IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

OF COUNSEL:

Jonathan M. Moses
Meredith L. Turner
Grant R. Mainland
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019-6150

Martin S. Lessner (DE Bar No. 3109)
Christian Douglas Wright (DE Bar No. 3554)
Kathaleen St. J. McCormick (DE Bar No. 4579)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
1000 West Street, 17th Floor
Wilmington, DE 19801-1037
(302) 571-6600
Attorneys for Defendants Atlas America, Inc., Edward E. Cohen, Jonathan Z. Cohen, Matthew A. Jones, and Daniel C. Herz

Patricia Villareal
Michael L. Davitt
JONES DAY
2727 North Harwood Street
Dallas, TX 75201-1515

Gregory P. Williams (DE Bar No. 2168)
Harry Tashjian, IV (DE Bar No. 4609)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801-1243
(302) 984-6015
Attorneys for Defendants Atlas Energy Resources, LLC, Richard D. Weber and Bruce M. Wolf

Peter Flocos
K&L GATES LLP
599 Lexington Avenue
New York, NY 10022-6030

Donald J. Wolfe, Jr. (DE Bar No. 285)
Kevin R. Shannon (DE Bar No. 3137)
POTTER ANDERSON & CORROON LLP
1313 North Market Street
Wilmington, DE 19801-6107
(302) 984-6015
Attorneys for Defendants Ellen F. Warren, Walter C. Jones, and Jessica K. Davis

Dated: June 11, 2010

[redacted]

TABLE OF CONTENTS

Page

[redacted]

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs' Opposition Brief does not dispute the dispositive issue on this motion to dismiss: In reviewing and agreeing to the Merger between Atlas America and Atlas Energy — a Merger that was overwhelmingly approved by Atlas Energy's unaffiliated unitholders — Defendants followed the terms of the governing LLC Agreement to the letter. Under the plain terms of the LLC Agreement, if its pre-established, sensible, and straightforward contractual process for reviewing conflict transactions is followed — a process that requires a conflict to be reviewed by disinterested directors or approved by a majority of unaffiliated unitholders — then the resolution of that conflict "shall not constitute a breach of . . . *any* duty existing at law, in equity or otherwise, *including any fiduciary duty*." LLC Agreement § 7.9(a) (emphases added). Moreover, the LLC Agreement limits the duties of officers and directors in all instances to a contractually described duty of "good faith," an express contractual standard specifically intended to supplant all other duties, "*including fiduciary duties*." *Id.* §§ 7.9(b), 7.9(d) (emphasis added). As Plaintiffs concede, the Delaware LLC Act requires that the contractual provisions of an LLC agreement be fully honored. Thus, because Plaintiffs have chosen to assert a claim for breach of fiduciary duty where the LLC Agreement has expressly eliminated such claims, the Amended Complaint should be dismissed.

In their Opposition Brief ("Opp'n Br."), Plaintiffs do not dispute the effect of the conflict resolution process or that its straightforward procedures were followed. Nor do they dispute the elimination of fiduciary duties under the LLC Agreement. Rather, they attempt to get around the contract itself by arguing that its provisions simply do not apply to the Merger. Plaintiffs' reading of the LLC Agreement cannot be squared with its plain language and intent.

Plaintiffs argue, for the first time, that Section 7.9(a) does not apply to the Merger because it governs conflicts between Atlas America and Atlas Energy, and that the only conflict

[redacted]

arising from the Merger was between Atlas America and Atlas Energy's public unitholders. But this argument is belied by Plaintiffs' own allegations. Clearly the Merger represented, in the words of Section 7.9(a), a "potential conflict" between Atlas America and Atlas Energy, as Plaintiffs' *own* Amended Complaint unequivocally and in ***boldface italics*** sets forth:

> Notably, Energy had acknowledged that America's domination and control over Energy would taint any transaction between the two entities. In the Company's December 2006 Prospectus, Energy stated . . . that "contracts between us, on the one hand, and our manager and Atlas America . . . on the other, ***will not be the result of arm's length negotiations***" . . . . Energy unitholders were entitled to a Board that was loyal to them and one that could have maximized the price for their units by negotiating an arm's length deal in the absence of such conflicts of interest.

Am. Compl. ¶ 46 (emphasis in original). And, as Plaintiffs further allege, it was precisely because the Merger posed a potential conflict between Atlas America and Atlas Energy that the Conflicts Committee was engaged to review the matter consistent with Section 7.9(a). Am. Compl. ¶ 55. Thus, Plaintiffs' newly minted argument is inconsistent with their own Amended Complaint, the reality of the very transaction they are challenging, and the plain purpose of the LLC Agreement. *See infra* Point I.

Nor do Plaintiffs have any response to Sections 7.9(b) and 7.9(d) of the LLC Agreement, both of which make absolutely clear that the directors, officers, and other "indemnitees" of Atlas Energy do not owe fiduciary duties. Plaintiffs offer no argument as to why this language does not mean what it says: namely, that fiduciary duty-based claims do not lie against the Individual Defendants. Plaintiffs have also not explained how, when they have conceded that the directors charged with reviewing the Merger have no fiduciary duties in the first place, a default fiduciary duty-based entire fairness review could possibly be appropriate. See *infra* Point II.

[redacted]

And Plaintiffs' argument that Section 12.2, which sets forth the procedural steps for approving a merger, controls without regard to any other contractual provision ignores the language and structure of the LLC Agreement, which imposes a good faith standard on all officer and director action unless another "express standard is provided for." LLC Agreement § 7.9(b). As Plaintiffs concede, there is no other express standard supplied for the Board's *approval* of a merger, as occurred here; thus, the "good faith" standard set forth in Section 7.9(b) applies with full force. Defendants' Opening Brief ("Opening Br.") set forth this very point, Opening Br. at 23-24, and Plaintiffs offer no response. *See infra* Point II.

The remainder (indeed, the bulk) of Plaintiffs' Opposition Brief is simply an attempt to suggest that the Merger was somehow unfair. Plaintiffs thus ask this Court to intervene and — contrary to the terms of the governing LLC Agreement and the expectations of the parties to it — subject the Merger to a judicial entire fairness review process lifted from the corporate context. But Delaware law is clear: LLCs are creatures of contract, and the terms of the LLC Agreement, such as those terms eliminating fiduciary duties, are to be fully honored. *See infra* Point III; *see also* Opening Br. at 13.

Regardless, there is no reason for this Court to second-guess the assessment of the disinterested directors, who approved the Merger pursuant to the process set forth by the LLC Agreement. Notwithstanding Plaintiffs' misleading labels, the Merger at issue was not a "squeeze out." It was a "stock-for-stock" transaction whereby the former unitholders of Atlas Energy, now stockholders of Atlas America, continue to enjoy the same potential upside, at an exchange ratio based on the then-trading values of the respective shares. And that exchange ratio, far from having been at an historic low as Plaintiffs disingenuously suggest, *see* Opp'n Br. at 14, was near its historic high. Moreover, contrary to Plaintiffs' suggestion that Atlas Energy

unitholders were subjected to a takeover by a dominant shareholder, *see, e.g.*, Opp'n Br. at 5-6, the opposite actually occurred. Unitholders went from owning an interest in a controlled company with a single dominant equity owner with numerous management rights to holding shares of a non-controlled company with no dominant equity owner. Not surprisingly, the Merger was overwhelmingly well-received. The price of Atlas Energy units jumped 27 percent within five days of the Merger's announcement, and the shares of Atlas America (renamed Atlas Energy) received by Plaintiffs have more than doubled in value. And as already noted, Atlas Energy unitholders, including unaffiliated unitholders who voted 98 percent in favor of the deal, enthusiastically approved the transaction after reviewing disclosures that Plaintiffs concede were materially accurate.

Despite this overwhelming support and despite the fact that the robust processes of the LLC Agreement were concededly followed, the individual Plaintiffs in this action — who represented only .064 percent of the publicly owned units of Atlas Energy — have chosen to prolong this litigation, hoping for yet another bite at the apple. Because the LLC Agreement and well-settled Delaware law are clear that this action cannot lie, Plaintiffs' Amended Complaint should be finally dismissed.

ARGUMENT

I. THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFFS DO NOT ALLEGE THAT THE LLC AGREEMENT'S CONFLICT RESOLUTION PROVISIONS, WHICH GOVERN THE MERGER, HAVE BEEN BREACHED.

Plaintiffs' Opposition Brief does not dispute the dispositive point: Defendants followed to the letter the conflict provisions of Section 7.9(a) of the LLC Agreement.

Section 7.9(a) is unambiguous. Under its terms, where a conflict between Atlas America and Atlas Energy is resolved via any one of four pre-established approval provisions,

such resolution constitutes compliance with the LLC Agreement and precludes any duty-based challenge. As Defendants set forth in their Opening Brief, the provisions governing resolution of a conflict between Atlas America and Atlas Energy were met in *three* separate ways. *See* Opening Br. at 15-17. Nowhere in their brief do Plaintiffs, who readily concede that Section 7.9(a)'s conflict resolution provisions 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," dispute that Section 7.9(a) was followed and that it was satisfied in multiple respects. Opp'n Br. at 20. Given that the Merger was the result of a Merger Agreement between Atlas America and Atlas Energy, Defendants' compliance with Section 7.9(a) is fatal to Plaintiffs' fiduciary duty-based complaint.

To avoid this clear result, Plaintiffs argue for the first time that Section 7.9(a) does not apply because the Merger did not involve a conflict between Atlas America and Atlas Energy. This argument defies the reality of the transaction and the clear import of the provision.[1]

The Merger here clearly involved a potential conflict between Atlas America and Atlas Energy. Plaintiffs' Amended Complaint concedes as much, alleging that "conflicts of interest" between Atlas America and Atlas Energy caused the Board not to maximize the value of the transaction for unitholders. Am. Compl. ¶ 46. Likewise, Plaintiffs concede the point

[1] In their initial Complaint, Plaintiffs essentially ignored the LLC Agreement and provided no explanation as to why it did not apply. After Defendants moved to dismiss, Plaintiffs filed an Amended Complaint alleging that the clear language of Section 7.9 does not apply because mergers are governed solely by Section 12.2 of the LLC Agreement. Am. Compl. ¶¶ 125-131. Plaintiffs maintain that wrong-headed position, addressed in Defendants' moving brief (Op. Br. at 22-25) and addressed again *infra* at Point II. But Plaintiffs' Opposition Brief marked the first time they contended that Section 7.9(a) doesn't apply because the Merger did not involve a conflict between Atlas America and Atlas Energy and, instead, involved some distinct conflict between Atlas America and the unaffiliated unitholders. This newfound theory, which is nowhere set out in (and, indeed, is contradicted by) the allegations of the Amended Complaint, is baseless.

when they allege that the Conflicts Committee of the Energy Board was called upon specifically because "some of the possible alternatives involved transactions with America." Am. Compl. ¶ 55. The Conflicts Committee is not called upon to resolve some other type of conflict not governed by Section 7.9(a). Rather, "approval from the conflicts committee" is sought for "a resolution of a conflict of interest with Atlas America or its affiliates." Prospectus at 127.[2] And, where Section 7.9(a)'s procedures are followed, claims that fall within the sweeping and inclusive language of the contract — including claims based on "*any* fiduciary duty" — are eliminated. LLC Agreement § 7.9(a) (emphasis added).

Plaintiffs cannot avoid dismissal simply by asserting that the Merger, which concededly involved a conflict between Atlas America and Atlas Energy that triggered the applicability of Section 7.9(a), also gave rise to a purported separate conflict between Atlas America and Atlas Energy's common unitholders. Rather, by its plain and broad terms, if there is a "potential conflict" between Atlas Energy and an affiliate, including Atlas America, as there clearly was here, and Section 7.9(a)'s procedures are followed, then claims based on "*any* fiduciary duty" are eliminated, including "*any* fiduciary duty" that might be owed to a "Member." LLC Agreement § 7.9(a) (emphasis added). It would turn these words into surplusage if they did not apply to potential fiduciary duties owed by Atlas America, as the

---

[2] And, of course, the parties to the Merger Agreement that embodies the challenged transaction are Atlas America, on the one hand, and Atlas Energy, on the other. *See* Merger Agreement, Whereas Clause (stating that the Merger Agreement "is entered into by and among ATLAS ENERGY RESOURCES, LLC, . . . ATLAS AMERICA, INC., . . . ATLAS ENERGY MANAGEMENT, INC., and [the Merger Sub]"). Unitholder involvement — in the form of the vote approving the Merger — could not occur until the Merger Agreement between Atlas America and Atlas Energy had been approved. *See, e.g.*, LLC Agreement § 12.3(a) ("[T]he 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. . . ."). Tellingly, while Plaintiffs' Amended Complaint and Opposition Brief focus extensively on the process by which that Merger Agreement was approved, Plaintiffs abandoned their disclosure claims in connection with the unitholder vote.

fiduciary duties of officers and directors are elsewhere specifically eliminated. *See* § 7.9(b); *see also Ross Holding & Mgmt. Co.* v. *Advance Realty Group, LLC*, 2010 WL 1838608, at *6 (Del. Ch. Apr. 28, 2010).[3]

In any event, Plaintiffs are attempting to draw a distinction between Atlas Energy and its unitholders where none exists. Plaintiffs have admitted as much, stating in their Opposition Brief that in the context of the Merger between Atlas America and Atlas Energy, there is no difference between the "'interests of the Company'" and the "interests of the unitholders." Opp'n Br. at 44 n.26; *see also* Opp'n Br. at 41 (arguing that independent directors breached their duty of loyalty in approving the Merger by putting Atlas America's interest above that of "Energy and its unitholders"). And to the extent that the unitholders allegedly suffered, Plaintiffs concede it was due to the underlying conflict between Atlas America and Atlas Energy. *See* Am. Compl. ¶ 46 (lamenting that "Energy unitholders were entitled to a Board that was loyal to them and one that could have maximized the price for their units by negotiating an arm's length deal in the absence of . . . conflicts of interest [with Atlas America]").

[3] That the board resolution of such a conflict would be dispositive of any fiduciary duty claim, including those potentially held by the unitholders, was clearly spelled out in the Prospectus. *See, e.g.*, Prospectus at 141 ("Our limited liability company agreement also restricts the remedies available for actions taken that, without those limitations, might constitute breaches of fiduciary duty. Whenever a conflict arises between Atlas America, our manager or their affiliates, on the one hand, and us or any other unitholder, on the other, our board of directors will resolve that conflict."). Citing *Kahn* v. *Portnoy*, 2008 WL 5197164 (Del. Ch. Dec. 11, 2008), Plaintiffs argue that "other disclosures do not impliedly override the express provisions of a Delaware LLC Agreement." Opp'n Br. 21 n.8. Plaintiffs' argument completely misses the point. In *Kahn*, the defendants argued that, notwithstanding the express provisions of the LLC Agreement addressing the board's duties regarding conflicts, the board instead fulfilled its duties under general partnership law by merely disclosing the conflicts. 2008 WL 5197164, at *5 n.22. The court noted that the disclosures were thus unavailing. *Id.* By contrast, Defendants here have emphasized, without dispute from Plaintiffs, that they have complied with their duties under Section 7.9(a) of the LLC Agreement. The Prospectus merely serves to confirm the clear understanding of the duties imposed by the LLC Agreement.

Plaintiffs' reliance on case law establishing the entire fairness doctrine in the corporate context, in support of the suggestion that there is some conflict with the minority unitholders preventing the application of Section 7.9(a), is likewise misplaced. The cases establishing the applicability of the entire fairness doctrine to a merger involving a controlling shareholder do not turn on the existence of a separate conflict with the minority. On the contrary, those cases confirm that the relevant conflict is between the controlling shareholder and the controlled target company. The strict entire fairness standard is applied precisely because the controller is viewed as standing on "both sides" of the transaction. *See Kahn* v. *Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994). And, it is that conflict — standing on "both sides" — that Section 7.9(a) specifically addresses and resolves.[4]

Plaintiffs' argument confuses the nature of a conflict subject to Section 7.9(a) and a particular fiduciary duty potentially owed by the parties to that conflict. Plaintiffs state: "Here, because America stood on both sides of the Merger, Defendants had fiduciary obligations to ensure that the Merger was entirely fair to Energy's public unitholders." Opp'n Br. at 21-22. But the fact that a controlling shareholder may owe a fiduciary duty to the minority in an interested transaction with its subsidiary does not change the nature of the underlying conflict — the fact that Atlas America purportedly stood on "both sides" of the transaction with Atlas Energy — such that Section 7.9(a) does not apply.

[4] Plaintiffs cite *Jedwab* v. *MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986), to suggest that the conflict underlying the Merger is with the minority. Opp'n Br. at 18. But *Jedwab* involved a challenge not to the actual transaction, but to the manner in which the controlling shareholder allocated the proceeds of a sale between himself and other shareholders. *Jedwab*, 509 A.2d at 18. Regardless, *Jedwab* in no way alters the basic rule that entire fairness applies when a controller stands on "both sides" of a transaction. *See id.* at 595 (*quoting Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 720 (Del. 1971)).

The cases cited by Plaintiffs involving other contractual provisions similar to Section 7.9 likewise do not temper Section 7.9(a)'s clear effect; rather, they confirm that Delaware courts do not hesitate to dismiss actions when a conflict resolution process is followed.

Citing *Brickell Partners* v. *Wise*, 794 A.2d 1, 2 (Del. Ch. 2001), Plaintiffs point to discrepancies between the language of Brickell's limited partnership agreement and the Atlas Energy LLC Agreement. In *Brickell*, the agreement included a reference to potential conflicts between partners and the general partner. *Brickell*, 794 A.2d at 2. Whatever the drafting reasons for these partnership-specific provisions — *cf.* Energy Prospectus at 143 ("We are unlike publicly-traded partnerships whose business and affairs are managed by a general partner with fiduciary duties to the partnership.") — it is a distinction without a difference, as *Brickell*, like here, involved an alleged conflict between the controlling entity and the entity controlled. Instead, the import of *Brickell* for this action is simple, straightforward, and one Plaintiffs do not take issue with: where "the plain and unambiguous language of" a Special Approval provision "displaces traditional fiduciary duty principles" and insulates the conflict resolution process from fiduciary duty-based challenges, as the LLC Agreement here plainly does, compliance with the contract precludes a claim for breach of fiduciary duty. *Id.* at 3-4. *Brickell* thus compels dismissal of Plaintiffs' claim.

Nor is *Kahn* v. *Portnoy* of different effect. Plaintiffs cite *Kahn* for the unremarkable proposition that where a contract is ambiguous and can be read in multiple, inconsistent ways, a motion to dismiss must be denied. Opp'n Br. at 20. In *Kahn*, the court found the contract to be subject to at least two reasonable interpretations. 2008 WL 5197164, at *4-5. The specific conflict at issue in *Kahn*, however, was a conflict between an interested director, standing on "both sides" of a challenged transaction, and the company, which — under

one reading of the contractual language — was not encompassed by the LLC Agreement's Special Approval provisions. *Id.* Here, on the other hand, the conflict between Atlas America, purportedly standing on "both sides" of the Merger, and the "company," Atlas Energy, is the precise conflict provided for by the LLC Agreement.

In sum, Section 7.9(a) of the LLC Agreement applies clearly and with full force to the Merger. Defendants legitimately relied on and followed the pre-established and straightforward processes set forth in that provision. Accordingly, absent allegations that Defendants failed to comply with the procedures set forth in Section 7.9(a) — of which this Court will find none — Plaintiffs have failed to state a claim.

II. PLAINTIFFS' CLAIMS FOR BREACH OF FIDUCIARY DUTY MUST BE DISMISSED BECAUSE FIDUCIARY DUTIES ARE EXPRESSLY ELIMINATED BY THE GOVERNING LLC AGREEMENT.

Nor can Plaintiffs rescue their Amended Complaint by invoking "default" fiduciary duties. Opp'n Br. at 22-23. Delaware law is well-settled that where an LLC agreement provides a "'more or less elaborated statement of [the parties'] respective rights and duties, absent fraud, those rights and duties, where they apply by their terms, and not the vague language of a default fiduciary duty, will be the metric for determining breach of duty.'" *Forsythe* v. *ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 2982247, at *6 (Del. Ch. Oct. 9, 2007) (citation omitted). That Atlas Energy's LLC Agreement was intended to and did eliminate any fiduciary duties potentially applicable here could not have been plainer.

In the first place, it is axiomatic that to allege a breach of duty, Plaintiffs must first identify the source of that duty. *See Fisk Ventures LLC* v. *Segal*, 2008 WL 1961156, at *8 ("The *sine qua non* of pleading an actionable breach is demonstrating that there was something to be breached in the first place."); *Kahn*, 2008 WL 5197164, at *1 ("As the company in this case is an LLC, the fiduciary duties of the directors are defined in the LLC Agreement."). The

LLC Agreement here, in fact, makes this rule explicit. Under its terms, for a duty to apply, it must be set forth in the agreement. LLC Agreement § 7.10(a) ("The duties and obligations owed to the Company and to the Members by the Officers and Directors shall be as set forth in this Agreement."). But despite their constant refrain that Defendants breached their "fiduciary duties," Plaintiffs have failed in their Opposition Brief to point to any source for those alleged duties in the LLC Agreement.

And for good reason. The LLC Agreement contains no express imposition of fiduciary duties. To the contrary, the LLC Agreement expressly eliminates fiduciary duties not once, but three times, and imposes instead a good faith standard on directors and officers. LLC Agreement §§ 7.9 (a), (b), and (d). Thus, the LLC Agreement here differs significantly from the underlying contracts in the cases on which Plaintiffs primarily rely:

- Contrary to *Kahn*, the Atlas Energy LLC Agreement specifically declines to import corporate fiduciary duties. *Compare, e.g.*, Energy LLC Agreement § 7.1(a) ("Except as otherwise specifically provided in this Agreement, the authority and functions of the Board ... and the Officers ... shall be identical to the authority and functions of" the board and officers of a corporation organized under Delaware corporate law) *with Kahn*, 2008 WL 5197164, at *4 ("the 'authority, powers … *and duties (including fiduciary duties)*'" of the board shall be identical to those of a corporate board) (*citing* TravelCenters LLC Agreement) (emphasis added).

- And, contrary to *Kelly* v. *Blum*, 2010 WL 629850 (Del. Ch. Feb. 24, 2010), there is no indication in the Atlas Energy LLC Agreement that fiduciary duties are intended to apply. The opposite is the case. *Compare* LLC Agreement §7.9(d) ("Except as expressly set forth in this Agreement or required by law, none of the Directors, nor any other Indemnitees shall have any duties or liabilities, *including fiduciary* duties, to the Company or any Member . . .") *with Kelly,* 2010 WL 629850, at *11 (finding that by

[redacted]

reference to "fiduciary duties," indemnification provision suggests such duties were intended to apply).

In the face of the clear language in the LLC Agreement, Plaintiffs, not surprisingly, admit that the individual Defendants can be held liable only if "their decision to approve the Merger lacked 'good faith,'" Opp'n Br. at 23, thus conceding that the LLC Agreement eliminates any potential fiduciary duty claim against any directors or officers. But Plaintiffs nonetheless insist that "default" fiduciary duties should be imposed upon Atlas America, as controlling unitholder, apparently on the grounds that the LLC Agreement allegedly does not eliminate its fiduciary duties.[5] Not so. Setting aside that Atlas America only acts through its officers and directors — whose duties have been expressly eliminated vis-à-vis Atlas Energy and its unitholders — the LLC Agreement, as reviewed *supra*, provides a precise mechanism by which conflict transactions are to be reviewed and states that if such conflicts are resolved pursuant to its Special Approval provisions, then "any fiduciary duty" claim arising from such conflict is eliminated. LLC Agreement § 7.9(a).

---

[5] Section 18-1101(c) of the Delaware LLC Act, which permits the contractual elimination of fiduciary duties, "does not specify a statutory default provision as do other sections of the LLC Act." *Kelly* v. *Blum*, 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010). Thus any default rule is in fact a judicial "policy decision" that is not required by the statute. *Id; see also* Hon. Myron T. Steele, "Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies," 32 DEL. J. CORP. L. 1, 4 (2007) ("I conclude that parties to contractual entities such as limited liability partnerships and limited liability companies should be free — given a full, clear disclosure paradigm — to adopt or reject any fiduciary duty obligation by contract. Courts should recognize the parties' freedom of choice exercised by contract and should not superimpose an overlay of common law fiduciary duties...."). And it is particularly improper to resort to such a default rule where, as here, the LLC Agreement clearly aims to eliminate fiduciary duties. In any event, the Court need not reach this issue given the plain language and intent of the LLC Agreement at issue in this case. *See* LLC Agreement §§ 7.9(a), (b), (d). Nor should the Court be swayed by a concern that Plaintiffs had no notice of the effect of the LLC Agreement; it was absolutely clear to investors that fiduciary duty claims would be unavailable. *See, e.g.*, Prospectus at 143 ("[O]ur directors and officers do not owe us the same duties that the directors and officers of a corporation organized under the DGCL would owe to their corporation.").

That Section 7.9(a) is intended to eliminate the possibility of fiduciary duty claims against Atlas America is absolutely clear, not only by its plain language, *see* Point I *supra*, but by its purpose. As Plaintiffs themselves acknowledge, the fact that there would be conflict transactions between Atlas America and Atlas Energy was readily and forthrightly acknowledged in the Atlas Energy Prospectus. Am. Compl. ¶ 46. And the Prospectus made clear that such conflict could include a merger. *See* Prospectus at 37 ("Atlas America will possess a controlling vote on all matters submitted to a vote of our unit holders" and "will be able to cause a change of control of our company"). It thus makes sense that the LLC Agreement, which plainly is designed to eliminate fiduciary duty claims, was drafted in a manner that would eliminate the possibility of a fiduciary duty claim in the likely context that one might otherwise arise against Atlas America, namely, a conflict transaction. *See Flight Options Int'l, Inc.* v. *Flight Options LLC*, 2005 WL 2335353, at *7 (Del. Ch. July 11, 2005) (noting that the context of the relationship of the parties involved in setting up an LLC must be considered).[6]

The recent decision in *Kelly* v. *Blum* requires no different conclusion. *Kelly* could not be more clear: Traditional duties apply in the LLC context *only* "'in the absence of a contrary provision in the LLC agreement,'" and *only* where the LLC Agreement does not state

[6] The only other likely contexts for such a claim against Atlas America would relate to competition and the management of Atlas Energy. But as the Prospectus made clear, competition issues were dealt with contractually (Prospectus at 38), and management functions were performed by individuals who were specifically freed of any fiduciary duty claim. *See* Prospectus at 143, LLC Agreement §§ 7.9(b), (d); *see also* Management Agreement § 11(a). Thus, the plain language of Section 7.9(a) provides a mechanism for eliminating fiduciary duties against Atlas America in the sole other conflict setting — when it engages in a conflict transaction. Regardless, Plaintiffs have not explained why, given the clear intention of broadly eliminating potential fiduciary duty claims in favor of contractual rights, the drafters would have left a lacuna allowing a fiduciary duty claim to proceed in this context. Nor have they explained why, if this was the intent, the Prospectus would not have touted to potential unitholders that they would have the ability to bring fiduciary duty claims in this context, which was identified as a possibility, instead of so clearly advising that no fiduciary duty claims were available.

that all duties must be set forth therein. *Kelly*, 2010 WL 629850, at *10 n.69. In fact, the court in *Kelly* specifically distinguished between agreements such as those present in *Fisk* — which included a clause stating that no duties existed "except as expressly set forth herein or in other written agreements" — and the agreement in *Kelly*, which contained "[n]o clause of that nature." *Id.* The Atlas Energy LLC Agreement, of course, contains a provision such as the one in *Fisk*. *See* LLC Agreement § 7.10(a). The LLC Agreement at issue in *Kelly* also did not have a provision even remotely similar to Section 7.9(a), which eliminates fiduciary duties in the context of a conflict transaction. Indeed, by contrast to the situation here, the LLC Agreement in *Kelly* explicitly allowed the controlling member to cause the conflicted transaction without any of the sensible checks provided by Section 7.9(a). *Kelly*, 2010 WL 629850, at *13 (citing Marconi LLC Agreement).

Furthermore, it would make no sense to apply a fiduciary duty-based, entire fairness analysis to this transaction. The rationale underlying application of an entire fairness review to a merger between a corporation and its controlling stockholder is the concern that sometimes even a disinterested board cannot adequately protect shareholders. *See Kahn* v. *Lynch*, 638 A.2d at 1116-17 (noting that the "policy rationale for the exclusive application of the entire fairness standard to interested merger transactions" is that in the context of a merger "'between the corporation and its controlling stockholder . . . even minority shareholders who have ratified a . . . merger *need procedural protections beyond those afforded* by full disclosure of all material facts. One way *to provide such protections* would be to adhere to the more stringent entire fairness standard of judicial review.'") (citing *Citron* v. *E.I. Du Pont de Nemours & Co*., 584 A.2d 490, 502 (Del. Ch. 1990) (emphases added)). That rationale is simply not applicable in the alternative entity context where, as here, the operative LLC Agreement

provides both agreed-upon protections applicable to a conflict between the LLC and its affiliate controlling unitholder and a contractual "good faith" standard for director action, including when reviewing a proposal from a controlling shareholder. LLC Agreement §§ 7.9(a), (b). A judicially imposed "entire fairness" review of this transaction is thus unwarranted, unworkable, and would serve no purpose other than to give Plaintiffs an extra-contractual remedy not contained in — and expressly eliminated by — the LLC Agreement.

Finally, Plaintiffs' tortured reading of Section 12 does not save Plaintiffs' claim for breach of fiduciary duty. Plaintiffs alleged in their Amended Complaint that Section 12 of the LLC Agreement, which sets forth the steps for mergers or other restructurings, somehow overrides the clear language of Sections 7.9(a) and 7.9(b). According to Plaintiffs, since Section 12.2 eliminates any good faith duty for the board when it rejects a merger but does not provide any express standard for the board when it approves a merger, the Court should import a default fiduciary standard to fill this alleged void.

This argument is meritless and ignores the entire structure of the LLC Agreement. As Defendants explained in their Opening Brief (pp. 22-24), under the plain terms of Section 7.9(b), "unless another *express standard* is provided for in this Agreement," the board shall act "in good faith," defined as acting "in the best interests of the Company." LLC Agreement § 7.9(b) (emphasis added). Section 12.2(a) provides an example of an "express standard," stating that where the board makes a decision not to pursue a merger, it "shall not be required to act in good faith," as it otherwise would have been under Section 7.9(b). Section 12.2(b), on the other hand, which sets forth the steps for approving a merger, provides no such "express standard." In other words, read together, Sections 7.9(b) and 12.2 require that the Atlas Energy board be governed by a contractual good faith standard, except in situations where it decides to

refuse a merger; in those instances, the contractual good faith standard will not apply. Such a reading does not result in surplusage, as Plaintiffs suggest (Opp'n Br. at 27); rather, it allows each provision to be fully respected. Plaintiffs' Opposition Brief offers no different cogent interpretation of this clear contractual language, and the Amended Complaint fails to allege that the steps in approving the Merger, as set forth in Section 12.2, were not followed.

* * *

In short, Plaintiffs have twice chosen to bring a fiduciary duty claim and not allege a breach of the LLC Agreement. In doing so, they have tendered a straightforward issue to the Court: Does the LLC Agreement allow for an action alleging a breach of fiduciary duty where Defendants complied with its contractual terms? Because the plain language of the LLC Agreement clearly eliminates any such claim and because the provisions of the LLC Agreement were concededly followed, *see supra* Points I, II, Plaintiffs' Amended Complaint should be dismissed.

III. PLAINTIFFS' "BAD FAITH" ALLEGATIONS DO NOT STATE A LEGALLY SUFFICIENT CLAIM UNDER THE LLC AGREEMENT.

Because Plaintiffs deliberately eschew a breach of contract claim and bring only fiduciary duty claims, their Amended Complaint must be dismissed pursuant to the clear language of the LLC Agreement. The bulk of the Opposition Brief, which recounts Plaintiffs' unsubstantiated process and price allegations in an attempt to plead an entire fairness case, is therefore beside the point. Good faith, not entire fairness, is the relevant standard under the LLC Agreement.[7]

[7] Since Plaintiffs have knowingly and strategically opted to plead only fiduciary duty claims both in their initial Complaint and — following significant document discovery — in their Amended Complaint, this Court should not entertain any future effort to proceed as a breach of contract action. *See* Del. Ch. Rule 15(aaa) (absent "good cause shown," dismissal under Rule 12(b)(6) is "with prejudice").

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

The good faith standard under the LLC Agreement is clear — directors must believe that an action is in the best interests of the Company. LLC Agreement § 7.9(b). Plaintiffs concede that standard applies to the Atlas Energy directors who approved the Merger (Opp'n Br. at 22-23), and the Amended Complaint contains no allegation that it has been breached. *See* Opening Br. at 25.

Plaintiffs make one after-the-fact attempt to remedy this pleading deficiency, arguing in their Opposition Brief, without citation, that the Special Committee approved the Merger "despite *knowing* that the Merger was not in the best interests of Energy and its unitholders." Opp'n Br. at 41 (emphasis added). A brief, of course, is not a pleading, and Plaintiffs provide no citation to any allegation made anywhere within the four corners of the Amended Complaint in support of this assertion. *See Haber* v. *Bell*, 465 A.2d 353, 357 (Del. Ch. 1983) ("In considering a motion to dismiss, only those matters referred to in the pleadings are to be considered by the Court."). And even if this allegation *were* made in the Amended Complaint, it is precisely the type of conclusory allegation that is insufficient to state a claim. *See Fisk*, 2008 WL 1961156, at *11 (holding that the "hollow invocation of 'bad faith' does not magically render a deficient complaint dismissal-proof").[8]

[8] In an attempt to bolster this uncited assertion, Plaintiffs point to allegations, based on the discovery record, that the independent directors at one point engaged in discussions with Atlas America regarding concerns about the transaction. Opp'n Br. at 30 n.13; Am. Compl. ¶ 103. As a threshold matter, that the Special Committee wanted to be "more at ease" with the Merger, as Plaintiffs allege (Am. Compl. ¶ 103), does not support a subsequent conclusion that the individual Defendants were "uneasy" with the transaction or did not believe it was in the best interests of the Company. Moreover, this allegation simply confirms that the independent directors took their jobs seriously and pressed Atlas America for additional information. Plaintiffs point to no evidence from the discovery record that the directors were not, at the time the Merger was approved, comfortable that the transaction was in the best interests of Atlas Energy.

Contrary to the baseless assertion in their Opposition Brief, Plaintiffs' own Amended Complaint acknowledges that the Special Committee "determined by unanimous vote that the Merger was … in the best interests of Energy and its public unitholders." Am. Compl. ¶ 64. The Proxy set forth at length the reasons supporting that belief, Opening Br. at 26-28, and Plaintiffs nowhere allege that these views were not genuinely held. Nor could they. After receiving an extensive discovery record, Plaintiffs withdrew their preliminary injunction motion and disclosure claims, thereby conceding the accuracy of the Proxy — including the Proxy's statement that the directors believed the Merger was in the best interests of the company. *See Clements* v. *Rogers*, 790 A.2d 1222, 1248-49 (Del. Ch. 2001) (granting summary judgment where there was "no record evidence that would support a conclusion that [the directors] consciously approved a merger that they subjectively believed was not in the best interests of [the] stockholders"). Ultimately, of course, the Atlas Energy unitholders' overwhelming support for the Merger, which was approved by over 98 percent of the unaffiliated unitholders voting, is the best indicator of all that the Merger was "in the best interests of" the company (as well as a separate and independent basis for why Section 7.9(a) was met). The Amended Complaint contains no allegation, nor any basis to infer, that the directors did not believe so.

Unable to allege subjective bad faith under the LLC Agreement, Plaintiffs instead set forth allegations *not* about what Defendants believed, but about what strategic alternatives were — in Plaintiffs' view — in the best interests of Atlas Energy. According to Plaintiffs, the only alternative that was truly in the independent unitholders' interest was rejecting the Merger, continuing the dividend, and remaining a separate company. Am. Compl. ¶ 91. But as Defendants' Opening Brief pointed out, every banker presentation Plaintiffs cite in their Amended Complaint confirms that a merger between these two related entities — in essence, a

reorganization that consolidated the corporate structure — was advisable and the dividend was unsustainable. Opening Br. at 28 n.13. Plaintiffs have offered no response to this reality.[9]

In short, Plaintiffs' own allegations would defeat any subjective bad faith claim. Absent allegations that the independent directors put the Merger Agreement to a vote without believing it was in the interest of Atlas Energy and its unitholders, of which there are absolutely none, no contractual bad faith claim can lie.

B. Price and process claims are inadequate to allege that Defendants did not believe they were acting in the best interests of Atlas Energy.

As Defendants demonstrated in their Opening Brief, Plaintiffs' price and process claims would be legally insufficient to give rise to a claim for breach of the contractual good faith standard, even assuming that such a claim had been raised in the first place. *See* Opening Br. at 29-38. Allegations of unfair process cannot replace allegations as to the individual Defendants' subjective beliefs, which — as Plaintiffs concede — are required to state a legally sufficient claim under the contract. LLC Agreement § 7.9(b); Opp'n Br. at 44; *see also Kahn*, 2008 WL 5197164, at *7 ("[A] director does not act in good faith if the director acts with a subjective belief that her actions are not in the best interest of the corporation.").

The only fresh contention in Plaintiffs' Opposition Brief is the argument that process failures can rise to a level sufficient to support a "bad faith" claim in the corporate context. This is true. Delaware courts have recognized that a board's "utter[] fail[ure]" of process, *Lyondell Chem. Co.* v. *Ryan*, 970 A.2d 235, 244 (Del. 1999), or its failure to engage in any "rational" consideration, *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 649 (Del. Ch.

[9] Similarly, Plaintiffs ignore the fact that the Defendants' focus on reaching an agreement prior to the announcement of the need to cut distributions was motivated by a desire to avoid causing a precipitous drop in the price of Atlas Energy units prior to the Merger Agreement being signed, which would have harmed the unitholders. Opening Br. at 33.

2008), can in some instances support a fiduciary duty-based bad faith claim against directors. Opp'n Br. at 31-32. But what Plaintiffs' Opposition Brief does not contend is that the alleged process failures here in any way support a *subjective bad faith* claim under the LLC Agreement. Nor does Plaintiffs' Opposition Brief explain how the very high standard of even a process-based bad faith claim could be met, even were that standard relevant, when the detailed contractual process for reviewing conflicts between Atlas America and Atlas Energy was followed.[10]

The cases Plaintiffs cite are not to the contrary. For example, Plaintiffs cite *Lear* for the proposition that "[a]llegations 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." Opp'n Br. at 31. Of course, neither *Lear* nor established Delaware law stand for any such proposition. In *Lear*, a derivative action that arose in the corporate context, plaintiffs alleged that the directors agreed to enter into a transaction that was "tantamount to corporate waste," and had "all the badges of the exercise of no care." *Lear*, 967 A.2d at 649. The court — noting that both the complaint and the proxy made clear that the board had met regularly and had relied on its advisors' opinion that the transaction was fair to the stockholders, and thus failed to allege that no rational process was

[10] Plaintiffs confuse the standard for pleading a contractual bad faith claim with the standard applicable to a claim for the breach of the duty of loyalty. Blatantly ignoring the clear terms of the LLC Agreement that define the applicable good faith standard, Plaintiffs instead suggest that this contractual duty is subsumed within the duty of loyalty, and that by pleading a process-based duty of loyalty violation they have therefore pled an actionable claim for a breach of the contractual obligation of good faith. Opp'n Br. at 31 n.14. This argument, however, ignores well-settled precedent setting forth an express and separate pleading standard for claims of bad faith. *See Official Committee of Unsecured Creditor of Integrated Health Services, Inc.* v. *Elkins*, 2004 WL 1949290, at *10 (Del. Ch. Aug. 24, 2004) (analyzing separately the questions of (a) whether the plaintiffs had adequately pleaded that the majority of the board was interested or lacked independence and (b) whether the board members had acted in bad faith under *Disney*). More importantly, this argument ignores the LLC Agreement's clear imposition of a subjectivity requirement. LLC Agreement § 7.9(b).

followed — held that the complaint "would not state a claim for lack of due care even if simple negligence were the applicable standard," let alone plead facts supporting an inference that the directors "consciously acted in a manner contrary to the interests of Lear and its stockholders," as required to plead a duty of loyalty violation in the 102(b)(7) context. *Id.* at 649, 652. Likewise here, as Plaintiffs concede and as the Proxy makes clear, the Special Committee met on a regular basis, *see* Am. Compl. ¶¶ 57-64, and received advice from special advisers that the Merger was fair. Merger Agreement § 4.5. The Amended Complaint altogether fails to allege that no "rational process" was followed. Thus for the same reasons that dictated the result in *Lear*, a process-based bad faith claim could not be maintained even were it the standard.[11]

[11] Nor do the other cases cited by Plaintiffs support an argument that a bad faith claim could be sustained. In *Elkins*, two officers caused the company to make unauthorized and undocumented loans to the officers, the compensation committee approved the loan *ex post*, and the board subsequently ratified the compensation committee's approval. Noting that the compensation committee and board allegedly approved the loans without any explanation of the purpose of the loans, and the board conducted no further inquiry, this Court held that plaintiffs' allegations implied that the "Board consciously and intentionally disregarded [its] responsibilities" and thus successfully pleaded a non-exculpated claim under 102(b)(7). 2004 WL 1949290, at *12 (emphases altered) (internal quotations omitted). Setting aside that the directors' conduct was evaluated under a different standard in *Elkins* than that imposed by the Atlas Energy LLC Agreement, here, by contrast, Plaintiffs have failed to allege that the Special Committee acted without deliberation or approved the Merger without any analysis.

Plaintiffs' citation to *Lyondell* in support of their bad faith claim is even more puzzling. There, the Delaware Supreme Court held that "[i]nstead of questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price, the inquiry should have been whether those directors utterly failed to attempt to obtain the best sale price." *Lyondell*, 970 A.2d at 244. At most, Plaintiffs here have alleged precisely what the *Lyondell* court held could not rise to the level of bad faith: that is, a failure to do "everything that they (arguably) should have done to obtain the best sale price," as opposed to an "utter failure" to attempt to obtain such a price. The Amended Complaint acknowledges that the Special Committee did not accept Atlas America's original proposed exchange ratio, and ultimately succeeded in obtaining a ratio that was 21 percent higher than the initial offer. Am. Compl. ¶¶ 62-63, 70. Plaintiffs' complaint that this consideration simply was not good enough does not approach the "utter failure" *Lyondell* requires for a proper allegation of bad faith in the corporate context.

Plaintiffs' remaining arguments confirm that they have made only unfair process/unfair price claims that do not in any way amount to allegations of subjective bad faith as required by the LLC Agreement. Indeed, Plaintiffs concede as much, captioning these arguments so as to highlight their contention that they demonstrate only "unfair process" and "unfair price." Opp'n Br. at 28, 42.

First, Plaintiffs challenge the Special Committee's process. But Plaintiffs have not pleaded — and have not even argued that they have pleaded — facts sufficient to show that the members of the Special Committee did not believe that they were acting in the best interests of the Company.[12] *See supra* III.A. Having conceded that the Special Committee of disinterested directors "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" (Opp'n Br. at 8), Plaintiffs instead come forth with allegations relating to the Special Committee's process. But Plaintiffs' own allegations — in addition to the Special Committee meeting minutes, which they attach — detail a sensible process clearly devoid of any subjective bad faith:

[12] Plaintiffs also do not offer any facts to challenge the independence of the members of the Special Committee other than to suggest that they retained their board seats following the Merger. Am. Compl. ¶ 48; Opp'n Br. at 5. Under Delaware law, as demonstrated in the Opening Brief and not rebutted by Plaintiffs, that is plainly insufficient to establish a disabling conflict of interest. *See Orman* v. *Cullman*, 794 A.2d 5, 28-29 (Del. Ch. 2002) ("No case has been cited to me, and I have found none, in which a director was found to have a financial interest *solely* because he will be a director in the surviving corporation. To the contrary, our case law has held that such an interest is not a disqualifying interest."); *Hokanson* v. *Petty*, 2008 WL 5169633, at *7 (Del. Ch. 2008) (same); *Krim* v. *ProNet, Inc.*, 744 A.2d 523, 528 n.16 (Del. Ch. 1999) (same). Plaintiffs also note that one of the independent directors recused himself from the process and, Plaintiffs omit to mention, abstained on the ultimate vote, because of his ownership of Atlas America shares. Merger Agreement § 4.5(a). Far from demonstrating bad faith, such abstention, and the abstention or recusal of *all* arguably conflicted directors — including a director Plaintiffs go so far as to label "conflicted" despite their concession that he was neither an officer nor director of Atlas America (Opp'n Br. at 32) — confirms the good-faith process at issue here. Opening Br. at 28-29.

- Consistent with the terms of the LLC Agreement, the Special Committee was formed in response to Atlas America's proposals, which implicated potential transactions between Atlas America and Atlas Energy. Am. Compl. ¶¶ 55-57.

- The Special Committee retained separate legal counsel (K&L Gates, LLP), and the independence and qualification of the Special Committee's counsel are not challenged. Am. Compl. ¶ 57.

- The Special Committee hired a separate investment banker (UBS Securities LLC) to provide financial advice. Am. Compl. ¶ 57.[13]

- The Special Committee met on numerous occasions and received presentations regarding, *inter alia*, Atlas Energy's business plans, prospects and various financial scenarios. Am. Compl. ¶¶ 58, 94, 98, 115, 116, 118, 124.

- The Special Committee and its legal and financial advisors held due diligence meetings with Atlas America's management and its advisors. Am. Compl. ¶ 94. *See also* LLC Agreement 7.10(b) (allowing directors to rely in good faith on management and outside advisers).

- Although not required by the LLC Agreement, *see* Opp'n Br. at 38, the Special Committee requested a majority of the minority provision with respect to the vote on the Merger, but that request was rejected by Atlas America. Am. Compl. ¶ 61, 124.

- The Special Committee rejected Atlas America's initial offer of an exchange ratio of 0.96 shares of Atlas America common stock for each Atlas Energy common unit. Am. Compl. ¶¶ 62-63.

- The Special Committee negotiated an increase in the exchange ratio from 0.96 to 1.16 shares of Atlas America common stock for each Atlas Energy common unit — a 21 percent increase. Am. Compl. ¶ 70.

- Prior to the Special Committee's approval of the Merger, it received advice and a fairness opinion from UBS. Am. Compl. ¶ 104.

---

[13] Although they assert that UBS had previously done work for Atlas America and was therefore conflicted, Plaintiffs fail to cite any authority for their erroneous assertion that a potential conflict involving its investment banker is sufficient to establish that the Special Committee believed it was taking actions in bad faith. Plaintiffs also fail to allege any facts to support a finding that the Special Committee believed that UBS had a disabling conflict and/or was not acting in the best interests of the Company. *See* Opening Br. at 35 n.19. Nor do the unitholders appear to have been concerned, as they approved the Merger with full knowledge of the supposed UBS conflict.

- 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." Opp'n Br. at 8.

Against this backdrop, it is clear that Plaintiffs' assertions do not, under any conceivable reading, amount to a claim that the Special Committee utterly failed to undertake a rational process or intentionally took actions it knew to be contrary to the best interests of the Company.[14]

Second, Plaintiffs argue that certain directors and officers of Atlas America had divided loyalties. Opp'n Br. at 32. This fact was not a secret and was, of course, disclosed to Plaintiffs. More importantly, however, any suggestion that the mere fact of this conflict of interest amounts to bad faith is false. For example, Plaintiffs argue that "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." Opp'n Br. at 35. But this claim is not consistent with Delaware law. If the simple fact of overlapping management could constitute a good faith violation regardless of the operative LLC Agreement, the LLC Agreement itself would be rendered meaningless. *See* 6 *Del. C.* § 18-1101(b) (2004) ("It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."). Furthermore, none

[14] Plaintiffs also claim that the Special Committee members violated their duty of good faith when, upon learning that they had been sued by Plaintiffs in this lawsuit, they failed "to tak[e] action to rectify the process and improve the price offered in the Merger" and, instead, asserted contract-based defenses. Opp'n Br. at 42. Setting aside Plaintiffs' inability to explain how reliance on legal defenses available to them under the governing contract amounts to "taking or declining to take" action with the belief that it is *not* in "the best interests of the Company," *see* LLC Agreement § 7.9(b), Plaintiffs' last-ditch theory also fails to allege that Atlas America would have agreed to modify the Merger Agreement or have been able to secure its own shareholder approval for such an increased price; thus Plaintiffs have altogether failed to explain how this "action" they claim the Special Committee should have taken would have had any effect.

of the cases on which Plaintiffs rely, Opp'n Br. at 34-36, suggest that this kind of ordinary conflict gives rise to bad faith conduct as opposed to, at most, requiring a potential entire fairness analysis, which here is obviated by the LLC Agreement.[15]

Third, Plaintiffs argue that Atlas America somehow rigged the process by presenting Atlas Energy with a limited set of options and by withholding information concerning a prior potential transaction. Defendants' Opening Brief responded to both points. Opening Br. at 31-36. The Special Committee considered a range of options — including the only option Plaintiffs allege to have actually been in the independent unitholders' interest: rejecting the Merger, continuing the dividend and remaining a separate company (Am. Compl. ¶ 91) — and had the power to say "no" to any option.[16] As for Plaintiffs' claim that the Merger negotiation process was flawed because certain information was not disclosed to all parties, Plaintiffs have not alleged that information concerning this concededly different potential transaction for Atlas America, and in which Atlas America is not alleged to have been interested, was not shared in bad faith. Plaintiffs also conceded this information was immaterial when they dropped their

[15] Plaintiffs cite *In re Freeport-McMoran Sulphur, Inc. S'holder Litig.*, 2005 WL 1653923, at *8 (Del. Ch. June 30, 2005), for the proposition that the conflict faced by the directors and officers with ties to Atlas America supports a claim based on a breach of the duty of loyalty. But in *Freeport* the issue was not the conduct of the concededly interested directors, but whether the disinterested directors were truly "disinterested." *Id.* at *6. Likewise, *Kahn* does not support Plaintiffs' claim. Unlike here, where the potentially interested directors were purposefully not allowed to vote on the Merger Agreement, in *Kahn* the allegedly interested directors approved the transaction. *Kahn*, 2008 WL 5197164, at *1. No such allegations have been made here.

[16] Thus, far from rigging the process, Atlas America, which Plaintiffs allege had determined that it wanted a merger, was subject to the Special Committee's power to stymie its desires. *See also* LLC Agreement § 12.2(b) (permitting the Special Committee to reject any merger without being subjected to any good faith standard).

disclosure claims, *see supra* at III.A, and have not come forth with any meaningful explanation for how it could have since become material. *See* Opening Br. at 33-36.[17]

Fourth, Plaintiffs assert that unitholders received unfairly low consideration as part of the Merger. But without accompanying allegations that Defendants subjectively believed their actions in negotiating for and agreeing to the exchange ratio were not in the best interests of the Company, such an allegation is insufficient to support a contractual bad faith claim. *See* Opening Br. at 37-38; *see also Lyondell*, 970 A.2d at 243-44. And neither Plaintiffs' Amended Complaint nor their Opposition Brief includes any such accompanying allegations.

Nor could any such allegations be made. Plaintiffs concede that the Special Committee received a fairness opinion from outside advisors opining that the deal was fair, reasonable, and in the best interests of the company and its unitholders. Am. Compl. ¶ 104; Opp'n Br. at 10. The ratio was not, as Plaintiffs misleadingly state in their Opposition Brief, at an historic low, Opp'n Br. at 14; rather, as the very banker presentations cited in Plaintiffs' Amended Complaint show, it was at an historic near high. Atlas Energy had, for most of its existence, traded at a discount to Atlas America.[18] Moreover, Atlas America's valuable Class A

---

[17] [redacted] And to the extent that Plaintiffs are suggesting that Defendants should have disclosed that, as a general matter, there might be alternatives involving premiums, the Special Committee members — as Plaintiffs recognize and allege — were aware that in other types of transactions, such as minority squeeze-outs, minority unitholders could command a premium. *See* Am. Compl. ¶ 7.

[18] To take just one example, Plaintiffs cite Atlas Energy's trading price of $30 on September 5, 2008, "before the tumultuous drop in the stock market," as evidence that Atlas Energy units "have consistently traded well in excess of the 1.16 exchange ratio." Am. Compl. ¶ 74. Atlas America closed at $34.03 on that date, at a premium to Atlas Energy, for a ratio of 0.88. Thus, using Plaintiffs' own date as a reference point, not only were Atlas Energy's units in no way [redacted]

interests, which entitled it as manager to an additional dividend on top of the dividend it received for owning nearly 50 percent of the Class B shares, were cancelled without consideration. And, Plaintiffs make no allegation that Atlas America, which had to get approval of its own shareholders, would have agreed to a ratio any higher than the amount set forth in the Merger Agreement.[19]

* * *

Putting aside whether a fiduciary duty claim may lie, Plaintiffs do not dispute the effect of the LLC Agreement's exculpatory provisions. The LLC Agreement's exculpation clause provides that "no Indemnitee shall be liable . . . unless there has been a final [judgment that] the Indemnitee acted in bad faith or engaged in fraud [or] willful misconduct." LLC Agreement § 7.8(a). As explained by the Delaware Supreme Court, "[w]here, as here, directors are exculpated from liability except for claims based on 'fraudulent,' 'illegal' or 'bad faith' conduct, a plaintiff must also plead particularized facts that demonstrate that the directors acted with scienter, *i.e.*, that they had 'actual or constructive knowledge' that their conduct was legally improper." *Wood* v. *Baum*, 953 A.2d 136, 141 (Del. 2008). In fact, even where "default [fiduciary] duties of care and loyalty remain," as in *Kelly*, to plead non-exculpated conduct "requires more than application of a standard like entire fairness and requires that [Plaintiffs]

---

trading "well in excess" of the Merger's 1.16 ratio, but the Merger ratio represented *a premium of 32%*.

[19] As for the suggestion that there should have been a premium, this was not a cash-out merger but a stock-for-stock transaction. Because of the stock-for-stock nature of the transaction, Atlas Energy unitholders continue to benefit from increases in the value of Atlas America's stock. That increase happened immediately upon the Merger's announcement (27 percent within five days) and on the day the transaction closed represented a premium of more than 100 percent over the pre-announcement price. Likewise, by their own concession, because of the stock-for-stock nature of the Merger Plaintiffs were able to take part in the upside of a joint venture worth $1.7 billion. Opp'n Br. at 34. Relatedly, that this joint venture was announced more than one year later has no bearing, as Plaintiffs attempt to suggest, on whether it was available at the time of the Merger at the same favorable value.

allege facts showing scienter." *Kelly*, 2010 WL 629850, at *12. Plaintiffs have failed to state a claim for non-exculpated conduct, but even if they had, their allegations altogether fail to plead scienter.

C. Plaintiffs have failed to state a claim for breach of the implied covenant of good faith and fair dealing because the Merger was expressly addressed by the LLC Agreement.

Plaintiffs have not asserted a contract claim, nor have they brought a claim for bad faith breach of contract. No such claim could be sustained, even had it been raised.

The implied covenant of good faith and fair dealing, which is "only rarely invoked successfully," requires a "'party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain." *Fisk*, 2008 WL 1961156, at *10 (citations omitted). Critically, "because the implied covenant is, by definition, *implied*, . . . it cannot be invoked where the contract itself expressly covers the subject at issue." *Id.*; *see also Nemec* v. *Shrader*, 991 A.2d 1120, 1125-26 (Del. 2010) (claim for breach of the implied covenant cannot be based on conduct authorized by the agreement.). Blatantly disregarding the applicable law, Plaintiffs claim that "[t]he Individual Defendants' negotiation of and agreement to a transaction which would benefit America . . . to the detriment of Energy's unitholders is a breach of the implied covenant of good faith and fair dealing." Opp'n Br. at 45. The "negotiation of and agreement to" a merger between Atlas America and Atlas Energy, of course, was expressly taken up by the terms of the LLC Agreement and, as such, is not the proper subject of an implied covenant claim. *Dave Greytak Enters., Inc.* v. *Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992)

("[W]here the subject at issue is expressly covered by the contract, . . . the implied duty to perform in good faith does not come into play."), *aff'd*, 609 A.2d 668 (Del. 1992).[20]

As the provisions of the LLC Agreement were followed and Plaintiffs do not allege that Defendants attempted to thwart compliance with those provisions — on the contrary, they chastise Defendants for relying on Section 7.9(a) (Opp'n Br. at 46) — no claim for a breach of the implied covenant could be sustained even if brought.

[20] Even if Plaintiffs had raised an implied covenant claim that could be appropriately asserted in this context, Plaintiffs have pleaded no facts supporting such a cause of action. "General allegations of bad faith" — which Plaintiffs here have not even mustered — do not suffice to state a cognizable claim for breach of the implied covenant. *Kelly*, 2010 WL 629850, at *13. Moreover, Plaintiffs have utterly failed to allege that Plaintiffs' expectations were frustrated. To state a claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs must allege that unitholders held specific expectations that were frustrated by Defendants' conduct, as required under Delaware law. *See* Opening Br. at 38-39. Plaintiffs' expectations were clear. They expected conflicts of interest to arise. Prospectus at 37, 143. They expected mergers to be subject to a simple majority vote. LLC Agreement § 12.3. They expected the board to resolve all conflicts. Prospectus at 141. Likewise, they expected Atlas America to control a change-of-control transaction. *Id.* at 37. Finally, they did *not* expect their officers and directors to owe them fiduciary duties, and they did *not* expect to be able to bring fiduciary duty claims following the board's approval of a conflict transaction with Atlas America. *Id.* at 37, 143. Plaintiffs' implication that the LLC Agreement here is somehow in conflict with Delaware statutory law precluding the elimination of the implied covenant of good faith, Opp'n Br. at 44, is thus utterly without basis. The LLC Agreement did not eliminate the implied covenant of good faith, but there was no breach of such covenant.

CONCLUSION

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

Dated: June 11, 2010

Respectfully submitted,

OF COUNSEL:

Jonathan M. Moses
Meredith L. Turner
Grant R. Mainland
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019-6150

/s/ Martin S. Lessner
Martin S. Lessner (DE Bar No. 3109)
Christian Douglas Wright (DE Bar No. 3554)
Kathaleen St. J. McCormick (DE Bar No. 4579)
YOUNG CONAWAY STARGATT & TAYLOR, LLP
1000 West Street, 17th Floor
Wilmington, DE 19801-1037
(302) 571-6600
Attorneys for Defendants Atlas America, Inc., Edward E. Cohen, Jonathan Z. Cohen, Matthew A. Jones, and Daniel C. Herz

Patricia Villareal
Michael L. Davitt
JONES DAY
2727 North Harwood Street
Dallas, TX 75201-1515

/s/ Gregory P. Williams
Gregory P. Williams (DE Bar No. 2168)
Rudolf Koch (DE Bar No. 4947)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801-1243
(302) 984-6015
Attorneys for Defendants Atlas Energy Resources, LLC, Richard D. Weber and Bruce M. Wolf

Peter N. Flocos
K&L GATES LLP
599 Lexington Avenue
New York, NY 10022-6030

/s/ Kevin R. Shannon
Donald J. Wolfe, Jr. (DE Bar No. 285)
Kevin R. Shannon (DE Bar No. 3137)
POTTER ANDERSON & CORROON LLP
1313 North Market Street
Wilmington, DE 19801-6107
(302) 984-6015
Attorneys for Defendants Ellen F. Warren, Walter C. Jones, and Jessica K. Davis

CERTIFICATE OF SERVICE

I, Kathaleen St. J. McCormick, Esquire, hereby certify that on June 11, 2010 a copy of the foregoing document was served on the following counsel in the manner indicated below:

By Lexis/Nexis File & Serve:

Jay W. Eisenhofer
Michael J. Barry
GRANT & EISENHOFER P.A.
1201 N. Market Street
Wilmington, Delaware 19801

Pamela S. Tikellis
Robert J. Kriner
A. Zachary Naylor
Tiffany J. Cramer
CHIMICLES & TIKELLIS LLP
222 Delaware Avenue, Suite 1100
Wilmington, Delaware 19899

Sidney S. Liebesman
FINGER, SLANINA & LIEBESMAN, LLC
One Commerce Center
1201 N. Orange Street, 7th Floor
Wilmington, DE 19801

Joseph A. Rosenthal
P. Bradford deLeeuw
ROSENTHAL MONHAIT & GODDESS, P.A
919 Market Street, Suite 1401
Wilmington, DE 19899-1070

David Jenkins
SMITH KATZENSTEIN & FURLOW LLP
800 Delaware Avenue, Suite 1000
Wilmington, DE 19899

Gregory P. Williams
Harry Tashjian, IV
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 N. King Street
Wilmington, DE 19801

Donald J. Wolfe, Jr.
Kevin R. Shannon
POTTER ANDERSON & CORROON LLP
1313 North Market Street
Wilmington, DE 19801

/s/ Kathaleen St. J. McCormick
Kathaleen St. J. McCormick (# 4579)