



COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

JOHN W. NOBLE  
VICE CHANCELLOR

417 SOUTH STATE STREET  
DOVER, DELAWARE 19901  
TELEPHONE: (302) 739-4397  
FACSIMILE: (302) 739-6179

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Peter B. Andrews, Esquire  
Craig J. Springer, Esquire  
Andrews & Springer LLC  
3801 Kennett Pike  
Building C, Suite 305  
Wilmington, DE 19807

Rolin P. Bissell, Esquire  
Tammy L. Mercer, Esquire  
Young Conaway Stargatt & Taylor LLP  
1000 North King Street  
Wilmington, DE 19801

David E. Ross, Esquire  
S. Michael Sirkin, Esquire  
Seitz Ross Aronstam & Moritz LLP  
100 S. West Street, Suite 400  
Wilmington, DE 19801

Thomas W. Briggs, Jr., Esquire  
Matthew R. Clark, Esquire  
Morris, Nichols, Arsht & Tunnell LLP  
1201 North Market Street  
Wilmington, DE 19801

Re: *Ellis v. OTLP GP, LLC*  
C.A. No. 10495-VCN  
Date Submitted: January 12, 2015

Dear Counsel:

Plaintiffs Matthew Ellis and Chaile Steinberg are limited partner unitholders of Oiltanking Partners, L.P. (“Oiltanking”) and bring this action to challenge the merger of Oiltanking with Defendant Enterprise Products Partners L.P. (“Enterprise”) which now owns approximately two-thirds of Oiltanking’s limited

partner interests. They have moved to expedite this proceeding in order to seek a preliminary injunction halting the upcoming vote on the proposed acquisition.

Motions to expedite are granted if a plaintiff sets forth a sufficiently colorable claim and a sufficient possibility of irreparable injury.<sup>1</sup> These showings are assessed in the context of the burdens on the parties and the Court of expedited proceedings.

## **I. BACKGROUND**

Defendant Marquard & Bahls AG (“M&B”) owned all of Oiltanking’s general partner, Defendant OTLP GP, LLC (“GP”), and approximately sixty-five percent of the limited partner interests in Oiltanking. In June 2014, Enterprise approached M&B not only about buying M&B’s interest in Oiltanking, but also its desire to acquire all of Oiltanking. M&B was willing to discuss the acquisition of its interest by Enterprise, but it did not support any deal structure that would depend upon the support of the unaffiliated unitholders.

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<sup>1</sup> *Giammargo v. Snapple Bev. Corp.*, 1994 WL 672698, at \*2 (Del. Ch. Nov. 15, 1994).

The rights of the common unitholders of Oiltanking (“Common Unitholders”), such as the Plaintiffs, are defined in the First Amended and Restated Agreement of Limited Partnership of Oiltanking, dated as of July 19, 2011 (the “LP Agreement”). Under Section 14.3(b) of the LP Agreement, any merger would require approval of a Unit Majority. Section 1.1 of the LP Agreement defines Unit Majority as “(i) during the Subordination Period, at least a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates), voting as a class, and at least a majority of the Outstanding Subordinated Units, voting as a class, and (ii) after the end of the Subordination Period, at least a majority of the Outstanding Common Units.”

The Subordination Period was expected to continue until mid-November 2014. Its purpose, as inferred from the LP Agreement, was to assure that the Common Unitholders received certain cash distributions from Oiltanking ahead of other investors in Oiltanking. Requiring a class vote of the Common Unitholders was a way to protect their cash flow expectations.

M&B was not interested in a transaction that would be dependent upon a class vote, essentially a majority-of-the-minority vote, of the unaffiliated Common Unitholders, who own approximately one-third of the limited partner interests. It advised Enterprise that it would deal directly with Enterprise, but that Enterprise should wait until the expiration of the Subordination Period to acquire the publicly held Common Units if it wanted to avoid a class vote on a merger.

M&B and Enterprise were able to negotiate an agreement under which Enterprise would acquire GP and M&B's two-thirds limited partner interests in Oiltanking. That transaction closed on October 1, 2014; a few days earlier, Enterprise had notified Oiltanking of its intention to acquire all of Oiltanking by merger. Its proposed merger price for each limited partner unit (a Common Unit) was less than what it was paying to M&B for its comparable units. GP referred the matter to the Conflicts Committee established under the LP Agreement, and the Conflicts Committee was able to negotiate an increase in the price that Enterprise would pay as merger consideration, although the final negotiated price remained below what Enterprise paid M&B.

## II. CONTENTIONS

The LP Agreement purports to define those duties, including fiduciary duties, that GP and its affiliates owe to the Common Unitholders; more significantly, it purports to eliminate all other duties, including fiduciary duties, that are not preserved by the agreement.<sup>2</sup>

Enterprise, because the necessary payments to the Common Unitholders have been made and, thus, the Subordination Period has ended, proposes a unitholder vote on the merger that would be determined by a simple majority of the Common Units voted. With its ownership of approximately two-thirds of those units, which are irrevocably committed by a support agreement to be voted to approve the merger, it is not difficult to predict the outcome of that vote. The Plaintiffs, however, contend that they and their fellow unaffiliated Common Unitholders are entitled to a class vote on the merger. Thus, they have moved for expedition in order to seek a preliminary injunction precluding the vote proposed by Enterprise.

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<sup>2</sup> LP Agmt. § 7.9(e).

The Plaintiffs argue that M&B and Enterprise designed the transaction in a conscious effort to defeat their entitlement to a class vote. Allegedly, because the acquisition was announced during the Subordination Period, the voting standard applicable during the Subordination Period would govern the merger vote. Plaintiffs claim that the LP Agreement is ambiguous on this issue, and that GP breached the implied covenant of good faith and fair dealing when it determined that no class vote is required. Plaintiffs also argue that M&B and Enterprise improperly divided a compromised transaction into subparts that when viewed separately may appear to be proper. This structure was allegedly part of a conscious effort to defeat Plaintiffs' right to a class vote. If viewed as a single integrated transaction that was effectively consummated when M&B transferred its interest, then GP has allegedly breached the LP Agreement by refusing a class vote. In addition, Plaintiffs assert that GP, because of its divided loyalties and unexculpated conduct, breached its contractual duty of good faith owed to Plaintiffs.

### III. ANALYSIS

#### A. *Voting Standard Claims*

At its core, the Plaintiffs' argument is that the Defendants could not announce, pursue, or agree to a merger before expiration of the Subordination Period without becoming obligated to seek a class vote. They maintain that because the merger was announced during the Subordination Period, the voting standard applicable during the Subordination Period would control, even if the merger vote would occur later.

The LP Agreement does not expressly address what voting standard would apply with respect to when an item for voting is announced. That, according to Plaintiffs, creates an ambiguity. However, “[a] contract is not rendered ambiguous simply because the parties do not agree on its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”<sup>3</sup> The LP Agreement specifies a voting standard during the

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<sup>3</sup> *Kaiser Alum. Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

Subordination Period and a voting standing for after the Subordination Period. In this instance, the vote (or the record holder date) will occur roughly two months after the end of the Subordination Period. The Plaintiffs offer no reason why, under either the LP Agreement or Delaware law, the voting standard is not determined by reference to the time of the vote.<sup>4</sup> The LP Agreement does not provide that the voting standard changes only after the Subordination Period ends *plus* the time necessary to announce and arrange for a vote. There is no reason to impose upon the merger process a voting standard requirement that is not required by the LP Agreement.

When the Subordination Period ends, the Subordinated Units are converted immediately, on a one-for-one basis, into Common Units. How the Subordinated Units, after conversion, would be treated is not clear under Plaintiffs' analysis. Even though the Subordinated Units, after the end of the Subordination Period, are to carry all the rights of the Common Units, the Plaintiffs would deny them their right to vote along with all other Common Units. Instead, the Plaintiffs apparently would propose creating a special subclass of Common Units consisting of the

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<sup>4</sup> See generally *Berlin v. Emerald P'rs*, 552 A.2d 482 (Del. 1988). This case is discussed *infra*, Section III.B.1.

unaffiliated Common Units from before the end of the Subordination Period. There is no basis in the LP Agreement to allow the Subordinated Units, after the end of the Subordination Period, to vote as a separate class of Subordinated Units because at that point there would no longer be any Subordinated Units.

If the drafters of the LP Agreement had wanted to subject announcements of merger, as contrasted with a vote on a merger, to certain requirements, presumably they could have done so. They did not do so. That omission, in these circumstances, does not implicate the covenant of good faith and fair dealing, which, of course, inheres in every Delaware contract.<sup>5</sup> “The implied covenant is not a free-floating duty that requires good faith conduct in some subjectively appropriate sense . . . [but] rather, the doctrine by which Delaware law cautiously supplies implied terms to fill gaps in the express provisions of an agreement.”<sup>6</sup>

The Subordination Period is well-defined and its expiration was readily predicted. Those who chose to invest in Common Units understood that the

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<sup>5</sup> See, e.g., *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (“[T]he implied covenant attaches to every contract . . .”).

<sup>6</sup> *In re El Paso Pipeline P’rs L.P. Deriv. Litig.*, 2014 WL 2768782, at \*16 (Del. Ch. June 12, 2014) (citing *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418 (Del. 2013), *overruled in part on other grounds by Winshal v. Viacom Int’l Inc.*, 76 A.3d 808 (Del. 2013)).

merger protection of a class vote would terminate upon the expiration of the Subordination Period. The text of the LP Agreement is clear, and the Plaintiffs have not identified any untoward effect that the drafters would have addressed had they thought about it. Nothing about the timing of the announcement or the timing of the vote defeats the reasonable expectations of the Common Unitholders as guaranteed by the LP Agreement.<sup>7</sup>

B. *Transaction Structuring Theory*

1. The Step-Transaction Doctrine Is Inapposite

The Plaintiffs contend that the entire process by which M&B sold its interests to Enterprise and Enterprise pursued a merger must be assessed as a single integrated transaction. However, M&B is not involved in the merger because it no longer has any interest in Oiltanking. It had every right to tell Enterprise that it would deal with its own interests and that it would not become involved with the unaffiliated Common Units. Enterprise was under no duty to reject M&B's

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<sup>7</sup> See, e.g., *id.* at \*18 (“Implying contract terms is an ‘occasional necessity . . . to ensure [that] parties’ reasonable expectations are fulfilled.’”) (quoting *Dunlap*, 878 A.2d at 422) (alternations in original)).

approach and, as is the case where there is a controller, the controller is generally free to dispose of its interests as it sees fit.<sup>8</sup>

M&B was confronted with a choice. It could deal with Enterprise for its own interest—as any controller could. Or, it could enter into a transaction that was conditioned on a class vote, assuming that that transaction process proceeded promptly and reached the voting stage before the end of the Subordination Period. It told Enterprise what its position was—and there was no fiduciary duty breach when it told Enterprise that it would deal with Enterprise but would not be involved in a transaction that would require a class vote. That was an M&B decision. At that time, GP was controlled by M&B and those parties were “affiliates.” But GP cannot be deemed to have breached its fiduciary duties because an affiliate (M&B) made a decision that it was properly able to make.

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<sup>8</sup> *Cf. In re Synthes Inc. S’holder Litig.*, 50 A.3d 1022, 1039 (Del. Ch. 2012) (“It is, of course, true that controlling stockholders are putatively free under our law to sell their own bloc for a premium or even to take a different premium in a merger.”).

Enterprise announced its merger offer for the public Common Units well after its agreement with M&B and without any contractual obligation to pursue a merger. Despite Plaintiffs' assertion, M&B did not structure the merger. Enterprise made the decision to buy M&B's interest first. Enterprise simply took advantage of the road map drawn by the LP Agreement.<sup>9</sup>

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<sup>9</sup> Under appropriate circumstances, the step-transaction doctrine treats formally separate but related transactions as a single transaction, if all the steps are substantially linked. *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 240 (Del. 2011). "The purpose of [this] doctrine is to ensure the fulfillment of parties' expectations notwithstanding the technical formalities with which a transaction is accomplished." *Coughlan v. NXP B.V.*, 2011 WL 5299491, at \*7 (Del. Ch. Nov. 4, 2011).

The Court recognizes three different tests for determining the doctrine's applicability: the end result test, the interdependence test, and the binding commitment test. *Id.* Plaintiffs argue that the first two tests apply here.

The end result test is not met because neither GP nor M&B structured the transactions as "prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result." *See Bank of N.Y. Mellon Trust Co.*, 29 A.3d at 240. Enterprise took separate steps, in a manner provided for by the LP Agreement, to acquire Oiltanking. Even if the step-transaction doctrine could apply to Enterprise's conduct (which it does not), the only claims against Enterprise are linked to GP's conduct; Enterprise did not breach any contract by proceeding in this manner.

The interdependence test does not apply because the steps were not "so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series." *Id.* For M&B, the "first step" clearly had independent legal significance. It was not even involved with the second step. The reverse is true for GP. Again, even if the first step would have left Enterprise

The parties argue about the impact of *Berlin v. Emerald Partners*,<sup>10</sup> which dealt with a stockholder plaintiff's attempt to enjoin a merger between May, Petroleum, Inc. ("May") and thirteen companies owned by May's Chief Executive Officer, Craig Hall ("Hall"). May's certificate of incorporation contained a provision requiring supermajority approval for a merger "between May and an acquiring entity owning in excess of 30% of May stock."<sup>11</sup>

Hall controlled at least 52% of May's outstanding common stock when the merger agreement was entered into. In an attempt to avoid the supermajority vote, Hall reduced his personal ownership of May stock from 52% to 25% prior to the record date and stockholder vote on the merger. He did so by transferring shares of May stock to an independent irrevocable trust set up for his children.

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frustrated without the second, it still would have effectively acquired full control of Oiltanking by the time of the merger. Even if it controlled the process, Enterprise acquired M&B's interest, which it was allowed to do, and separately sought a merger, the vote on which would occur after the Subordination Period.

<sup>10</sup> 552 A.2d 482 (Del. 1988).

<sup>11</sup> *Id.* at 486.

This Court initially determined that the “supermajority vote [was required] to approve a merger with any entity that held 30 or more of May’s outstanding common stock at the time the May Board voted to recommend the merger.”<sup>12</sup> The Supreme Court reversed, finding that the provision unambiguously established that “the relevant time to assess whether the supermajority vote provision . . . [was] triggered [was] when the merger proposal [was] presented to the stockholders for a vote.”<sup>13</sup> The class vote provision in this case operates similarly. Further, the conduct here does not approach the strategy implemented in *Emerald Partners*. Here, the Subordination Period expired. One could argue that the controller in *Emerald Partners* had transferred an interest in May to his children’s trust to implement a strategy pursued for a specific purpose—to defeat certain shareholder rights as to which there was no meaningful temporal limitation. Despite recognizing that motivation, the Supreme Court concluded that no injunction was warranted. With Oiltanking, M&B made no decision which benefited itself other than to respond that it would not sell under certain circumstances. Even if it told

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<sup>12</sup> *Id.* at 488.

<sup>13</sup> *Id.* at 489. Because the record date establishes which stockholders are eligible to vote, the “‘date of the stockholder vote’ . . . is inexorably tied to the record date.” *Id.* n.9.

Enterprise about the limited duration of the Subordination Period (and Enterprise decided to go forward with a transaction with M&B alone initially) there was no fiduciary duty (or contractual) breach.

2. Plaintiffs' Claims Fail Even Assuming the Step-Transaction Doctrine Is Applicable

Even if M&B made the decision to implement the two-step process—it sold to Enterprise and Enterprise followed with a merger—the result would be the same as if M&B had merely let time go by. M&B, GP, and Enterprise did nothing out of the ordinary to defeat the class vote, allowing (but not causing) the Subordination Period to expire. Payments to the Common Unitholders were regular and predictable and, in that context, the Subordination Period lapsed.

Plaintiffs' critical contention is that the entire change in structure was effectuated as part of a single integrated transaction on October 1, 2014, once M&B sold its interest to Enterprise and Enterprise announced its intention to acquire the balance of Oiltanking through merger. This all happened during the Subordination Period, and when Enterprise acquired M&B's interest, the outcome of the merger vote—in the absence of a class vote—was preordained because

Enterprise owned two-thirds of the limited partnership interests. This, according to Plaintiffs, necessitates a class vote.

However, at the time of the M&B transfer, during the Subordination Period, Enterprise was still bound to honor the class vote requirement until that requirement expired with the passage of time. There simply is no reason to treat the transaction (both M&B's sale and the merger) as completed on October 1 when, in fact, Enterprise could not have avoided the class vote if it had wanted to consummate the merger at that precise time. It could accomplish the merger without a class vote only after the Subordination Period and that was consistent with the agreement that had been reached for the benefit of the Common Unitholders.

Plaintiffs also suggest that although the merger was not completed during the Subordination Period, its announcement during that time, when linked as the "second step" to M&B's sale of its interests, triggers the class vote. In other words, the merger was part of an improperly divided single transaction that was negotiated, agreed to, and announced during the Subordination Period. However, the argument for a class vote based on this theory collapses into the Plaintiffs'

already rejected voting standard claims. Announcing a contrived two-step process during the Subordination Period would only trigger a class vote if mere announcement were sufficient to trigger that voting standard. The only way to avoid this result is to posit that the entire single integrated transaction was consummated on October 1, a proposition that the Court has rejected.

### 3. GP's Approval of Enterprise's Offer

In addition, the Plaintiffs challenge GP's handling or structuring of Enterprise's merger offer. The offer was referred to the Conflicts Committee, as contemplated by Section 7.9(a) of the LP Agreement. The Plaintiffs do not explain what it was that GP did that was a breach of its contractual duty of good faith.<sup>14</sup> They suggest either that GP should not have told Enterprise in June that the LP Agreement would allow a merger without a class vote if Enterprise waited until the Subordination Period expired or that under the terms of the LP Agreement GP was not exculpated because it did not seek the best possible price for the Common Unitholders. The Plaintiffs do not explain how GP violated any fiduciary duties by

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<sup>14</sup> See LP Agmt. § 7.9(b) (describing the contractual good faith standard applicable when GP acted in its capacity as the general partner, rather than in its individual capacity).

informing Enterprise when the Subordination Period would expire and what those consequences would be for obtaining merger approval.<sup>15</sup>

The Plaintiffs argue that the exculpation language of Section 14.2(a) of the LP Agreement protects GP if it “just says no” to a merger but offers no comparable protection for agreeing to a merger. Yet, the Conflicts Committee provided a recognized pathway by which the interests of the Common Unitholders would be duly represented. That they received less per unit than M&B did may be troubling, but that seems to be an inevitable consequence of the way the LP Agreement, to which the Common Unitholders agreed, was drafted. Certainly, Plaintiffs have not pointed to another viable path.

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<sup>15</sup> Plaintiffs allege that GP acted in its capacity as the general partner when it made “the self-interested determination that ‘any . . . second step transaction for the [Common Units held by the public] would need to occur *after* the closing of the acquisition of Oiltanking interests from M&B and its affiliates.’” Compl. ¶ 105 (emphasis in original). However, the language that Plaintiffs quote comes from the Form S-4 registration statement filed by Enterprise on November 26, 2014. In that filing, Enterprise explained how M&B (not GP) made it clear that it would not be interested in considering a sale of its Oiltanking interests as part of a transaction requiring unitholder approval by all unaffiliated Oiltanking Common Unitholders.

Plaintiffs complain that M&B (or GP) did not submit the decision to bifurcate the merger process into two discrete steps to the Conflicts Committee. Yet, as set forth above, the decision to sell M&B's interest to Enterprise was one for M&B to make. Nothing required M&B to seek Conflicts Committee approval of how it would (or would not) go about selling its own interest. The first issue that would appropriately go to the Conflicts Committee for review was the Enterprise merger offer, which the Conflicts Committee addressed.

#### **IV. CONCLUSION**

In sum, the Plaintiffs have not shown a colorable claim. Without a colorable claim, the burdens of expedited proceedings should not be imposed. Accordingly, the motion to expedite is denied.<sup>16</sup>

**IT IS SO ORDERED.**

Very truly yours,

*/s/ John W. Noble*

JWN/cap  
cc: Register in Chancery-K

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<sup>16</sup> With this conclusion, it is not necessary to address the Defendants' argument that the Plaintiffs are guilty of laches in seeking interim injunctive relief in the courts of Delaware or the Plaintiffs' claim that they would suffer irreparable harm in the absence of interim injunctive relief.