received approval consistent with § 7.9(a) — Defendants, themselves all parties to or beneficiaries of that LLC Agreement, should not now face claims based on a different standard.

III. PLAINTIFFS' CLAIMS MUST BE DISMISSED BECAUSE THE COMPLAINT FAILS TO ALLEGE THAT DEFENDANTS DID NOT ACT IN GOOD FAITH.

As set forth in Points I and II, Defendants' full compliance with the terms of the LLC Agreement, Plaintiffs' failure to allege otherwise, and the contractual elimination of fiduciary duties, mandate dismissal of Plaintiffs' action. Plaintiffs' conclusory and passing references to "bad faith" fare no better. To allege bad faith, Plaintiffs must plead facts demonstrating that Defendants believed the Merger was not in the best interests of Atlas Energy. Plaintiffs, however, have alleged no facts whatsoever pertaining to Defendants' subjective belief, let alone facts demonstrating that Defendants supported the Merger despite believing it was detrimental to Atlas Energy. The lack of any such allegations is not surprising — as borne out by the significant jump in share price and overwhelming support of its unitholders, the Merger was, in fact, good for Atlas Energy. What Plaintiffs *do* allege boils down to no more than nit-picking about the price at which the Merger was consummated and the negotiation process leading to that result, which, under well-settled Delaware law, does not give rise to a claim of bad faith. Setting aside the fact that Plaintiffs have not even asserted a claim for breach of the contractual good faith standard, Plaintiffs' last-ditch invocation of "bad faith" cannot save their Amended Complaint.

A. Plaintiffs have failed to allege that Defendants did not believe they were acting in the best interests of Atlas Energy.

True to form, Plaintiffs again ignore the applicable provisions of the LLC agreement in making their bad faith allegations. Good faith, the standard that replaces default fiduciary duties with respect to the approval of a conflict transaction, is defined by the LLC Agreement as any action taken with the belief that it is "in the best interests of the Company." LLC Agreement § 7.9(b); *see also Flight Options*, 2005 WL 2335353, at *9 n.42 (finding no breach of duty of good faith where "there is no reason to doubt that the [directors] reasonably and in good faith believed . . . that the proposed financing was in the Company's best interest."). In other words, the only cognizable "bad faith" claim must be based on allegations that those Defendants approving the Merger, *i.e.* the independent directors who made up the Special Committee, subjectively believed that the Merger was *not* in the best interests of Atlas Energy.

Plaintiffs' allegations nowhere support the inference that the Special Committee subjectively believed anything other than that the Merger *was* in the best interests of Atlas Energy. Defendants have filed public documents setting forth in detail the belief of the Special Committee and the Atlas Energy board that the Merger was in the best interests of Atlas Energy. Thus, the Proxy cited by Plaintiffs in their Amended Complaint sets forth the reasoning of the Atlas Energy Board in approving the Merger and the basis for its belief that the transaction was "fair and reasonable to, and in the best interests of, Atlas Energy and the Atlas Energy unitholders that are not affiliated with Atlas America."[12] Proxy at 65. Specifically, in setting

[12] The LLC Agreement creates a presumption of good faith where — as here — directors resolve a conflict by determining that a given course of action is "fair and reasonable" under Section 7.9(a). LLC Agreement § 7.9(a)(B) ("*it shall be presumed that, in making its decision, the Board of Directors acted in good faith*, and in any proceeding brought by any Member or Assignee or by or on behalf of such Member or any other Member or the Company challenging such approval, the Person bringing or prosecuting such proceeding shall have the burden of overcoming such presumption.") (emphasis added).

forth Defendants' subjective belief that the Merger was in the best interests of Atlas Energy, the Proxy details the challenges facing Atlas Energy due to the contraction of liquidity in the winter of 2009; the difficulties it faced in maintaining distributions; the risks of reducing distributions while remaining an LLC; the benefits that could be achieved by preserving capital and allowing the Atlas companies to exploit the Marcellus Shale far more rapidly; and the myriad other benefits provided by a merger. *See, e.g.*, *id.* at 70. The Proxy also explained that the Special Committee, in reliance upon its financial advisor, viewed the negotiated exchange ratio as fair to Atlas Energy. *Id.* at 79, 91-95.

Not once do Plaintiffs allege that Defendants did not believe these considerations to be true. Plaintiffs do not allege, for example, that Defendants did not believe that "the available cash at Atlas America and the better access to capital markets that the combined company would likely have" would "permit Atlas Energy to reduce its debt and lessen Atlas Energy's concerns about its liquidity and permit the potential acceleration of Atlas Energy's investment and growth in the Marcellus Shale." *Id.* at 79. Likewise, Plaintiffs do not allege that Defendants believed enabling Atlas Energy unitholders to "participate in any future growth and profitability in the underlying assets of the combined company" was detrimental to Atlas Energy. *Id.* And Plaintiffs never contend that Defendants' use of an independent Special Committee, their reliance on independent legal and financial advisors, and their strict adherence to the conflict resolution provision set forth in the LLC Agreement were undertaken in bad faith or with ulterior motives. In fact, there are no factual allegations whatsoever that the independent

directors actually believed, contrary to their claims in the Proxy, that the Merger was not in the best interests of Atlas Energy.[13]

Nor do Plaintiffs allege facts suggesting that the Special Committee members acted for the benefit of some other entity or individual, had a motive to profit at the expense of Atlas Energy, or that their stated views were not held in good faith but, instead, were a mere pretext for some sort of personal benefit. *See Kahn*, 2008 WL 5197164, at *7 (noting that for a director to have failed to "act with the good faith belief that his actions are in the best interest of the company" he must have "intentionally act[ed] to benefit [him]self at the expense of the Company"). Indeed, the facts adduced to hint at any lack of independence prove just the opposite. For instance, Plaintiffs note that Bruce M. Wolf, an independent director of Atlas Energy and a member of the original Conflicts Committee, recused himself from service on the Special Committee out of an abundance of caution due to his stock holdings in Atlas America. Am. Compl. ¶ 55. Plaintiffs characterize this recusal as sinister evidence of the "interrelated nature of virtually all aspects of Energy and America," when in fact all it shows is that the Defendants were highly sensitive to possible conflicts of interest, and erred on the side of caution with respect to any such conflicts.[14] Challenging the recusal stands logic on its head, akin to setting aside a judicial decision on grounds that a conflicted judge recused himself and the case

[13] Not only have Plaintiffs failed to allege that Defendants believed the Merger was not in the best interests of Atlas Energy, but — to the contrary — the very documents produced in discovery and cited by Plaintiffs (Am. Compl. ¶ 76) show that prospective financial advisors, in addition to UBS, advised the Special Committee that it was in the best interests of the Company to pursue an alternative corporate structure and to eliminate the distribution and reinvest the proceeds in development of the Marcellus Shale. [redacted]

[14] On a motion to dismiss under Delaware Rule 12(b)(6), the Court "is required to draw only reasonable inferences in the nonmovant's favor," but is *not* obligated to accept "inferences or conclusions of fact unsupported by allegations of specific facts." *Globis Partners, L.P.* v. *Plumtree Software, Inc.*, 2007 WL 4292024, at *4 (Del. Ch. Nov. 30, 2007).

was reassigned to a judge without conflict. Furthermore, Plaintiffs' allegation that members of the Special Committee were offered positions on the board of the future company, Am. Compl. ¶ 48, is without legal significance, for Delaware law is clear that expectation of service on a future board does not render a director conflicted, much less constitute evidence of bad faith. *See, 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.").

Thus, not only have Plaintiffs failed to expressly assert that Defendants breached their contractual duty to act in the best interests of Atlas Energy, but the Amended Complaint's passing references to bad faith utterly fail to support any such claim. Plaintiffs do not allege that the Atlas Energy board did not believe it was acting in the best interests of the company, and they do not allege that the independent Special Committee members who approved the Merger had any motivation or incentive to act disloyally.[15] Accordingly, no bad faith claim lies.

B. Plaintiffs' remaining references to bad faith are merely restated price and process claims, which are insufficient to state a claim under Delaware law.

The allegations Plaintiffs *do* set forth in ostensible support of a bad faith claim are plainly insufficient. Far from showing that Defendants consciously believed that the Merger was contrary to Atlas Energy's interests, these allegations merely rehash Plaintiffs' belief that the Merger was a conflict transaction struck at an unfairly low price. Even if an entire fairness claim

[15] In *Kahn*, by contrast, plaintiffs sufficiently pleaded bad faith — albeit for purposes of a fiduciary duty claim — where they alleged that the directors of an LLC "intentionally acted to benefit [another company and an individual] at the expense of the Company," supported by "specific factual allegations" showing the ways in which the directors were beholden to other parties. *Kahn*, 2008 WL 5197164, at *8-*9. Unlike Plaintiffs here, the plaintiffs in *Kahn* alleged that the directors approving the transaction received significant and material compensation from their services on the boards of other companies that had diverging interests in the given transaction; that the directors owed duties of loyalty to other, conflicted entities; and that the directors took actions that harmed the nominal defendant. *Id.*

was properly raised or sufficiently pled — which it was not — unfair price and process allegations are legally insufficient to show, without more, that Defendants acted with subjective bad faith.[16] *See, e.g.*, *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 243 (Del. 2009) ("There is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties.").

As a threshold matter, Plaintiffs' chief complaint — that the overall process was tainted by conflict due to the overlapping nature and so-called "hat-switching" of Atlas Energy and Atlas America management — is precisely that: a process claim, one that does not in any way suggest that Defendants acted with the requisite subjective intent. Moreover, the fact that there were and would be such conflicts was well known to unitholders, and it is for this precise reason that the LLC Agreement provided an elaborate mechanism, followed here, for resolving conflict transactions. LLC Agreement § 7.9(a).

Plaintiffs' remaining allegations are similarly rooted in the framework of an entire fairness claim, and are similarly unavailing.

First, Plaintiffs complain about the lack of a premium and compensation for the distribution, which is merely a repackaging of their tired refrain that the merger consideration was inadequate. Even if this were true, which it is not, an assertion that a given price is unfair

[16] The motion, of course, does not turn on whether Plaintiffs have made allegations sufficient to support an "entire fairness" action; rather it concerns whether such a claim lies at all. Defendants are confident that were this an "entire fairness" case, the evidence would show that the process was proper and Plaintiffs could not meet their burden of showing the price was unfair. *See Kahn* v. *Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (approval by an independent committee of directors shifts the burden to plaintiffs to show the transaction was not entirely fair). But proceeding with extensive and costly discovery is unnecessary and inappropriate where the parties set forth ahead of the time in an LLC agreement exactly how a conflict transaction was to be resolved, such process was followed, and Plaintiffs do not allege otherwise. *See* Hon. Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L. J. 221, 241 (Summer 2009) ("[D]efault fiduciary duties introduce unexpected litigation expenses. Without default fiduciary duties, the parties' litigation will focus solely on the agreement between them — and not on fiduciary duty principles outside of the contract.").

does not suffice to give rise to bad faith unless accompanied by a well-pleaded allegation of disloyalty, which is lacking in the Amended Complaint. *See, e.g., In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *22 n.117 (Del. Ch. Aug. 18, 2006) (holding that defendant directors "missed the mark in attempting to set a fair price" but did not do so "out of bad faith"); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *24, 41 (Del. Ch. May 3, 2004) (holding that, although the merger was struck at an unfair price, certain directors' decision to approve the merger was not made in bad faith because there was no evidence of "conduct disloyal to the minority stockholders' interests"); *Clements* v. *Rogers*, 790 A.2d 1222, 1248-49 (Del. Ch. 2001) (granting summary judgment in favor of Special Committee members on grounds that their "lack of effectiveness" in pursuing a fair price was at most a breach of the duty of care, not evidence of bad faith).

Second, Plaintiffs assert that Atlas America "abused its control" by dictating the terms of the Merger, but the facts alleged in support of this argument show no such thing. Central to Plaintiffs' allegation in this regard is that Atlas America controlled the negotiation process by presenting Atlas Energy with only five potential options: a) Atlas Energy remains an LLC and continues its dividend policy; b) Atlas Energy remains an LLC and eliminates or reduces its dividend; c) Atlas Energy becomes a C-corporation; d) Atlas Energy seeks a joint venture partner; or e) Atlas Energy merges with Atlas America. Am. Compl. ¶ 54. Selling Atlas Energy to a third party was not a viable option, as Plaintiffs themselves concede, because Atlas America had made clear that it would not support such a transaction. Am. Compl. ¶ 108. Plaintiffs therefore do not, and cannot, allege that the Atlas Energy board or the Special Committee were not free to consider all viable options, as discussed further below. Similarly, Plaintiffs' complaint that the Special Committee was left only with the choice of whether to remain as an LLC or merge with Atlas America (Am. Compl. ¶¶ 95, 97-98) does not support a

claim that Atlas America abused its control, let alone a bad faith claim. To the contrary, it highlights the fact that the Special Committee had the power to block a merger if it believed that it was not in the best interests of the company.

As for Plaintiffs' insinuation that Atlas America abused its control by instructing the Special Committee on the "clear choice" regarding Atlas Energy's strategic options, *id.* ¶ 97, the actual facts proffered in the Amended Complaint show nothing more than that Atlas America had expressed its opinion to the members of the Special Committee that a merger of the companies could be beneficial. That Atlas America would express its view of the matter to the Special Committee was to be expected; but evidence of bad faith by the Special Committee in negotiating and approving the transaction — a Special Committee that engaged in a lengthy review process with the assistance of its own bankers and lawyers — is entirely absent.[17]

Plaintiffs also claim that Defendants "skewed the process" by "shutting off" cash distributions to Atlas Energy unitholders, apparently to compel the acquiescence of such unitholders to the deal. Am. Compl. ¶ 85. But the notion that Atlas Energy's decision to suspend the distribution was driven by anything other than prudent business management in challenging economic conditions is pure supposition, utterly unsupported by any actual facts. Notably, Plaintiffs fail to include in the Amended Complaint reference to any of the numerous reasons, articulated in the discovery record or Proxy, why Defendants believed cutting off distributions was prudent and advisable. Nor do Plaintiffs explain why Atlas America would have sought to cut off distributions from which it stood to garner *more* than other Class B

[17] *See Robotti & Co., LLC* v. *Liddell*, 2010 WL 157474, at *11 (Del. Ch. Jan. 14, 2010) (holding, where plaintiffs in the corporate context had alleged that the board "failed to consider certain aspects of the Offering, including the effect that the low price would have on the anti-dilution provisions, alternative methods of financing, and even the need for the transaction," that "[e]ven if the Defendants did not consider these issues as thoroughly as they should or could have," the Court "cannot reasonably infer that the Defendants completely disregarded their responsibilities to the corporation and its shareholders and therefore acted in bad faith").

unitholders due to its ownership of Class A units unless it believed such a move was economically beneficial. Likewise, contrary to Plaintiffs' suggestion, *see id.* ¶¶ 112-120, the focus on reaching an agreement before the distribution announcement is not evidence of bad faith. Precisely to the contrary: if the negotiations had moved past that announcement, it is likely that Atlas Energy stock would have dropped along with its ratio to Atlas America stock. If Atlas America had wanted to game the system, it would have caused Atlas Energy to announce a dividend cut before proposing the Merger.

Third, Plaintiffs complain that Atlas America and certain Individual Defendants allegedly withheld information from the Special Committee in bad faith. *Id.* ¶¶ 99, 105-09. Yet Plaintiffs fail to allege why any of this information was material, and thus cannot even show that nondisclosure would have violated a duty of care standard (itself inapplicable per the LLC Agreement), much less constitute bad faith. *See McMillan* v. *Intercargo Corp.*, 768 A.2d 492, 507 n.66 (Del. Ch. 2000) (holding that even material omissions from the Proxy would not constitute evidence of bad faith unless they were "'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith'") (quoting *In re J.P. Stevens & Co.*, 542 A.2d 770, 780-81 (Del. Ch. 1988), *appeal refused*, 540 A.2d 1088 (Del. 1988)). In fact, by dropping from the Amended Complaint their prior claims that disclosure in the Proxy was inadequate, Plaintiffs have conceded that shareholders were provided all information necessary for a fully informed vote on the Merger. If the unitholders had no need to consider these facts in determining whether to support the Merger, how can it be so significant that the alleged failure to provide it to the Special Committee rose "so far beyond the bounds of reasonable judgment" as to constitute bad faith?

At any rate, examination of Plaintiffs' own allegations regarding the facts allegedly not provided to the Special Committee shows why they are immaterial.[18] [redacted] In any event, an allegation that a piece of information might "potentially" influence the price hardly makes it material or makes the failure to disclose it an act of "bad faith." *Arnold* v. *Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1281 (Del. 1994) (investment firm's valuation of stock prior to merger, which was higher than value of stock under merger, was too speculative to be material). This is particularly so when Plaintiffs also allege that the Special Committee had been informed from numerous sources that premiums of up to 30% could be obtained in cash deals. Am. Compl. ¶ 7.

Plaintiffs also point to [redacted]

[18] It is well settled that crediting Plaintiffs' allegations does not require the blind acceptance of contradictory and self-defeating allegations. *See Fertitta*, 2009 WL 2263406, at *9 n.38 (plaintiffs are only entitled to inferences that "'logically flow from the face of the complaint'"); *BAE Sys. Information & Elec. Sys. Integration, Inc.* v. *Lockheed Martin Corp.*, 2009 WL 264088, at *3 (Del. Ch. Feb. 3, 2009) ("In considering a motion to dismiss, . . . the Court need not blindly accept as true all allegations . . ."); *Desimone* v. *Barrows*, 924 A.2d 908, 948 (Del. Ch. 2007) (dismissing plaintiffs' claims where certain allegations were contradicted by the "complaint itself").

[redacted] As Plaintiffs themselves acknowledge, the Special Committee consulted with its financial advisors at UBS regarding a joint venture, and concluded that it was not a viable option. *Id.* ¶ 106. Plaintiffs' contention that UBS did not in fact believe this advice is made up out of whole cloth, [redacted].[19]

At best, these allegations raise issues of process, but they do not support a reasonable inference of subjective bad faith. Defendants' alleged failure to provide the Special Committee with information regarding discussions with third parties cannot be found to constitute deliberate misconduct absent facts showing that Defendants (a) believed the information should have been provided to the Special Committee, and (b) intentionally decided to withhold it. *Robotti & Co., LLC* v. *Liddell*, 2010 WL 157474, at *11 (Del. Ch. Jan. 14, 2010) (stating that bad faith arises when a person "consciously disregards his or her responsibilities"); *see also McMillan*, 768 A.2d at 507 n.66 (omissions are not evidence of bad faith unless they are

[19] Plaintiffs also claim that UBS was "beholden" to Atlas America, Am. Compl. ¶ 105, but again fail to allege any facts reasonably supporting that notion. Plaintiffs' sole assertion in support of any connection *at all* between Atlas America and UBS is that "UBS has regularly performed work for the Atlas family of entities and likely hopes that trend of steady work to continue." *Id.* ¶ 104. That a bank advising a special committee might wish to do business with the surviving entity can, of course, be fairly said of any bank advising any client and in no way suggests a "beholden" relationship. More importantly, however, Plaintiffs have not alleged that Atlas America played any role whatsoever in the Special Committee's decision, after meeting with several potential financial institutions, to select UBS as its independent financial advisor. In order for Atlas America to have abused its control in bad faith, as Plaintiffs apparently allege, presumably Atlas America would have needed to believe that UBS was a financial advisor that would advocate for Atlas America's best interests, deliberately hide this information from the Special Committee, and then control the selection process. Plaintiffs have alleged none of these things. Nor have Plaintiffs alleged that Atlas America acted improperly or contacted UBS regarding the Merger following UBS's retention by the Special Committee. *See Emerson Radio Corp.* v. *Int'l Jensen Inc.*, 1996 WL 483086, *14 n.17 (Del. Ch. Aug. 20, 1996) (finding that Lehman, the financial advisor to the target company, was not "beholden" to the CEO of the target who ultimately bought one of the its business units, despite plaintiffs' allegations that the CEO had "participated in Lehman's selection as the target's financial advisor and in negotiating the terms of Lehman's engagement," because Plaintiffs had not alleged evidence "that Lehman ever improperly contacted the CEO once he announced his intention to acquire [the business unit]").

"'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith'"). Plaintiffs have adduced nothing of the sort.

Finally, Plaintiffs claim the Special Committee acted in bad faith by not shopping the company to third parties, Am. Compl. ¶ 26, failing to secure a higher price, *id.* ¶ 63, and failing to procure a "majority of the minority" provision in the Merger Agreement, *id.* ¶ 121. Plaintiffs' claim with respect to third-party offers is not only insufficient to show bad faith, it is nonsensical. As Plaintiffs recognize in the Amended Complaint, any third-party discussions would have been futile, as Atlas America was on the record as opposing such a deal. Am. Compl. ¶ 108. Contrary to Plaintiffs' insinuations, such opposition was entirely within the rights of Atlas America as a unitholder, as well as the Atlas Energy Board of Directors, under the LLC Agreement and Delaware law. *See* LLC Agreement § 12.2(a) (providing that "the Board of Directors shall have no duty or obligation to consent to any merger, . . . and, in declining to consent to a merger, . . . shall not be required to act in good faith"); *Bershad* v. *Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) ("Clearly, a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority."). Plaintiffs simply fail to explain how it could have been improper, much less bad faith, for the Special Committee not to pursue a third-party deal that Atlas America had both the right and intent to veto. *See Wayne County Employee Ret. Sys.* v. *Corti*, 2009 WL 2219260, at *14 (Del. Ch. July 24, 2009) (holding, in the corporate context, that directors' failure to "probe[] for alternatives" did not constitute bad faith); *cf. In re First Boston, Inc. S'holders Litig.*, 1990 WL 78836, at *7 (Del. Ch. June 7, 1990) (noting that "where a controlling shareholder owns a majority of voting power" and thus "precludes alternatives," special committee's "only leverage . . . is the power to say no").

With respect to Plaintiffs' complaint about the supposedly deficient price negotiations, it is entirely meritless to argue that the Special Committee negotiated in bad faith, all the while conceding, as Plaintiffs do, that "the Special Committee did not 'accept' America's original suggestion" on the exchange ratio. Am. Compl. ¶ 63. Plaintiffs' assertion that the Special Committee somehow did not mean it when they rejected Atlas America's initial offer is — like all of Plaintiffs' allegations concerning bad faith — without any factual support. As concerns a "majority of the minority," the fact that the Special Committee bargained for such a provision, and Atlas America refused, simply suggests the existence of a back-and-forth negotiation process. In addition, given that the LLC Agreement does not require a "majority of the minority" provision, *see* LLC Agreement § 12.2(b), it can hardly be evidence of bad faith that the Special Committee did not obtain one. At any rate, such an argument is irrelevant given that the Merger was in fact approved by a majority of the minority unitholders. *See* Voting Results at 2.

In sum, even if one were to draw the most damning inferences possible from the facts proffered by Plaintiffs — or even the "reasonable" inferences permitted — those facts at most go to an "entire fairness" argument, a standard that is simply inapplicable in this case. *See infra* Points I and II. The allegations do not, as they must, support a reasonable inference that Defendants subjectively believed that the Merger was not in the best interests of Atlas Energy and its unitholders. *See, e.g.*, *Kahn*, 2008 WL 5197164, at *7 ("[A] director does not act in good faith if the director acts with a subjective belief that her actions are not in the best interest of the corporation, such as when she is acting for the benefit of a related person at the expense of the company."); *Stone* v. *Ritter*, 911 A.2d 362, 369 (Del. 2006) ("[A] failure to act in good faith requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (*i.e.*, gross negligence)."); *Emerging Commc'ns*,

2004 WL 1305745, at *42 ("[N]egligent or even gross negligent conduct, however misguided, does not automatically equate to disloyalty or bad faith.").[20]

C. Plaintiffs have failed to allege that Defendants frustrated the expectations of Atlas Energy's public unitholders.

Plaintiffs have eschewed bringing a contract claim, instead alleging breaches of fiduciary duty. As already shown, such an action cannot stand. In any event, Plaintiffs' conclusory allegations of bad faith also fail to state a claim for breach of the implied covenant of good faith and fair dealing, which is preserved by Delaware statute. 6 Del. C. § 18-1101(c). To allege a breach of this implied covenant, Plaintiffs must allege that Atlas America and the Individual Defendants frustrated the expectations of the other unitholders. *Fisk*, 2008 WL 1961156, at *10 (the implied covenant of good faith and fair dealing "requires a 'party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain") (citations omitted). This claim is "rarely invoked successfully" and, because it protects "the spirit of the agreement rather than the form, it cannot be invoked where the contract itself expressly covers the subject at issue." *Id.* Here, the LLC agreement itself set forth a process for conflict transactions that was followed to the letter, and Plaintiffs to do not allege otherwise. *See City of Westland Police & Fire Ret. Sys.* v. *Axcelis Techs.*, 2009 WL 3086537, at *5 (Del. Ch. Sept. 28, 2009) (where board exercised precisely that discretion granted it by contract, its actions were not

[20] Put differently, these conclusory allegations also fail to state a non-exculpated claim. Pursuant to the LLC Agreement, the Individual Defendants are contractually exculpated from liability for *all conduct* except actions taken in bad faith, or fraud or willful misconduct. LLC Agreement § 7.8(a). "Where, as here, directors are exculpated from liability except for claims based on 'fraudulent,' 'illegal' or 'bad faith' conduct, a plaintiff must also plead particularized facts that demonstrate that the directors acted with scienter, *i.e.*, that they had 'actual or constructive knowledge' that their conduct was legally improper." *Wood* v. *Baum*, 953 A.2d 136, 141 (Del. 2008) (citations omitted). As noted above, Plaintiffs have failed to plead any particularized facts evidencing bad faith, fraud, or willful misconduct. For this additional reason, the claims against the Individual Defendants must be dismissed as well.

grounds for suspected wrongdoing); *Twin Bridges Ltd. P'ship* v. *Draper*, 2007 WL 2744609, at *16 (Del. Ch. Sept. 14, 2007) ("[A] claim for breach of an implied covenant generally cannot be based on conduct authorized by the terms of the agreement."). In such a circumstance, a breach of the implied covenant of good faith and fair dealing cannot stand. *See Amirsaleh* v. *Bd. of Trade of the City of N.Y., Inc.*, 2009 WL 3756700, at *5 (Del. Ch. Nov. 9, 2009) (holding that, to prove a breach of the implied covenant, plaintiffs "must demonstrate that defendants acted in 'bad faith'," which in turn requires a showing that "the defendant's conduct [was] driven by an improper purpose"). For the reasons already stated, Plaintiffs' well pleaded allegations, even assuming they could be proven true, support no such showing.

CONCLUSION

For the foregoing reasons, Plaintiffs' Amended Complaint should be dismissed.

Respectfully Submitted,

DATED: February 18, 2010

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