REDACTED VERSION - PUBLICATION [redacted]

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

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Plaintiffs, Operating Engineers Construction Industry and Miscellaneous Pension Fund and Montgomery County Employees' Retirement Fund, through their counsel, respectfully submit this brief in response to Defendants' Motion to Dismiss.

**PRELIMINARY STATEMENT**

Defendants' motion to dismiss is premised on a fundamental misreading of the Amended and Restated Operating Agreement of Atlas Energy Resources, LLC ("Energy's LLC Agreement"). As explained below, Energy's LLC Agreement, quite simply, *does not eliminate or reduce the fiduciary obligations* of either the individual directors of Atlas Energy Resources, LLC ("Energy") or of Energy's controlling unitholder Atlas America, Inc. ("America") in connection with a merger between America and Energy (the "Merger"). Section 7 of the Energy LLC Agreement, upon which Defendants principally rely, (a) by its express terms does not apply to conflicts between America and individual Energy unitholders, and (b) in any event, does not apply *at all* to the fiduciary obligations of America itself. And Section 12, which *does* apply to mergers, does not eliminate or restrict the fiduciary obligations of Energy directors in connection with a decision by the Energy Board to *accept* a merger agreement with America or any third party.

Defendants also argue that the Complaint[1] should be dismissed because Plaintiffs failed to adequately allege that the Defendants did not act in good faith. Defendants' argument in this regard is largely beside the point, and is incorrect in any event. Because Energy's LLC Agreement does not eliminate or alter the traditional fiduciary obligations imposed under Delaware law in the context of mergers with and into a controlling shareholder, Defendants are obligated to prove that the Merger was "entirely fair" to Energy's public unitholders. And in this

[1] "Complaint" as used herein, refers to Plaintiffs' Amended Verified Consolidated Class Action Complaint, filed December 15, 2009.

[redacted]

regard, the Complaint is replete with allegations demonstrating that the Merger was the product of an unfair process and resulted in an unfair price for Energy's public unitholders. Moreover, the Complaint contains detailed allegations that, in approving the Merger, the individual directors of Energy elevated the interests of America over the interests of the public unitholders of Energy, and thus acted in bad faith.

Defendants' motion to dismiss is therefore premised on a plain misapplication of Energy's LLC Agreement, and a fundamental misreading of Plaintiffs' Complaint. Defendants' motion to dismiss should be denied.

## STATEMENT OF FACTS

### A. Parties

Nominal Defendant Energy was a Delaware limited liability company that developed and produced natural gas and oil in the Eastern United States. (Compl. ¶13). Energy was governed by its LLC agreement that, among other things, set forth the duties and obligations of its officers and directors, and made the Merger subject to a simple majority vote of the unitholders.[2] (Compl. ¶¶45, 125). Energy's main businesses included natural gas and oil exploration and development, and the sponsorship of investment partnerships to finance such exploration and development. Energy became a wholly-owned subsidiary of Defendant America upon consummation of the Merger. *Id.* at ¶13. America is a Delaware corporation that, prior to the consummation of the Merger, owned approximately 47.3% of the Class B common units and all of the Class A units and management incentive interests in Energy. (Compl. ¶15). In addition to these holdings, America exercised control over Energy through its wholly-owned subsidiary Atlas Energy

[2] Article 12 of Energy's LLC Agreement, titled "Merger Consolidation or Conversion" sets forth the Energy Board's duties and the procedures to be followed in connection with a merger. (Compl. ¶126). Section 12.2(b), which specifically governs the Board's approval of a merger, does not eliminate or modify the fiduciary duties owed to Energy unitholders by Energy's directors and officers, or by America. (Compl. ¶¶128–29).

Management ("Manager"), which managed Energy's business operations. *Id.* Upon consummation of the Merger, America acquired the 33.4 million Class B common units of Energy that it did not previously hold and was renamed Atlas Energy, Inc. *Id.*

Defendant Edward E. Cohen ("E. Cohen") served as Chairman of the Energy Board and Chief Executive Officer of Energy since its formation in 2006, and has served as the Chairman and CEO of America since its formation in September 2000. (Compl. ¶16). He also holds leading positions in numerous other organizations in America's web of entities. *Id.* E. Cohen's son, Defendant Jonathan Z. Cohen ("J. Cohen"), was the Vice Chairman of the Energy Board and has been Vice Chairman of the America Board since their respective formations, in addition to holding top positions throughout the America organization. (Compl. ¶17). Defendant Richard D. Weber ("Weber") was the President, Chief Operating Officer, and a director of Energy since its formation, and is currently the President and COO of America. (Compl. ¶18). Defendant Matthew A. Jones ("M. Jones") was the Chief Financial Officer of Energy since its formation and has been the CFO of America since 2005. (Compl. ¶19). Defendant Daniel C. Herz ("Herz") was the Senior Vice President of Corporate Development for Energy and has held the same position at America since August 2007. (Compl. ¶24).

Defendants Walter C. Jones ("W. Jones"), Ellen F. Warren ("Warren"), Bruce M. Wolf ("Wolf"), and Jessica K. Davis ("Davis") were directors of Energy at the time of the Board's consideration of the Merger. (Compl. ¶¶20–23). Each of these Defendants became a director of America subsequent to the Merger. *Id.*

**B. Unitholders Finance Energy's Operational Success**

America spun off Energy in December 2006 in an initial public offering, raising capital from investors to develop natural gas production in the Marcellus Shale, a large geological formation in the northeastern United States and Appalachia containing at least 4 to 6 trillion cubic



[redacted]

feet of untapped natural gas. (Compl. ¶¶1, 27). Since that time, Energy's public unitholders bore significant cost and risk to develop natural gas production in this area. *Id.* With this infusion of public capital, Energy quickly became one of the leading natural gas producers in the Marcellus Shale and throughout the Appalachian Basin, in addition to its success in other reserves in Michigan, Illinois and Tennessee. (Compl. ¶¶28–29). In 2008, Energy reported tremendous operational gains, including a 59% increase over its prior year production and the addition of 838 new wells (including 95 in the Marcellus Shale). (Compl. ¶32). Indeed, even as the Merger unfolded, numerous Individual Defendants repeatedly touted Energy's record results and strong prospects for continuing success, particularly in the Marcellus Shale. (Compl. ¶¶34–39).

This operational success soon paid off financially. On February 25, 2009, Energy posted record financial results for the full fiscal year and the fourth quarter of 2008. (Compl. ¶30). The Company's results represented 57% year-over-year growth in EBITDA, a 22% increase in net income, and a 36% increase in revenues. *Id.* Due to its success, Energy was able to consistently issue significant quarterly cash distributions to its unitholders, paying $0.61 per unit since the third quarter of 2008. (Compl. ¶31). Energy's success also gave it ready access to additional investor funds, with the Company reporting fund-raising of $438.4 million in 2008—which was 21% higher than its previous record—despite the severe global financial crisis. (Compl. ¶33).

### C. America's Control Over Energy

Throughout this time, America was a controlling unitholder of Energy—owning approximately 47.3% of Energy's Class B units and 100% of the outstanding Class A units at the time the Merger was announced—and maintained functional control over the Company's operations. (Compl. ¶¶40–41). America's and Manager's holdings constituted approximately 48% of the voting power of all classes of Energy units. (Compl. ¶40). And through Manager, America substantially controlled Energy's business operations, including, *inter alia*, by providing



[redacted]

executive and administrative personnel, investigating and proposing acquisition and investment opportunities, communicating with Energy unitholders, reporting to the Energy Board on the Company's operating performance, and providing financing advice. (Compl. ¶41).

In addition to its dominant voting bloc and functional control of Energy operations, America exerted control over Energy through its influence over the Energy directors and senior officers, who held their positions at the pleasure of, and were compensated by, America. (Compl. ¶42). Further weakening the Energy Board's independence, each of Energy's independent directors was guaranteed—and ultimately accepted—a spot on the America Board after consummation of the Merger. (Compl. ¶48). America also exerted its influence over Energy's decision making and operations through the significant overlap that existed among Energy and America officers. As stated above, Defendant E. Cohen was Chairman and CEO of both entities, and of Manager; his son Defendant J. Cohen was the Vice Chairman of Energy, America, and Manager; Defendants M. Jones and Herz simultaneously occupied high-ranking positions at both Energy and America; and Defendant Weber was beholden to America for his executive position and director positions with Energy. (Compl. ¶¶16-17, 19, 24, 43–44).

Through its dominant voting bloc, control over Energy's day-to-day operations, influence over Energy's directors and officers, and a web of shared senior management, America essentially maintained total control over Energy's consideration and evaluation of the Merger. (Compl. ¶45). Indeed, Energy's 2006 Prospectus recognized America's domination over Energy, stating: "contracts between us, on the one hand, and our manager and Atlas America and its affiliates, on the other, will not be the result of arm's-length negotiations." (Compl. ¶46). Notwithstanding this, at America's insistence the Merger vote required only a simple majority of Energy Class A and B units, which America had virtually locked up with its ownership of 100% of the Energy Class A units and 47.3% of the Class B units, along with the ownership of an



[redacted]

additional 2.4% of the Class B units by Energy directors and officers. (Compl. ¶45). Indeed, as a result of its effective control over approximately 49.7% of Energy's Class B units, America needed the support of *less than 1%* of the Energy public unitholders to effectuate the Merger.

**D. America Foists A Merger On Energy**

Recognizing the substantial operational and financial success Energy had enjoyed since its IPO, America began planning a takeover of the Company in late 2008. America's senior officers, including Defendant E. Cohen, have openly acknowledged that America sought to reacquire total control of Energy due to its success and growth prospects in the Marcellus Shale. (Compl. ¶¶49–51). Because of its command over Energy through a dominant voting bloc, operational control of the Company, and a system of overlapping directors and officers who were all beholden to it, America, with the acquiescence and capitulation of Energy's outside directors, was able to dictate the terms of the Merger, allowing it to time and structure a transaction favorable to America at the expense of Energy's unitholders. (Compl. ¶¶84–85).

As an initial step towards the Merger, America retained J.P. Morgan Securities, Inc. and Wachtell, Lipton, Rosen & Katz ("Wachtell") as financial and legal advisors as its explored its options. (Compl. ¶52). America's interactions and communications with its advisors clearly indicate that America's main goals included ending the significant cash distributions to Energy unitholders and consummating a merger between the companies, regardless of the consequences for Energy's public unitholders. (Compl. ¶¶87–89). [redacted] (Compl. ¶¶88–89). Indeed, four of the five strategic alternatives that America and its advisors developed and eventually presented to the Energy Board (the "Five Alternatives") would clearly benefit



[redacted]

America to the detriment of Energy's public unitholders. (Compl. ¶91). Tellingly, the only alternative that would have allowed Energy's public unitholders to maintain their interest in Energy, reap the rewards of their Energy investment, and continue receiving cash distributions—maintaining the status quo—was quickly dismissed. *Id.*

Although Defendant E. Cohen and America's management informed the America Board that it was exploring "strategic alternatives" for Energy on January 27, 2009, Defendants Weber, J. Cohen, and Herz first presented the Five Alternatives that America had compiled *without any input from Energy* to the Energy Board almost two months later on March 17, 2009. (Compl. ¶¶53–54). Energy's Board was only informed days earlier, on March 13, 2009, that Energy management—*i.e.*, the overlapping officers shared by both America and Energy—were even considering any strategic alternatives. (Compl. ¶55). Because several of the Five Alternatives involved transactions with America, the Energy Board formed a Special Committee consisting of Defendants Warren, W. Jones, and Davis to consider the Five Alternatives, and engaged UBS Securities LLC ("UBS") as financial advisor to the Special Committee and K&L Gates LLP ("K&L Gates") as its legal advisor. (Compl. ¶57).

Once the Special Committee had been formed, and with America driving the process, America and Energy barreled toward the inevitable Merger. (Compl. ¶¶58–65). As the Complaint describes in detail, the goals of America, and of the officers it shared with Energy, dominated the Special Committee's evaluation of the Five Alternatives. On April 2, 2009, for example, Defendant Weber made a presentation to the Special Committee regarding Energy's business plans, prospects, and financial scenarios. (Compl. ¶58). That very afternoon, the Special Committee approached Defendant J. Cohen to explore a merger with America because it realized after Weber's presentation that America would exercise its units to block any transaction not in its own interest. *Id.* America confirmed these suspicions less than a week later when



[redacted]

Defendants J. Cohen and Herz, both of whom occupied senior positions at both Energy and America, informed UBS and K&L Gates that America was not interested in two of the Five Alternatives that did not involve a merger between the entities. (Compl. ¶59).

Shortly thereafter on April 19, 2009, Wachtell, America's legal advisor, provided the Special Committee with an outline of legal terms for a merger in which Energy would become a wholly-owned subsidiary of America, with Energy's public unitholders receiving shares of America as consideration. (Compl. ¶62). On April 27, 2009, little more than a week after it received the legal terms for a merger with America, the Special Committee determined by a unanimous vote that the Merger was advisable, fair, and reasonable to, and in the best interests of, Energy and its public unitholders, and recommended approval of the Merger to the full Energy Board. (Compl. ¶¶64–65). Pursuant to the Merger Agreement between Energy and America, on September 29, 2009, America was renamed Atlas Energy, Inc. and Energy had become a wholly-owned subsidiary of America. (Compl. ¶65).

Throughout this abbreviated process, America controlled the flow of information to Energy and the Special Committee, setting the stage for the quick evaluation and approval of a merger with America. Indeed, America's officers blatantly steered Energy toward the Merger with little or no regard for their fiduciary duties as *Energy* officers. (Compl. ¶92). With America and the conflicted America/Energy officers controlling the flow of the information that reached the Special Committee, the Committee acquiesced to America's goals of ceasing cash distributions to Energy unitholders even before the Merger was completed. (Compl. ¶¶95-97). Essentially, America and its management were able to force the Special Committee and the entire Energy board to accept the inevitability of the Merger and to acquiesce to the terms dictated by America. (Compl. ¶95).



[redacted]

Further tainting the process, several of the conflicted America/Energy officers engaged in constant "hat switching" by which they purportedly would shift their roles and loyalties in any manner that would best serve America, making it impossible to determine on whose behalf they were acting at any particular time. (Compl. ¶¶92–94). [redacted] (Compl.¶ 97).

In addition to controlling the flow of information to the entire Special Committee, the conflicted America/Energy officers also improperly influenced the individual members of the Special Committee during the process. [redacted] (Compl. ¶103). [redacted] *Id.*

America was also able to more subtly influence the Special Committee's deliberations through the Committee's conflicted financial advisor, UBS, which advised the Special Committee



[redacted]

throughout the process and issued a fairness opinion regarding the price offered to Energy. (Compl. ¶104). In addition to its role as the Special Committee's advisor, UBS also regularly performed work for numerous other entities in the Atlas organization and surely wished to continue this flow of engagements after completing its work for the Special Committee. *Id.* UBS's work with all parties to the transaction raises questions regarding its true loyalties during the Special Committee engagement. Indeed, the record indicates the close association between UBS and America during this sensitive time, as it shows that several UBS personnel advising the Special Committee were also in constant contact with America's officers. *Id.*

In addition to feeding favorable information to the Special Committee, America and the conflicted officers also *withheld* critical information from the Committee. The Special Committee appears to have approved the Merger without evaluating any potential transactional options with third parties. Yet during the time the Special Committee was considering the Merger, [redacted] (Compl. ¶¶99, 108). [redacted] These Energy officers apparently were more interested in locking down the great deal America was getting than they were in their own fiduciary duties to the Energy unitholders.

Energy's conflicted financial advisor, UBS, also withheld similar information from the very Special Committee that it was advising. It failed to inform the Committee that [redacted]



[redacted]

[redacted] (Compl. ¶¶105, 107–08). [redacted] (Compl. ¶107). [redacted] (Compl. ¶¶105–06).

The utter falsity of this guidance was later revealed on April 9, 2010 when America announced that it had entered into a joint venture with a subsidiary of the Indian energy company Reliance Industries Limited to develop the Marcellus Shale in a deal that is worth an estimated *$1.7 billion for America.* *See* Atlas Energy, Inc. Form 8-K, Ex. 99.1, at 1 (Apr. 13, 2010) (attached as Exhibit A to the accompanying Declaration of Peter Andrews ).[3] During an analyst conference call discussing the joint venture (a transcript of which was attached as an exhibit to Atlas Energy, Inc.'s 8-K), Defendant E. Cohen emphasized the continuing broad interest in a joint venture to develop the Marcellus Shale, stating: "We received an enormously positive response to our exploration of a joint venture. And Reliance's proposal was not the only one in this elevated dollar range." *Id.* at Ex. 99.2, at 1. He further stated that "Reliance anticipates a possible further $3.4 billion commitment to our joint venture over the next decade." *Id.* at Ex. 99.2, at 2. This $1.7 billion joint venture—announced little more than six months after the Merger—and the admitted significant industry interest in a joint venture to develop the Marcellus Shale illustrate both America's and UBS's egregious failures to inform the Special Committee

[3] In deciding a motion to dismiss, the Court may take judicial notice of matters that are not subject to reasonable dispute, including public filings with the U.S. Securities and Exchange Commission. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169, 170-71 (Del. 2006); *Fleischman v. Huang*, 2007 WL 2410386, at *3 (Del. Ch. Aug. 22, 2007).



[redacted]

and the Energy Board about potential third party transactions, and the Special Committee's shocking failure to explore such options on its own.

Further illustrating both America's total control over the process leading to the Merger and the Special Committee's utter failure to protect Energy's public unitholders is the Defendants' refusal to negotiate in good faith any measures even slightly advantageous to Energy and Energy's public unitholders. For example, notwithstanding America's dominant voting bloc, the parties agreed on a simple majority vote of all Energy unitholders to approve the Merger. The Special Committee briefly considered requiring a "majority of the minority" voting requirement—which has become common when controlling unitholders enter into transactions with controlled entities—on April 17, 2009, but it quickly abandoned that idea when America indicated that it would not accept any standard of approval higher than a simple majority. (Compl. ¶¶61, 121–22). Such a vote was, of course, essentially locked up due to America's dominant voting bloc, which would have allowed America to push the Merger through with less than 1% of the public unitholders' support in a majority vote—a fact of which the Special Committee was surely aware. [redacted] (Compl. ¶124).

In addition to the lack of a majority of the minority vote requirement, America also dictated the elimination of Energy's cash distributions, notwithstanding that Energy had never identified any need to eliminate the distributions prior to America presenting the Five Alternatives. (Compl. ¶¶111–12). Only at America's insistence did the Special Committee come to the conclusion that Energy should stop paying a distribution, regardless of the clear damage



[redacted]

this would cause to Energy's unitholders. (Compl. ¶120). Furthermore, the cash distribution issue was perhaps the primary factor driving the accelerated and abbreviated deliberative process by which the Special Committee approved the Merger. (Compl. ¶¶111–120). [redacted] (Compl. ¶¶114–120).

**E. America's Control Over The Process Results In An Unfair Price**

The result of this patently unfair process was a woefully inadequate merger consideration. On April 19, 2009, America first floated a proposed exchange ratio of 0.96 of a share of America common stock for each outstanding Energy common unit. This implied a price of $12.43 for each outstanding common unit of Energy based the closing price of America common stock on April 17, 2009 (the last trading day prior to America's proposal), or a price of $10.44 per Energy common unit based on a thirty-day trailing average price of America common stock. Based on the publicly traded price of Energy common units of $14.40 on April 17, 2009, therefore, America's opening offer represented a discount of between 14% and 27% to the publicly traded price of Energy common units. (*See* Compl. ¶¶62–63). Just five days later, the Special Committee agreed to accept an exchange ratio of 1.16 shares of America common stock for each outstanding common unit of Energy. (Compl. ¶65). Although a nominal increase, the final exchange ratio was essentially flat with the publicly traded price of Energy common units ($14.35 as of April 24, 2009), implying a price of $14.39 based on the publicly traded price of



[redacted]

America common stock as of April 24, 2009, or $12.80 based on a trailing thirty-day average This essentially zero premium deal, therefore, totally ignored, *inter alia*, Energy's strong historic performance, the underlying value of Energy, and the future prospects of the Company—which America's management had itself consistently touted. (Compl. ¶¶2, 63, 70). It also ignored the strong likelihood of a lucrative joint venture to develop the Marcellus Shale, as illustrated by the $1.7 billion deal America entered into little more than six months after the Merger was consummated. Indeed, prior to the global economic crisis, Energy units had consistently traded well in excess of the 1.16 exchange ratio, trading at over $30.00 per unit on September 5, 2008 after reaching a 52-week high of over $45 per unit. (Compl. ¶74).

The final exchange ratio accepted by the Special Committee also did not take into account that the Merger was a "minority squeeze-out" by America of the Energy public unitholders in which America's dominant voting bloc essentially allowed it to impose its will on the non-affiliated Energy unitholders. (Compl. ¶71). In such situations, a special committee would typically demand a "minority squeeze-out premium," which is often significant and can be as high as in the 30% range. *Id.* [redacted] *Id.* Even with this knowledge, the Special Committee accepted America's offer without insisting on a minority squeeze-out premium, seeking any deals with outside parties, or even testing the waters to determine what price it could get from any party other than America. (Compl. ¶¶63, 72).



[redacted]

Finally, the Merger price was deficient because it did not compensate Energy's public unitholders for the loss of their units for a substantially different investment in America or for the loss of their significant $0.61 per unit quarterly cash distributions, which were suspended during the pendency of the Merger beginning with the distribution due for the quarter ending March 31, 2009. (Compl. ¶¶67, 78). These tax-deferred cash distributions were a significant incentive for the unitholders to invest in Energy and bear the risk of the exploration and development of Energy's projects. (Compl. ¶78). Notwithstanding this fact, the Special Committee acquiesced in the suspension of these distributions at the demand of America's management, which had made no secret of its desire to end the cash distributions. (Compl. ¶67). As set forth in the Final Prospectus, the cash distributions would be retained and diverted for reinvestment and repayment of the debt of the combined company, therefore providing America significant cash flow at the expense of the Energy public unitholders, without America having to compensate them in any manner. (Compl. ¶79).

In sum, the Merger was a fundamentally transformative event for the public Energy unitholders, who saw their high-yield, special purpose investment eliminated without an effective stockholder-vote or effectively independent board. In place of that investment and for an unfairly low exchange ratio, unitholders received shares of a totally different company with no dividend yield. In allowing this deeply flawed Merger to go forward through their collective actions and inactions, Defendants disregarded their obligations to Energy's public unitholders to America's ultimate benefit.



[redacted]

## ARGUMENT

Defendants move to dismiss Plaintiffs' Complaint pursuant to Court of Chancery Rule 12(b)(6). "Under the 'notice pleading' standard of Court of Chancery Rule 8(a), the complaint need only set forth 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008) (*citing* Ct. Ch. R. 8(a) and *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)). In evaluating whether Plaintiffs' Complaint has satisfied this burden, the Court must:

> (1) accept as true all well pleaded facts; (2) make all reasonable inferences in favor of the plaintiff[s]; and (3) only dismiss the complaint if [the Court] can determine with "reasonable certainty" that there is no set of facts that can be reasonably inferred from the well pleaded allegations in the complaint upon which the plaintiff[s] could prevail.

*Id.* (citing *In re Coca-Cola Enters., Inc. S'holders. Litig.*, 2007 WL 3122370, at *3 (Del. Ch. Oct. 17, 2007)).

### I. ENERGY'S LLC AGREEMENT DOES NOT ELIMINATE DEFENDANTS' COMMON LAW FIDUCIARY DUTIES

It is true, of course, that "LLC agreements are contracts that are enforced according to their terms, and all fiduciary duties, except the implied contractual covenant of good faith and fair dealing, can be waived in an LLC agreement." *Kahn*, 2008 WL 5197164, at *3. But for an LLC agreement to effectively alter fiduciary obligations, it must do so in clear and unambiguous terms. *See Kelly v. Blum*, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010) ("Having been granted great contractual freedom by the LLC Act, drafters of and parties to an LLC agreement should be expected to provide parties and anyone interpreting the agreement with clear and unambiguous provisions when they desire to expand, restrict, or eliminate the operation of traditional fiduciary duties."). Here, there is *nothing* in the Energy LLC Agreement that "clearly and unambiguously"



[redacted]

alters or eliminates the fiduciary obligations of Atlas America and the directors of Atlas Energy to ensure that the Merger was "entirely fair" to Energy's public unitholders.[4]

### A. Section 7.9 Of The Energy LLC Agreement Does Not Alter Or Eliminate Defendants' Fiduciary Duties In The Context Of The Merger.

Defendants strenuously argue that Section 7.9 eliminates the fiduciary obligations of Defendants here because it essentially establishes safe-harbor provisions for the resolution of conflicts of interest. *See* Def. Br. at 13-18. Defendants are mistaken. By its plain terms, Section 7.9 of Energy's LLC Agreement *does not apply* to conflicts between America, as Energy's controlling unitholder, and the public unitholders of Energy. And even if it did, it has absolutely *no* impact on the fiduciary duties of America itself.

#### 1. Section 7.9(a) Does Not Apply To Conflicts Between America And Individual Energy Unitholders.

Section 7.9(a) of the Energy LLC Agreement states, in relevant part:

> *Resolution of Conflicts of Interest: Standards of Conduct and Modification of Duties*
>
> (a) Unless otherwise expressly provided in this Agreement or any Group Member Agreement, ***whenever 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... 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....

Energy's LLC Agreement § 7.9(a) (emphasis added).

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[4] *See infra* Sec. II (discussing fiduciary duties of America and the directors of Energy related to the Merger).



[redacted]

Defendants argue that under Section 7.9(a), if there is a resolution of a potential conflict by any of the "four enumerated options," the Energy 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." Def. Br. at 15. In other words, according to Defendants, so long as the Energy Board complies with any of the four enumerated options in a conflict situation, all claims for potential breach of fiduciary duties are eliminated. *See* Def. Br. at 18. Defendants are wrong.

By its plain terms, Section 7.9(a) does not apply to conflicts between America and individual unitholders of Energy. As the quoted paragraph above indicates, Section 7.9(a) only applies where "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." Energy's LLC Agreement § 7.9(a) (emphasis supplied). In the context of the Merger, where America acquired the remaining outstanding units of Energy, a potential conflict existed between America and the public unitholders of Energy regarding the price that America was willing to pay for the units of Energy that it did not already own. *See e.g. Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594-95 (Del. Ch. 1986) (holding that the heightened judicial scrutiny called for by the test of intrinsic or entire fairness is applied when a controller has an interest with respect to the transaction that conflicts with the interest of the minority); *see also, Kahn v. Lynch Commc'ns Sys.*, 638 A.2d 1110, 1116 (Del. 1994) (recognizing inherent conflict in a controlling shareholder parent/subsidiary merger and policy rationale for exclusive application of entire fairness standard in those circumstances). Although America undoubtedly qualifies as an "Affiliate of the Company,"[5] the individual public unitholders of Energy do not qualify as a "Group Member" under the LLC Agreement, thus rendering Section 7.9(a) wholly irrelevant.

[5] Section 1.1 of the Energy LLC Agreement provides the following definitions:



[redacted]

The Energy LLC Agreement defines "Group Member" as "a member of the Company Group." Energy's LLC Agreement at § 1.1.[6] "Company Group," in turn, is defined as "the Company and each Subsidiary of the Company, treated as a single consolidated entity." Energy's public unitholders are clearly not included in a straight forward definition. Thus, the provisions

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> '*Affiliate*' means, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with the Person in question. As used herein, the term '*control*' means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract or otherwise.
>
> '*Company*' means Atlas Energy Resources, LLC, a Delaware limited liability company, and any successors thereto.
>
> '*Person*' means an individual or a corporation, limited liability company, partnership, joint venture, trust, unincorporated organization or other enterprise (including an employee benefit plan), association, government agency or political subdivision thereof or other entity.

Energy LLC Agreement, § 1.1. Because, through its unitholdings and ability to designate Board members, America had (and exercised) the ability to control Energy, America qualified as an "Affiliate of the Company." Indeed, by invoking Section 7.9 in their motion to dismiss, Defendants appear to concede this point.

[6] In this regard, it is important to note that the term "member" is not capitalized in the definition of "Group Member." This indicates that the term "member" within the definition of "Group Member" is not coextensive with the term "Member," as that term is formally defined in Article 1, Section 1.1 of the Energy LLC Agreement. Indeed, throughout the Energy LLC Agreement, whenever a defined term is used, it is capitalized. The failure to capitalize the word "member" in the definition of the defined term "Group Member," therefore, supports an inference that the term "Group Member," which is restricted to corporate entities, is not intended to include individual unitholders of Energy. *See Delaware Solid Waste Authority v. Eastern Shore Envtl., Inc.*, 2002 WL 537691, at *3 (Del. Ch. Mar 28, 2002) (observing, in the context of the interpretation of a statute that "'district,' a defined term, is always capitalized in Chapter 48, but is never capitalized in Chapter 49. *The purposeful capitalization of 'district' throughout Chapter 48 is evidence of the General Assembly's intent to give the same term different meanings in each Chapter.*" (Emphasis supplied)). To the extent, however, that the Court determines that the LLC Agreement's disparate use of "member" and "Member" is unclear, such ambiguity must be resolved against America and against the waiver of fiduciary obligations urged by Defendants here. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398 (Del. Supr. 1996) (holding that an agreement's conflicting use of the terms "common stock" and "Common Stock" contributed to the creation of a "hopelessly ambiguous contract"); *Kelly*, 2010 WL 629850, at *10 n.70 (any attempt to alter fiduciary obligations in an LLC agreement must be set forth in clear and unambiguous terms).



[redacted]

of Section 7.9(a) only apply to the resolution of conflicts of interest between America, on the one hand, and Energy itself or any subsidiaries of Energy, on the other. Section 7.9(a)'s conflict provisions, therefore, do not unambiguously absolve fiduciary duties with regard to conflicts between America and minority unitholders.

The decision of the Court in *Kahn v. Portnoy*, is instructive. In *Kahn*, the conflict provision of the LLC agreement only applied to "a potential conflict of interest ... between any Shareholder or an Affiliate thereof, and/or one or more Directors or their respective Affiliates and/or the Company..." *Id.* at *4, n.17. Based on this language, the Court determined that the LLC agreement applied only to "a conflict between a shareholder and the board or a shareholder and the Company." *Id.* at *4. Because the conflicts at issue in that case were between a single director and the Company itself, as it was alleged the director stood on both sides of the challenged transaction, the Court held that the LLC agreement's conflict provisions could be reasonably interpreted *not* to apply, and denied the defendants' motion to dismiss. *Id.* at 5. Likewise, here.[7]

Wholly ignoring the actual language of Section 7.9(a), Defendants argue that "[t]he conflict resolution process prescribed by [Energy's] LLC Agreement and followed by Defendants here is virtually identical to the contractual provision at issue in *Brickell* [*Partners v. Wise*, 794 A.2d 1, 2 (Del. Ch. 2001)]." *See* Def. Br. at 17. Defendants are incorrect. In *Brickell* the relevant LLP agreement language stated that "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...***"

[7] *See VLIW Tech. LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) ("Because the provisions at issue in the Agreement are susceptible to more than one reasonable interpretation, for purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party.").



[redacted]

any resolution shall be deemed permitted and approved and shall not be considered a breach of the agreement. *Brickell,* 794 A.2d at 2 (emphasis added). The LLP agreement at issue in *Brickell,* and in stark contrast to the Energy LLC Agreement at issue here, specifically addressed conflicts between the "General Partner" (*i.e.* America in this context) and "Partners" (*i.e.* the individual Energy unitholders here). *Cf. Kahn,* at *4 (holding that the LLC agreement did not apply to transaction involving a board decision in the face of a conflict between single directory and company). [8] Energy's LLC Agreement could have provided that Section 7.9 applied whenever "a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company, any Group Member, ***or any individual unitholder of the Company*** on the other." It did not.

Under Delaware law, "despite the wide latitude of freedom of contract afforded to contracting parties in the LLC context, 'in the absence of a contrary provision in the LLC Agreement,' LLC managers and members owe 'traditional duties of loyalty and care' to each other and to the company." *Id.* (listing cases). Here, because America stood on both sides of the Merger, Defendants had fiduciary obligations to ensure that the Merger was entirely fair to

[8] Defendants try to ignore the actual language of the Energy LLC Agreement by arguing the Prospectus warned the minority unitholders Energy's LLC Agreement restricted or eliminated the operation of traditional fiduciary duties. *See e.g.* Def. Br. at 6, 14, *citing* Prospectus at 141. As Defendants point out, the Prospectus stated that the conflict of interest provisions apply to "**Atlas America... on the one hand**", and "us [the Company] or **any other unitholder on the other**". Prospectus at 141 (emphasis added). The problem with Defendants' argument in this regard, of course, is that the language of the Prospectus is completely different from Energy's LLC Agreement, and Defendants cannot dispute this point. *See* Energy's LLC Agreement § 7.9(a) ("whenever a potential conflict of interest exists or arises between any Affiliate of the Company, on the one hand, and the Company or any Group Members, on the other..."). Unfortunately for Defendants, the language of the Energy LLC Agreement controls, and other disclosures do not impliedly override the express provisions of a Delaware LLC Agreement. *See Kahn,* 2008 WL 5197164, at *5 n. 21 (rejecting similar argument that conflict was disclosed and agreed at the time plaintiff acquired interest in LLC- holding "the express provisions of the LLC Agreement define the fiduciary duties owed..., and other disclosures do not impliedly override the express provisions of ... [the] primary governing document.").



[redacted]

Energy's public unitholders. *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) (holding that there is an "unflinching" fairness requirement where the controlling stockholder stands on both sides of transaction). Because Section 7.9(a) does not apply to the resolution of conflicts between America and individual Energy unitholders, these fiduciary duties remain unaffected.

**2. Section 7.9(b) And (d), Does Not Apply At All To Excuse America Itself From Liability For Its Own Breach Of Fiduciary Duty, And Does Not Exculpate The Individual Defendants From Liability For Acts Committed In Bad Faith.**

Section 7.9(b) and (d) of Energy's LLC Agreement also fail to excuse America from liability for its breach of fiduciary duty owed to the public Energy unitholders. Nowhere in their brief do Defendants even attempt to explain how America's duties are modified or eliminated under the terms of Energy's LLC Agreement.

Section 7.9(b) of the Energy's LLC Agreement provides, in relevant part:

> 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 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 other 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. 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 other action must believe that the determination or other action is in the best interests of the Company....

*See* Energy LLC Agreement § 7.9 (b). Section 7.9(b) does not modify America's duties in any respect, only the Board of Directors or Officers or Directors of Energy.

Section 7.9(d) of Energy's LLC Agreement also does not exculpate America. The relevant part of Section 7.9(d) states:



[redacted]

> Except as expressly set forth in this Agreement or required by Law, none of the Directors, nor any other Indemnittee 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.

Energy's LLC Agreement, § 7.9(d). Again, Section 7.9(d) relates only to Directors and Indemnittees. America is neither.[9] Section 7.9 does not modify America's duties in any way.

At best, Sections 7.9(b) and (d) reflect that the individual director Defendants can be held liable to the extent that their decision to approve the Merger lacked "good faith." Regardless, Plaintiffs' Complaint adequately alleges facts in support of a determination that approval by the Special Committee of the Merger did not constitute "good faith" under the entire fairness standard which is to be applied in interested transactions. *See* Part III, *infra*.

**3. Section 12 of Energy's LLC Agreement Unambiguously Applies To Mergers And Does Not Limit Common Law Fiduciary Duties Where The Energy Board Accepts A Merger Proposal.**

Article 12 of the Energy LLC Agreement explicitly governs mergers by Energy. *See* Energy LLC Agreement (Article 12 "Merger, Consolidation or Conversion"). However, the Energy Board's duties vary depending on whether a merger is *approved* or *rejected*. For instance, Section 12.2(a), applicable to *rejection* of a merger, provides:

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[9] Section of the Energy LLC Agreement defines "Indemnitee" as follows:

> '*Indemnitee*' means (a) and Person who is or was a Director, Officer, employee or agent of the Company, or a Tax Matters Partner of the Company, (b) any Person who is or was a member, partner, manager, director, officer, fiduciary or trustee of any Group Member (other than the Company) or any Affiliate of a Group Member (other than the Company), (c) any Person who is or was serving at the request of the Company as a director, manager, officer, tax matters partner, fiduciary or trustee of another Person; *provided* that a Person shall not be an '*Indemnitee*' by reason of providing, on a fee-for-services basis, trustee, fiduciary or custodial services and (d) any Person that the Company designates as an '*Indemnitee*' for purposes of this Agreement.



[redacted]

> [T]o the fullest extent permitted by law, the Board of Directors shall have no duty or obligation to consent to any merger, consolidation or conversion of the Company and **may decline to do so free of any fiduciary duty or obligation whatsoever** to the Company or any Member and, in declining to consent to a merger, consolidation or conversion, shall not be required to act in good faith or pursuant to any other standard imposed by this Agreement, any other agreement contemplated hereby or under the Delaware Act or any other law, rule or regulation or at equity.

Energy LLC Agreement § 12.2(a)(emphasis added). Thus, pursuant to Section 12.2(a) the Energy Board may "decline" to consent to a Merger "free of any fiduciary duty or obligation." However, Section 12.2(a) cannot apply here since the Energy Board did not "decline" to participate in the Merger with America. To the contrary, the Energy Board but was forced to accept America's merger terms as a result of America's controlling unitholder position.

Unlike Section 12.2(a), the remainder of Section 12 does not contain specific modifications of duties in the merger or consolidation context, but is silent. *See* Energy LLC Agreement §§ 12.2(b), 12.3. Although Section 12.2(b) sets forth required items should the Energy Board *approve* a merger, it does not eliminate or modify the Energy Board's fiduciary duties in any way with respect to that decision. [10] Similarly, Section 12.3 addresses a majority

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[10] Section 12.2(b) reads, in relevant part:

> If the Board of Directors shall determine to consent to a merger or consolidation, the Board of Directors shall approve the Merger Agreement, which shall set forth:
>
> (i) the names and jurisdiction of domicile of each of the business entities proposing to merge or consolidate;
>
> (ii) the name and jurisdiction of domicile of the business entity that is to survive the proposed merger or consolidation (the "*Surviving Business Entity*");
>
> (iii) the terms and conditions of the proposed merger or consolidation;
>
> (iv) the manner and basis of exchanging or converting the rights or securities of, or interests in, each constituent business entity for, or into, cash, property, rights or obligations of, securities of or interests in, the Surviving Business Entity…;
>
> (v) a statement of any changes in the constituent documents or the adoption of new constituent documents…;

vote requirement for approval, but like Section 12.2(b), does not modify any fiduciary duties of the Energy Board.[11]

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(vi) the effective time of the merger or consolidation...; and

(vii) such other provisions with respect to the proposed merger or consolidation that the Board of Directors determines to be necessary of appropriate.

[11] Section 12.3 states in relevant part:

(a) Except as provided in *Section 12.3(d)*, the Board of Directors, upon its approval of the Merger Agreement or Plan of Conversion, as the case may be, shall direct that the Merger Agreement or Plan of Conversion, as applicable, be submitted to a vote of Members, whether at an annual meeting or a special meeting, in either case in accordance with the requirements of *Article 11*...

(b) Except as provided in *Section 12.3(d)*, the Merger Agreement or Plan of Conversion, as the case may be, shall be approved upon receiving the affirmative vote or consent of the holders of a Class A Unit Majority and a Common Unit Majority unless the Merger Agreement or Plan of Conversion, as applicable, contains any provision that, if contained in an amendment to this Agreement, the provisions of this Agreement or the Delaware Act would require for its approval the vote or consent of a greater percentage of the Outstanding Units or of any class of Members, in which case such greater percentage vote or consent shall be required for approval of the Merger Agreement or Plan of Conversion, as applicable.

(c) Except as provided in *Section 12.3(d)*, after such approval by vote or consent of the Members, and at any time prior to the filing of the certificate of merger or certificate of conversion pursuant to *Section 12.4*, the merger, consolidation or conversion may be abandoned pursuant to provisions therefore, if any, set forth in the Merger Agreement or Plan of Conversion, as applicable.

(d) Notwithstanding anything else contained in this *Article 12* or in this Agreement, the Board of Directors is permitted without Member approval, to convert the Company or any Group Member into a new limited liability entity, to merge the Company or any Group Member into, or convey all of the Company's assets to, another limited liability entity which shall be newly formed and shall have no assets, liabilities or operations at the time of such conversion, merger or conveyance other than those it receives from the Company or other Group Member...

(e) Additionally, notwithstanding anything else contained in this Article 12 or in this Agreement, the Board of Directors is permitted without Member approval to merge or consolidate the Company with or into another entity if (A) the Board of Directors has received an Opinion of Counsel that the merger or consolidation, as the case may be, would not result in the loss of the limited liability of any Member under Delaware law or cause the Company to be treated as an association taxable as a corporation or otherwise to be taxed as an entity for



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Because Article 12 does not expand or eliminate fiduciary duties owed by the Energy Board when approving the Merger, traditional fiduciary duties are to be applied. *Kelly*, 2010 WL 629850, at *10 ("'[I]n the absence of contrary provisions in the LLC agreement," LLC managers owe 'traditional fiduciary duties of loyalty and care to each other' and to the company.")(citations omitted). Even more important to consider is that America as "controlling member" owes the same "traditional fiduciary duties" to the minority members (i.e. Plaintiffs) unless Energy's LLC Agreement expands, restricts, or eliminates fiduciary duties elsewhere. *Id.* Contrary to Defendant's arguments otherwise, Energy's LLC Agreement does not *unambiguously* expand, restrict, or eliminate fiduciary duties in the context of the Merger.

Defendants argue that "Section 12," (despite the obvious applicability since Section 12 governs mergers), "in no way alters the clear elimination of fiduciary duties in reflected in Section 7.9." Def. Br. at 23-24. Defendants claim that Section 12.2(b) was required to "spell out" the "duties or obligations." *Id.* at 23. Once again, Defendants are incorrect.

First, as discussed above, Section 7.9 does not "eliminate" any fiduciary duties *at all*. So Defendants' invocation of Section 7.9 of the Energy LLC Agreement while ignoring the plain language of Section 12 fails.

Second, Energy's LLC Agreement specifically eliminated fiduciary duties in Section 12.2(a) with regard to *rejection* of a Merger, but did not with regard to the *acceptance* of a

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federal income tax purposes (to the extent not previously treated as such), (B) the merger or consolidation would not result in an amendment to this Agreement other than any amendments that could be adopted pursuant to Section 11.1(c), (C) the Company is the Surviving Business Entity in such merger or consolidation, (D) each Member Interest outstanding immediately prior to the effective date of the merger or consolidation is to be an identical Member Interest of the Company after the effective date of the merger or consolidation, and (E) the number of Company Securities to be issued by the Company in such merger or consolidation do not exceed 20% of the Company Securities Outstanding immediately prior to the effective date of such merger or consolidation.



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Merger in Section 12.2(b), when it could have. This indicates a clear intention by the drafters that the fiduciary obligations of Energy's Board should remain in full force and effect in connection with a decision to approve a merger. *See Bay Center Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *9 (Del. Ch. April 20, 2009)("[t]he interpretive scales also tip in favor of preserving fiduciary duties under the rule that the drafters of the chartering documents must make their intention to eliminate fiduciary duties plain and unambiguous.").

Third, Defendants' argument that the conflicts provisions in Section 7.9 essentially trumps the merger provisions in Section 12 does not make any sense. According to Defendants, because Section 7.9 supposedly eliminates all fiduciary obligations of Energy's directors in all circumstances (which is a clear misapplication of the relevant provision, as discussed above), the provisions in Section 12.2(a) that address fiduciary obligations in connection with rejecting mergers, and the provisions in Section 12.2(b) dealing with procedures that must be followed in accepting mergers are completely irrelevant. Such an interpretation is at odds with established Delaware law. *See Bay Center Apartments,* 2009 WL 1124451, at *9 ("It is a maxim of contract interpretation that, 'given ambiguity between potentially conflicting terms, a contract should be read so as not to render any term meaningless.'").

## II. THE MERGER WAS NOT ENTIRELY FAIR TO ENERGY'S PUBLIC UNITHOLDERS

Since Energy's LLC Agreement cannot apply to divest any Defendant of traditional fiduciary duties, Plaintiffs' breach of fiduciary duties claims must survive as a matter of law and are subject to an entire fairness review. Where, as here, the proponent of a merger is an interested, controlling stockholder, the exacting entire fairness standard will apply to the Court's review. *Ryan v. Tad's Enters, Inc.*, 709 A.2d 682, 689 (Del. Ch. 1996); *See e.g., Kahn v. Lynch Commc'ns. Sys.*, 638 A.2d at 1116 (Del.1994)(exclusive standard is entire fairness in examining interested, cash-out merger transaction by controlling shareholder). The entire fairness standard



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requires that the controlling stockholder, America, demonstrate that the Merger was the product of a fair process and that it offers a fair price to the minority stockholders. *Cede & Co. v. Technicolor, Inc.*, 637 A.2d 345, 361 (Del. Ch. 1993). Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. Ch. 1983). The fair price inquiry focuses on "the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Id.* If "the facts alleged [in a complaint] import a form of overreaching, [then] in the context of entire fairness they deserve more considered analysis than can be accorded them on a motion to dismiss." *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1107 (Del. 1985). Indeed, because the Defendants bear the burden of proof in establishing the entire fairness of the Merger here, their motion to dismiss is inappropriate and should be denied. *see Gantler v. Stephens*, 965 A.2d 695, 705 (Del. 2009)(holding that Court of Chancery erred in dismissing claim on motion to dismiss where entire fairness applied); *Orman v. Cullen*, 794 A.2d 5, 21 (Del. Ch. 2002) ("Once the business judgment rule presumption is rebutted, the burden of proof shifts to the defendant, who must either establish the entire fairness of the transaction or show that the burden of disproving its entire fairness must be shifted to the plaintiff. A determination of whether the defendant has met that burden will normally be impossible by examining only the documents the Court is free to consider on a motion to dismiss-the complaint and any documents it incorporates by reference.")

**A. The Merger Was Not the Product Of A Fair Process**

Controlling shareholders owe minority shareholders "the duty 'not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority



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stockholders.'" *Kelly v. Blum*, 2010 WL 629850, at *12 (finding that allegations that controlling stockholders effected a merger in order to benefit themselves at the expense of the minority stockholder were sufficient to survive a motion to dismiss) (*citing Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006)); *Cede & Co.*, 634 A.2d 345, 361 (Del. 1993)("[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a ... controlling shareholder and not shared by the stockholders generally.").

A director's duty of loyalty to the corporation mandates that the director not consider or represent interests other than the best interests of the corporation and its stockholders in making a business decision. *Weinberger*, 457 A.2d at 710; *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). Indeed, director defendants will be found to have breached their duty of loyalty if they subordinate the interests of the minority stockholders to the interests of the company's majority stockholder. *Strassberger v. Earley*, 752 A.2d 557, 581 (Del. Ch. 2000) (finding that director defendants breached their duty of loyalty when they "gave priority to [interest of the majority shareholder], and ignored their fiduciary obligation as [company] directors to assure that *all* [company] stockholders would be treated fairly" (emphasis in original)). Thus, allegations of an unfair merger process controlled by a majority stockholder will be sufficient to defeat a motion to dismiss. *See Weinberger*, 457 A.2d at 711 (finding that a process which was entirely initiated by the controlling stockholder, and in which the controlling stockholder set serious time constraints, structured the transaction, and in which the negotiations were "modest at best" was not the product of fair dealing); *Rabkin*, 498 A.2d at 1105-06 (finding that allegations supported a claim of unfair dealing sufficient to defeat dismissal of a motion to dismiss where: (i) a controlling stockholder purposely timing a merger to its benefit, (ii) the controlling stockholder's alleged attitude toward the minority, and (iii) the absence of any meaningful negotiations as to price).



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The duty of loyalty also requires that directors of a company act in good faith. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). The "good faith" requirement is met where actions are taken in the best interests of a Company and its stockholders. *See In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 289 (Del. 2003) ("Knowing or deliberate indifference by a director to his or her duty to act faithfully and with appropriate care is conduct . . . that may not have been taken honestly and in good faith to advance the best interests of the company."); *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) ("A director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest.").[12] The Delaware Supreme Court recently held that a claim for failure to act in good faith exists if a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties," or, in other words, "if they knowingly and completely failed to undertake their responsibilities." *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009) (citations omitted).[13]

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[12] Defendants' citation to *Flight Options Int'l, Inc. v. Flight Options LLC*, is inapposite. In *Flight Options*, the Company that entered into the challenged purchase agreement had serious financial problems. 2005 Del. Ch. LEXIS 149, at *3 (Del. Ch. Sept. 20, 2005). In that factual context, the Court found no reason to doubt that "[the fiduciaries] reasonably and in good faith believed that the Common Units were of no (or *de minimis*) value and that the proposed financing was in the Company's best interest. The balance sheet is negative, cash needs cannot be met, and the debt is substantial." *Id.* at *36 n.42. By contrast, here, Energy, formerly one of the leading natural gas and oil exploration development companies in the Eastern United States (Compl. ¶27), consistently reported strong operational and financial results, especially in relation to its development of the Marcellus Shale. (Compl. ¶¶30-39). Indeed, Defendants E. Cohen, Weber and M. Jones, in their capacity as executives of Energy, highlighted the Company's strong natural gas product levels, the likely future growth of these significant results, and the belief that the Company's financials would only improve in the future. (Compl. ¶¶37-39). In this context of Energy's positive operational and financial prospects, the Individual Defendants inexplicably acceded to a merger which fundamentally altered the nature of the Energy unitholders' investment and offered virtually no premium.

[13] In *Lyondell* the Court found that the directors had not failed to act in good faith because they had solicited and followed the advice of their financial and legal advisors; attempted to negotiate a higher offer, despite having a "blowout offer" on the table; and approved the merger agreement, because "[i]t was simply too good not to pass along [to the stockholders] for their consideration."



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Allegations that a board failed to employ a meaningful process in considering whether to approve a transaction are also sufficient to plead that director defendants breached their duty of loyalty by acting in bad faith.[14] *See In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 649 (Del. Ch. 2008) (indicating that allegations a "board failed to employ a rational process in considering whether to approve the [ ] Merger Agreement" would be sufficient to plead a breach of the duty of loyalty); *Official Committee of Unsecured Creditors of Integrated Health Services, Inc. v. Elkins*, 2004 WL 1949290, at *9 (Del. Ch. Aug. 24, 2004)(*citing In re Walt Disney*, 825 A.2d at 289 (holding that allegations that directors "knew that they were making material decisions without adequate information and without adequate deliberations, and that they simply did not care if the decisions caused the corporation and its stockholders to suffer injury or loss" were sufficient to demonstrate a breach of the duty of loyalty)); *Walter v. Ryan*, 970 A.2d 235, 244 (Del. 2009) (indicating that in a *Revlon* context, allegations that "directors utterly failed to

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970 A.2d at 244. By contrast, and as discussed more fully below, here the Individual Defendants relied on the advice of Energy's conflicted financial advisor, UBS. (Compl. ¶¶104–08). Additionally, America never made an offer that even approached a "blowout price." There was also no exhibited sentiment on the part of the Special Committee or the full Energy Board that this transaction was "too good not to pass along." Indeed, the Special Committee was uneasy with the deal mere days before the Company announced the Merger. (Compl. ¶103). Moreover, unlike the Board in *Lyondell*, the Energy Board was faced with the added factor of a controlling unitholder, America, the interests of which the Energy Board repeatedly gave higher consideration to than those of the non-America unitholders. ( *See infra* at Section II.A.1 & 2).

[14] Defendants incorrectly indicate that allegations of an unfair process cannot be sufficient to plead a breach of the duty of loyalty to act in good faith. (*See* Def. Br. at 30). As discussed herein, allegations that the Energy Board repeatedly acted to place the interests of America above those of Energy and its unitholders are sufficient to plead that the Defendants breached their duty of loyalty to act in good faith. *Cede & Co. v. Technicolor, Inc.* 634 A.2d 345, 361 (Del.,1993)("Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally. "); *see also Orman v. Cullman*, 94 A.2d 5, 14 n.3 (Del.Ch.,2002) (breach of duty of loyalty necessarily implicates breach of duty of good faith, as "'good faith' is merely a subset of a director's duty of loyalty ... and necessarily includes a consideration of whether the facts pled suggest the defendants did not act in good faith with regard to their duty of loyalty to the Company.")



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attempt to obtain the best sale price" would be sufficient to plead a claim for a breach of the duty of loyalty).

### 1. America And The Conflicted Directors And Officers Violated Their Fiduciary Duties

Defendants' actions in failing to conduct a fair process and agreeing to a transaction that benefitted America at the expense of Energy and the public Energy unitholders, notwithstanding Energy's strong financial condition and prospects, were not even remotely, much less entirely, fair.

The conflicted directors and officers, Defendants E. Cohen, J. Cohen, Weber,[15] M. Jones and Herz, all had divided loyalties due to their dual roles representing both America and Energy.[16] (Compl. ¶¶5, 6). Factual allegations that a director had divided loyalties with respect to a challenged transaction will be sufficient to plead that they were not acting independently. *See In re Freeport-McMoran Sulphur, Inc. S'holder Litig.*, 2005 WL 1653923, at *8 (Del. Ch. June 30, 2005) (finding that director defendants "were still not able to act independently in the transaction because they sat on both boards and owed the same duty of loyalty to both companies. Their conflicting loyalties created a structural problem that precluded them from acting independently as directors of Sulphur, any more than they could act independently as directors of MOXY, in this transaction."). Not only did these Defendants have divided loyalties, but the

[15] While Defendant Weber, an Energy officer and director, was not an officer or director of America, he has had previous ties to America and its family of entities (Compl. ¶18), was in constant contact with America's management without prior Energy Board consent (Compl. ¶100), [redacted] (Compl. ¶99).

[16] Defendants cannot point to the fact that the conflicts between America and Energy were disclosed to Energy unitholders to inject any fairness into the process nor to preclude Plaintiffs from complaining about the conflicts. (*See* Def. Br. at 30); *Kahn*, 2008 WL 5197164, at *5 n.22 (finding unavailing Defendants argument that Plaintiff could not complain about a conflict of interest because it was disclosed and agreed to by partner s in forming the partnership).



[redacted]

conflicted directors and officers continually and explicitly acted to place the interests of America over those of Energy and the public Energy unitholders in breach of their fiduciary duties.

These Defendants, acting in the best interests of America and completely disregarding their duties towards Energy, decided to explore potential ways for America to acquire complete control over Energy without even discussing America's objectives with the rest of the Energy Board. (Compl. ¶¶53–57). Indeed, Defendants Weber, J. Cohen, and Herz, acting on behalf of America, first presented to the Energy Board the Five Alternatives for Energy that America developed without any involvement from Energy itself. (Compl. ¶¶53, 54). These Defendants' actions in first formulating "strategic alternatives" for Energy as America officers and directors, and then presenting and considering these same alternatives as Energy officers and directors, are sufficient to plead that these Defendants were not acting good faith.

These Defendants further illustrated their divided loyalties after the formation of the Special Committee, as Defendants E. Cohen, J. Cohen, Weber, M. Jones and Herz steered the Special Committee toward the inevitable decision to recommend a merger with America. Indeed, the presentation of the Five Alternatives was a mere formality, designed to give the false impression of a choice while, in reality, management was busying itself with presenting one single option for the Energy Board: acceptance of a merger with America. (Compl. ¶¶56, 58). Indeed, even before the Five Alternatives were fully developed, America, led by the conflicted Defendants, had identified as America's key objective a consolidation of America and Energy via a merger and a cessation of distributions. (Compl. ¶88). During the Special Committee's consideration of the Five Alternatives, Defendants E. Cohen, J. Cohen, Weber, M. Jones, and Herz, all impressed upon the Special Committee and its advisors America's ability to exercise its voting control to block any transaction it did not want to see consummated and any terms it opposed, including a majority of the minority voting provision. (Compl. ¶¶58-61, 98). In



[redacted]

addition, these Defendants framed all information regarding both Energy's prospects and the Five Alternatives so as to cast any alternative that contemplated continued payment of distributions in a negative light. (Compl. ¶¶92, 95-97).

These Defendants also illustrated their bad faith by further breaching their fiduciary duties by withholding critical information from the very Energy Board they claimed to serve. For example, although one of the Five Alternatives originally presented was pursuing a third party joint venture to develop the Marcellus Shale (Compl. ¶54(d)), [redacted] (Compl. ¶¶99, 105). The possibility of a strategic alternative of that nature should have been of obvious great interest to a properly functioning Special Committee. Yet instead of disclosing it, these Defendants served America's interests by concealing this information. (*Id.*). This failure by Energy officers and directors to disclose a third party's interest in a joint venture is even more shocking when one considers America's April 2010 announcement that it had entered into a joint venture with Reliance Industries Limited to develop the Marcellus Shale in a deal that is *worth an estimated $1.7 billion for America*. *See supra* at Statement of Facts Section D. Were it not for the conflicted Defendants' significant breaches of their fiduciary duties, this $1.7 billion deal likely would have accrued directly to the benefit of Energy and its public unitholders, rather than solely to America.

The Proxy issued in connection with the Merger absurdly describes the conflicted officers and directors as sometimes acting in their capacity on behalf of America and at other times acting in their Energy capacity. (Compl. ¶¶92-94). This alleged changing of "hats" is a fiction, which confused even those working on the Merger, (Compl. ¶94), and should be given no weight, particularly considering the egregious conduct in this case. *See Freeport-McMoran*, 2005 WL



[redacted]

01653923, at *8. Thus, these allegations that the conflicted Defendants had loyalties to America as officers and directors of America, but also had conflicting obligations to Energy and its unitholders as officers and directors of Energy, are sufficient to plead that they were acting to benefit America at the expense of Energy and its unitholders, in breach of their duty of loyalty to Energy. *Id.* at *8.

These factual allegations illustrating that the conflicted Defendants had divided loyalties with respect to the challenged transaction are sufficient to state a claim for breach of the duty to act in good faith. *See Kahn v. Portnoy*, 2008 WL 5197164, at *7. In *Kahn*, the Court found that allegations that a defendant, who was a director of both parties to a challenged transaction had divided loyalties with respect to the transaction, was sufficient to show that he did not act in good faith. *Id.* at *7. The Court stated that, "as a director of HPT and TA, [the defendant] is therefore bound to act in the best interest of both companies. Thus, when [the defendant] acted on behalf of TA in approving the transaction, his loyalties as an HPT director raise at least a reasonable doubt as to whether he was acting in the best interest of TA." *Id.* The conflicted directors and officers, Defendants E. Cohen J. Cohen, Weber, M. Jones and Herz, all had divided loyalties and all explicitly acted on behalf of America in connection with the process leading up to the Merger while simultaneously owing fiduciary duties to Energy and its unitholders. (Compl. ¶¶5, 6). These Defendants decided that it was in America's best interests to achieve a merger between America and Energy and to cease all distributions to the Energy unitholders (Compl. ¶88); crafted the Five Alternatives for Energy with no involvement from Energy itself (Compl. ¶¶53, 54); force-fed the Special Committee America's desired transaction structure and terms (Compl. ¶¶56, 58-61, 98); and, in bad faith [redacted]



[redacted]

[redacted] (Compl. ¶¶99, 105)[17]. These allegations are more than sufficient to plead that they were not acting in the best interest of Energy and its unitholders, in breach of their duty of loyalty to act in good faith. *See Kahn*, 2008 WL 5197164, at *7; *Freeport-McMoran*, 2005 WL 1653923, at *8.

**2. The "Independent" Directors Violated Their Fiduciary Duties To Energy's Public Unitholders**

Defendants W. Jones, Warren, Wolf, and Davis breached their fiduciary duties to Energy and its public unitholders by allowing themselves to be subjugated to the will of America and to the conflicted directors and officers. In particular, the Special Committee's repeated failure to act independently and place the interests of the Energy unitholders above those of America was a breach of their duty of loyalty.

Indeed, at every step of its "process" the Special Committee took actions that served the interests of America over those of either Energy or its unitholders. As an initial matter, for its banking advice, the Special Committee turned to UBS, which regularly performed work for the

[17] Defendants argue that America's and the Conflicted Directors and Officers' withholding of information was not made in bad faith, because such information was not material. (Def. Br. at 33-36). However, as discussed, information regarding possible joint ventures would be of great interest to a properly functioning Special Committee. Further, in support of their proposition, Defendants cite to cases discussing the materiality standard with respect to a director's duty to disclose information to stockholders, but Plaintiffs are alleging that such information was withheld in bad faith from the Special Committee members to further the interests of America, and these cases are therefore inapposite. *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 507 n.66 (Del. Ch. 2000) (discussing allegations that directors concealed material information from stockholders in breach of their duty of disclosure); *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1281 (Del. 1994) (discussing whether withholding information was in breach of directors duty of disclosure to shareholders).

Additionally, it is only the business decision made by an "*apparently* well motivated board" that is subject to the inquiry whether "such a decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *In re J.P. Steven & Co. S'holder Litig.*, 542 A.2d 770, 780-81 (Del. Ch. 1988), *appeal refused*, 540 A.2d 1088 (Del. 1988). As discussed, the action of America and the Conflicted Directors and Officers are far from those of a "well motivated board."



[redacted]

Atlas family of entities.[18] (Compl. ¶¶104, 107-109). Indeed, the specific UBS bankers that advised the Special Committee had extensive ties to America, and were in constant contact with both America and Energy. *Id.* Coupled with the Special Committee's reliance on conflicted directors and management, the use of UBS as its bankers belies any effort by the Special Committee to conduct itself in good faith. [redacted] (Compl. ¶106).

The Special Committee also agreed to discontinue distributions at America's behest notwithstanding Energy's overwhelmingly positive operational and financial results. Until America informed the Energy Board of Energy's supposed "need" to cease paying distribution, Energy had not identified such a need and had even touted its ability to pay a regular cash

[18] Defendants attempt to distract from the Special Committee's reliance on a conflicted financial advisor, UBS, by arguing that UBS was not "beholden" to America. (*See* Def. Br. at 35 n.19). However, not only had UBS regularly performed work for the Atlas family entities, and the specific bankers advising the Special Committee had extensive ties to America and were in constant contact with both America and Energy, but these bankers were also the bankers who were involved in the negotiations/discussions regarding joint ventures, which were ultimately withheld from the Special Committee. So whether UBS was "beholden" to America is irrelevant. The simple point is that UBS was advising America on financial transactions that conflicted with the interests of Energy at the very time that UBS supposedly was providing "independent" advice to the Special Committee.

[19] Defendants' argument that the Special Committee's failure to look into potential third party offers or opportunities was not a failure to act in good faith, because America already had informed the Special Committee it would use its controlling vote to block any such third party transaction, is unavailing. (*See* Def. Br. at 36) Even in the case where a board cannot realistically seek any alternative, because a majority stockholder has a controlling vote which can block any such transaction, "the directors are obliged to make an informed and deliberate judgment in good faith, about whether the sale [] that is being proposed by the majority shareholder will result in a maximization of value for the minority shareholders. *McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000)(finding that in the face of an 80% shareholder blocking vote, the directors ha a duty to act on an informed basis to independently ascertain how the Merger consideration compared to Company's value as a going concern). Thus, even though a third party transaction may not have been possible, the Special Committee still had a duty to evaluate the exchange ratio as compared to Energy's value as would be provided through other alternatives.



[redacted]

distribution. (Compl. ¶111). Only after America established its goal to acquire Energy, and only at America's insistence did the Special Committee come to the preposterous conclusion that Energy had to stop paying a distribution. (Compl. ¶¶111-120).

Additionally, the Special Committee succumbed to America's will by failing to insist on a heightened unitholder voting requirement, which would have empowered and enfranchised Energy's public unitholders. (Compl. ¶¶121-124). The Special Committee, upon learning of America's reluctance to agree to such a provision, merely accepted defeat, and did not discuss, deliberate, or engage in a course of negotiation which would enable it to obtain such a provision.[20] (*Id.*). The Special Committee merely acceded to America's wishes, notwithstanding that a simple majority voting requirement rendered the Merger a *fait accompli* due to America's control of a dominant block of Energy units.

Ultimately, the Special Committee recommended approval of the Merger even though it was uncomfortable with the terms.[21] [redacted] (Compl. ¶ 103). Upon becoming aware of the Special Committee's unease, America, and specifically Defendants J. Cohen and E. Cohen, launched a campaign to influence the Special Committee's decision. *See id.* Thus, despite its unease with a deal which clearly put America's interests ahead of those of Energy and Energy's public unitholders, the

[20] Despite that the LLC Agreement does not require a "majority of the minority" provision (*See* LLC Agreement §12.2(b)), the Special Committee's failure to even meaningful discussion demanding such a requirement, is indicative of its continual placement of America's interest above those of Energy and its unitholders.

[21] Defendants' argument that because the Special Committee did not accept America's initial suggestion on the exchange ratio is suggestive of an arms-length negotiation process is unavailing, as it ultimately acquiesced to an exchange ratio which represented a discount relative to Energy's publicly-traded price, despite the many synergies America would achieve as a result of the Merger.



[redacted]

Special Committee acceded to America's pressure and recommended approval of the Merger in clear breach of their duty of loyalty. (Compl. ¶ 64).

The Special Committee's ultimate approval of the Merger should come as little surprise given that the Special Committee appears to have committed to a single ultimate conclusion early in the evaluation process. [redacted] (Compl. ¶ 97). [redacted] From there, their only objective appears to have been to make certain America got what it demanded, in breach of their duty of loyalty.

In addition to the members of the Special Committee, Defendant Wolf was also subject to America's will, which used him to taint and control the Special Committee's deliberations.[22] His ultimate blessing of the Merger was not made independently, in breach of his duty of loyalty. Indeed, Defendant Wolf had a long history with America and its family of entities, previously serving the organization as an executive for nearly twenty years. (Compl. ¶22). [redacted] (Compl. ¶101). Even prior to America's presentation of the Five Alternatives to the Energy Board, Defendant Wolf acted to place America's interests above those of Energy and its public unitholders by, for example, failing to share material information regarding America's plans for Energy with the Energy Board. (Compl. ¶100, 102).

[22] Defendants' attempt to explain away Defendant Wolf's lack of independence by highlighting his recusal from the Special Committee due to his conflicts of interest when it came to America, but they tellingly ignore the fact that the Special Committee viewed him as lacking independence when it came to looking at things with regard to America (Compl. ¶10), and that he was privy to confidential information regarding America's plans for Energy even prior to America's presentation of the Five Alternatives. (Compl. ¶¶100, 102).



[redacted]

These examples clearly illustrate the Energy outside directors' breaches of their fiduciary duties, including their duty of loyalty to act in good faith. "[E]ven if there is not a direct conflict of interest ... a director does not act in good faith if ... she is acting for the benefit of a related person at the expense of the company. This is 'classic, quintessential bad faith.'" *Kahn*, 2008 WL 5197164, at *7; *see In re Walt Disney*, 906 A.2d 27, 66 (Del. 2006)("Cases have arisen where corporate directors have no conflicting self-interest in a decision, yet engage in misconduct that is more culpable than simple inattention or failure to be informed of all facts material to the decision. To protect the interests of the corporation and its shareholders, fiduciary conduct of this kind, which does not involve disloyalty (as traditionally defined) but is qualitatively more culpable than gross negligence, should be proscribed. A vehicle is needed to address such violations doctrinally, and that doctrinal vehicle is the duty to act in good faith"). Indeed, allegations of self-interest or lack of independence are not required to successfully plead a breach of the duty of good faith. *See Blackmore Partners, L.P. v. Link Energy LLC*, 864 A.2d 80, 85 (Del. Ch. 2004) (holding that allegations that director defendants approved a transaction that disadvantaged a class of securities to the benefit of another contingency were sufficient to survive a motion to dismiss).

As discussed more fully above, at every step of its unfair process the Special Committee took actions that served the interests of America over those of either Energy or its public unitholders. In sum, the Special Committee: (1) hired a conflicted banker as its financial advisor, (Compl. ¶¶104, 107-109); (2) relied on conflicted directors and management for their information and advice regarding the proposed transaction and its terms and acceded to such unfair terms, (Compl. ¶106); (3) agreed, without any meaningful deliberation or discussion, to discontinue distributions at America's behest, and without ensuring that Energy unitholders would be fairly compensated for their loss of such distributions; (4) allowed the Merger to proceed on a simple



[redacted]

majority vote ensuring that the Merger was a *fait accompli* without meaningfully, (Compl. ¶111-124); and (5) caved to pressure from America to agree to a deal which included terms and a structure that it realized was not in the best interests of Energy and its unitholders,[23] (Compl. ¶¶64, 103). Thus, despite knowing that the Merger was not in the best interests of Energy and its unitholders, the Special Committee acceded to America's pressure and approved the Merger in breach of their duty of loyalty to act in good faith. *See Lear*, 967 A.2d at 656 (indicating that allegations that a board approved a merger believing that it was a poor deal would be sufficient to plead that directors acted in bad faith).[24]

Additionally, Defendant Wolf, a long-time associate of America, was subject to America's command, and took actions at America's behest to taint and control the Special Committee's deliberations. (Compl. ¶¶22, 100-102). Thus, his ultimate blessing of the Merger was not made independently, in breach of his duty of loyalty to act in good faith.

Moreover, when Plaintiffs filed the above-captioned action, Plaintiffs provided the Special Committee, and the Individual Defendants as a whole, with the opportunity to cure the deficiencies in the Merger and evidence a good faith effort to protect the interests of Energy's public unitholders. They did nothing. Plaintiffs have sufficiently alleged that the Individual

[23] Contrary to Defendant's assertions otherwise (Def. Br. at 28 n.13), that prospective financial advisors advised the Special Committee the "MLP/LLC structure [was] not suitable to ATN" and that there were downsides to "[c]ontinuing to pay distributions," does not demonstrate that the Merger's terms and structure were fair to Energy and its unitholders, nor does it have any effect on the Special Committee's failure to act independently and placement of America's interest above those of the individual Energy unitholders.

[24] Defendants' citation to *Robotti & Co., LLC v. Liddell* for the proposition that allegations that Defendants "did not consider [] issues as thoroughly as they should or could have", did not constitute bad faith, is unavailing. 2010 WL 157474, at *11 (Jan. 14, 2010) (*see* Def. Br. at 32). Unlike the Defendants in *Robotti* who were not subject to the control of a controlling stockholder and were merely alleged to have failed to consider all aspects of a transaction, the Energy Special Committee has not merely failed to consider all aspects of a transaction but has blindly placed the interests of America above those of Energy and its unitholders and repeatedly failed to act independently.

Defendants breached their duty to act in good faith, continuously placing the interests of America above those of Energy and its unitholders, resulting in an unfair price and process. However, even in the face of Plaintiffs' claims that Individual Defendants breached their fiduciary duties by elevating the interests of America over the interests of Energy's public unitholders and failing to act in good faith connection with their approval of the Merger, instead of taking action to rectify the process and improve the price offered in the Merger, the Individual Defendants, chose instead to disclaim any fiduciary obligations at all through their reliance on Section 7.9 of the LLC Agreement. Having disclaimed any fiduciary duties at all, the Individual Defendants did not even purport to evaluate the entire fairness of the Merger.

**B. The Financial Terms Of The Merger Were Unfair To The Unitholders**

Along with Plaintiffs' myriad allegations that America leveraged its control into obtaining its preferred transaction against the interests of Energy's public unitholders, the Complaint also states a claim that the financial terms of the Merger were unfair.[25] In the Merger, Energy unitholders received America stock valued at a mere 0.3% premium to market price based on a fixed exchange ratio, and the pricing terms failed to protect Energy's unitholders from declines in America's stock or increases in the price per Energy unit. (Compl. ¶¶2, 70, 82). Furthermore, the Merger consideration did not reflect any "minority squeeze-out" premium typically applied in control party transactions. (Compl. ¶¶71, 72). Indeed, [redacted]

[25] Defendants' citations for the proposition that bare claims of unfair price, without more, are thus inapposite. (Def. Br. at 31); *See In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *22 n.117 (Del. Ch. Aug. 18. 2006)(finding no bad faith regarding allegation of unfair price with no allegation that directors (who were not subject to the control of any controlling stockholder) intended to deal unfairly with the minority); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *43 (Del. Ch. May 3, 2004)(finding no bad faith when there was no evidence that directors acted with conscious and intentional disregard of their duties); *Clements v. Rogers*, 790 A.2d 1222, 1248-49 (Del. Ch. 2001) (finding no bad faith where evidence showed that Special Committee members' lack of effectiveness was as a result of misunderstanding, their duties or failing to apply adequate time and attention to their assignment).



[redacted]

[redacted] the Energy unitholders received essentially no premium at all – only a nominal 0.3% premium for their units. (Compl. ¶¶70-72).

The Merger also failed to compensate Energy unitholders for the unique aspects of Energy that were destroyed when the units were exchanged for America stock. For example, in connection with the Merger, Energy ceased payment of its significant distributions, so that America, and not Energy's public unitholders, could reap the rewards of the cash flow generated by Energy's operational success. The essentially meaningless 0.3% premium failed to compensate Energy's unitholders for this significant loss. (Compl. ¶¶1, 2, 7, 79). Indeed, when accounting for the fact that Energy unitholders were relinquishing their holdings which provided a sizeable, bargained-for and required quarterly cash distribution in exchange for an interest in a company with a history of paying miniscule discretionary dividends, the 0.3% premium provided by the Merger was actually a discount. (Compl. ¶¶7, 31, 78).

Additionally, Energy unitholders were forced to accept a fundamental change in the nature of their investment, from a Marcellus Shale-oriented natural gas production play with significant cash yield, providing a strong incentive for unitholders to invest, to an equity investment in a broader natural gas business offering a comparatively insignificant discretionary dividend. (Compl. ¶¶78, 80). This is especially significant, as Energy (and its unitholders) stood on the cusp of significant gains stemming from the increased development of the Marcellus Shale. (Compl. ¶83; *see* Compl. ¶¶28, 37, 39).

## III. THE COMPLAINT ADEQUATELY ALLEGES THAT DEFENDANTS DID NOT ACT IN GOOD FAITH

Section 7.9(b) of Energy's LLC Agreement provides that "[w]henever the Board of Directors or any Director or Officer makes a determination or takes or declines to take any other action . . . the Board of Directors or such Director or Officer shall make such determination or



[redacted]

take or decline to take such other action in good faith." An action is in "good faith" if "the Person or Persons making such determination or taking or declining to take other action ... believe[s] that the determination or other action is in the best interests of the Company." *Id.*[26]

A limited liability agreement may not eliminate the implied contractual covenant of good faith and fair dealing.[27] 6 *Del C.* § 18-1101(c); *Kelly v. Blum*, 2010 WL 629850, at *9 n.57; *Kahn*, 2008 5197164, at *3. Thus, to the extent the LCC agreement attempts to define good faith as a "[belief] that the determination is in the best interests of the Company" in the context of a cash-out merger of minority shareholders, it is ineffective.[28] *See Elf Atochem N. Am.., Inc. v. Jaffari*, 727 A.2d 286, 290 (Del. 1999) ("The [LLC] Act can be characterized as a 'flexible statue' because it generally permits members to engage in private ordering with substantial freedom of contract to govern their relationship, provided they do not contravene any mandatory provisions of the Act.").

"This Court has previously held that breach of the implied covenant of good faith and fair dealing 'implicitly indicates bad faith conduct' ... that the exercise of discretion was ... motivated by an improper purpose or done with a culpable mental state." *Amirsaleh v. Board of Trade of the City of New York, Inc.*, 2009 WL 3756700, at **4-6 (Del. Ch. Nov. 9, 2009) (finding

[26] As discussed above, in the context of a Merger in which Energy was absorbed into America, "the best interests of the Company," as opposed to the best interests of the unitholders, are meaningless.

[27] An implied covenant of good faith and fair dealing is engrafted upon every contract and "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 contract." *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985) (citation omitted).

[28] Additionally, to the extent that the LLC Agreement attempts to create a presumption of good faith where directors determine that a course of action is "fair and reasonable," (*see* LLC Agreement §7.9(a) & (b); Def. Br. at 26 n.12), it is also ineffective. *See Elf Atochem*, 727 A.2d at 290. Thus, the Defendants' citations to the Proxy's setting forth the belief of the Special Committee and the Energy Board that the Merger was in Energy's best interest cannot create a presumption of good faith. *See* Def. Br. at 26-27.



[redacted]

that defendants were subject to an implied contractual obligation not to make a discretionary decision to favor the interests of connected members, which conduct would constitute bad faith). The Individual Defendants' negotiation of and agreement to a transaction which would benefit America, Energy's controlling stockholder, and America's stockholders to the detriment of Energy's unitholders is a breach of the implied covenant of good faith and fair dealing.

### A. America's Affiliates On The Energy Board Failed To Act In Good Faith As Required By The LLC Agreement

The conflicted directors and officers, Defendants E. Cohen, J. Cohen, Weber, M. Jones and Herz had divided loyalties with respect to the Merger, and failed to act in good faith.[29] *See Kahn v. Portnoy*, 2008 WL 5197164, at *7 ("A director does not act in food 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 benefits of a related person at the expense of the company."). These Defendants consistently acted on behalf of America during the process leading up to the Merger, all the while purportedly switching between their America and Energy capacities. (Compl. ¶¶5, 6, 92-94). They were involved in the development of the Five Alternatives and were instrumental in pushing the Special Committee toward any terms that put America's interests above those of Energy and its public unitholders. (Compl. ¶¶53-61, 92, 95-98). They also demonstrated their bad faith by withholding key information from the Special Committee, [redacted] (Compl. ¶¶99, 105)

Thus, the Complaint alleges that the conflicted directors and officers, Defendants E. Cohen, J. Cohen, Weber, M. Jones and Herz, not only had divided loyalties, but explicitly acted

[29] "Good faith" as it is applied in the fiduciary duty context is instructive in this context. *Mickman v. Am. Int'l Processing, LLC*, 2009 WL 2244608, at *2 (Del. Ch. July 28, 2009) ("The court often looks to Delaware corporate statutes and case law when interpreting similar provisions in an LLC agreement 'due to the paucity of reported decisions in the LLC context.'").



[redacted]

to ensure that the interests of America were served, notwithstanding their duties to Energy and its unitholders, in breach of their contractual duty to act in good faith.

### B. The "Independent" Energy Directors Failed To Act In Good Faith As Required By The LLC Agreement

As discussed *supra*, the "independent" Energy directors knowingly subjugated themselves to the will of America and to the conflicted directors and officers, in breach of their contractual duty to act in good faith. In particular, the Special Committee repeatedly failed to act independently, and placed the interests of the America above those of the Energy unitholders. Demonstrating its failure to act independently, the Special Committee had prejudged the merits of the strategic alternatives evaluation process, (Compl. ¶ 97); hired and relied on the advice of conflicted advisors, (Compl. ¶¶104, 106-109); relied on the advice of conflicted directors and management, (Compl. ¶¶58-61, 92, 95-98, 103); agreed to discontinue distributions at America's behest, (Compl. ¶¶111-120); and allowed the merger to proceed on a simple majority vote ensuring America a *fait accompli* with no meaningful deliberation or discussion, (Compl. ¶¶121-124).

Likewise, Defendant Wolf, while not a member of the Special Committee, was not independent when it came to America and also acted to place the interests of America over those of the Energy unitholders. His ultimate approval of the Merger as part of the full Board was in breach of his duty to act in good faith.

Indeed, all Individual Defendants (including the Special Committee) had the opportunity to act in good faith when Plaintiffs filed the above-captioned action. However, rather than take action to rectify the price and process of the Merger, which favored the interests of America above those of Energy and its unitholders, the Individual Defendants chose instead to rely solely on the special approval process outlined in Energy's LLC Agreement.



[redacted]

## CONCLUSION

For the reasons set forth above, Plaintiffs submit that Defendants' Motion to Dismiss should be denied with respect to all Defendants and all claims.

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**CERTIFICATE OF SERVICE**

I, Michael J. Barry, certify that on this 3rd day of May, 2010, I caused the foregoing Plaintiffs' Response to Defendants' Motion to Dismiss, Declaration of Peter B. Andrews and Compendium of Unreported Decisions to be served by LexisNexis File & Serve on all counsel of record identified below:

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I, Kathaleen St. J. McCormick, Esquire, hereby certify that on May 6, 2010 a copy of the foregoing document was served on the following counsel in the manner indicated below:

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