

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MATTHEW ELLIS and CHAILE)
STEINBERG, on behalf of themselves)
and all others similarly situated,)
)
Plaintiffs,)

v.)

C.A. No. 10495-VCN

OTLP GP, LLC, OILTANKING)
HOLDING AMERICAS, INC.,)
OILTANKING GMBH, MARQUARD)
& BAHLS AG, KENNETH F. OWEN,)
CHRISTIAN FLACH, ENTERPRISE)
PRODUCTS PARTNERS L.P. and)
ENTERPRISE PRODUCTS)
HOLDINGS LLC,)
)
Defendants.)

**DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION TO EXPEDITE THE PROCEEDINGS**

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INTRODUCTION

The Plaintiffs' Verified Class Action Complaint (the "Complaint") challenges the end result of two separate transactions. The first was a private sale of equity interests on October 1, 2014: Enterprise Products Partners, L.P. ("Enterprise") acquired a direct and indirect controlling interest in Oiltanking Partners, L.P. ("Oiltanking") from affiliates of Marquard & Bahls AG (collectively, "M&B"), including all of the limited liability company interests in Oiltanking's general partner, OTLP GP, LLC (the "General Partner"), pursuant to a securities purchase agreement (such transaction, the "Equity Purchase"). The practical consequence of the Equity Purchase was that instead of being controlled by M&B, Oiltanking was then controlled by Enterprise. Oiltanking's partnership agreement (the "Partnership Agreement," attached as Exhibit A hereto) expressly permitted M&B to engage in the Equity Purchase, free of any fiduciary duties, and without regard to the corporate opportunity doctrine. Because this was merely a private sale of M&B's equity interests, the General Partner had no involvement in the bilateral transaction. Plaintiffs do not allege any facts suggesting otherwise.

The second transaction was a purchase of the remaining publicly-held Oiltanking common units, which was announced on November 12. That transaction followed more than a month of negotiations between Enterprise and the Conflicts Committee of the General Partner. Enterprise agreed to acquire all of the

outstanding Oiltanking common units it did not already own pursuant to an agreement and plan of merger (such transaction, the “Merger”).

Plaintiffs do not challenge the propriety of either transaction in isolation, but contend that they should be viewed as an integrated whole. Despite waiting six weeks to file their Complaint, Plaintiffs now request expedited discovery, including “depositions of key individuals,” as well as expedited consideration of an anticipated motion for a preliminary injunction. *See Op. Br.* at 4.

The Plaintiffs’ Motion to Expedite the Proceedings (the “Motion”) should be denied for two reasons.

First, it comes too late. The Plaintiffs were on notice of the facts giving rise to their purported claims on November 12. One week later, they sued in Texas federal court—in violation of the mandatory forum selection clause that has been part of Oiltanking’s partnership agreement since its inception. The Plaintiffs waited three weeks to dismiss that action, and then waited another ten days before filing this action and Motion on the evening of December 23. Thus, after wasting nearly six weeks—roughly half of the time available—Plaintiffs now ask the Court, the Defendants, and non-party Oiltanking to endure the burdens of expedited litigation in advance of a February 13 meeting date. This request is unjustified and would be prejudicial to the Defendants (and the Court), and therefore should be denied.

Second, Plaintiffs have not set forth a colorable claim. The Motion rests on Plaintiffs' assertion that because the Equity Purchase and the Merger were announced during the contractual "Subordination Period," the Merger is subject to the "Unit Majority" approval standard that applied during the Subordination Period. But the Partnership Agreement makes clear that the relevant date for determining the voting standard is no earlier than the record date; the date of the announcement is irrelevant. And even if the Partnership Agreement did not make that clear (it does), in an analogous case, the Delaware Supreme Court so held, establishing there that the relevant time for determining the required vote on a merger is the record date, and not the date of announcement or signing. *See generally Berlin v. Emerald Partners*, 552 A.2d 482 (Del. 1989) (attached as Exhibit B hereto). As of the November 17 expiration of the Subordination Period, the record date had not yet been declared.

The Plaintiffs' claim that proceeding with the Equity Purchase and the Merger violated an express contractual duty of good faith fares no better. While this case involves a Delaware master limited partnership, Plaintiffs ignore the contract upon which they base their claims, and did not even attach it to their pleadings. So it is no surprise that they have ignored or misunderstood provisions that specifically authorize the conduct about which they now complain, and

preclude the claims they now assert. As a result, Plaintiffs have not set forth a colorable claim, and the Motion should be denied.

BACKGROUND¹

I. M&B forms Oiltanking.

Oiltanking is a publicly traded Delaware limited partnership formed in 2011 “to engage in the terminaling, storage and transportation of crude oil, refined petroleum products and liquefied petroleum gas.” Oiltanking Partners, L.P., Registration Statement (Form S-1) at 1 (filed May 11, 2011) (the “S-1”) (attached as Exhibit D hereto); *see also* Compl. ¶ 29. From the IPO until the Equity Purchase, M&B controlled Oiltanking, owning 100% of the General Partner as well as a majority of the outstanding limited partner interests, which consisted of common units and subordinated units. S-1 at 7, 12; *see also* Compl. ¶ 30.

As the S-1 explained, the subordinated units “are deemed ‘subordinated’ because for a period of time, referred to as the [S]ubordination [P]eriod, [they] will not be entitled to receive any distributions from operating surplus until the common units have received” certain specified distributions. S-1 at 58. This entitlement to payments is “[t]he principal difference between . . . common units

¹ These facts are drawn from the Complaint, as well as documents incorporated therein, including the Enterprise Products Partners L.P. Registration Statement, dated November 26, 2014 (the “Proxy”) (attached as Exhibit C hereto). *See, e.g., In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022, 1026 (Del. Ch. 2012) (“Having premised their recitation of the facts squarely on [the Proxy Statement] and incorporated it, the plaintiffs cannot fairly, even at the pleading stage, try to have the court draw inferences in their favor that contradict that document, unless they plead non-conclusory facts contradicting it.”) (citing *In re BHC Commc’ns S’holder Litig., Inc.*, 789 A.2d 1, 13 (Del. Ch. 2001)).

and subordinated units.” *Id.* at 12; *see also id.* at 46 (same). Subordinated units are also treated differently in that they have no “right to vote on or approve matters requiring the vote or approval of a percentage of holders of Outstanding Common Units.” Partnership Agreement § 6.7.

There are various points at which the Subordination Period can end. One is “on the first business day after” making certain specified distributions. Regardless of how it ends, “[w]hen the [S]ubordination [P]eriod ends, all subordinated units . . . convert into common units on a one-for-one basis.” S-1 at 13.² As a result, “*immediately upon the conversion of Subordinated Units into Common Units . . . the Unitholder holding a Subordinated Unit shall possess all of the rights . . . of a Unitholder holding Common Units . . . with respect to such converted Subordinated Units, including the right to vote as a Common Unitholder.*” Partnership Agreement § 6.7(a) (emphasis added).

These voting rights are relevant to, among other things, Oiltanking’s ability to enter into a merger. Under Section 14.3(b), mergers must be approved by a “Unit Majority.” Compl. ¶ 36; *see also* Partnership Agreement § 14.3(b). “[D]uring the Subordination Period,” this requires two separate class votes: “a majority of the Outstanding Common Units (excluding Common Units owned by

² The S-1 further disclosed that the general partner could borrow money solely to accelerate the expiration of the subordination period. S-1 at 27.

the General Partner and its Affiliates),” and “a majority of the Outstanding Subordinated Units.” Partnership Agreement § 1.1, at 23. Accordingly, this dual class vote structure applicable during the Subordination Period presumes the existence of outstanding subordinated units. “[A]fter the end of the Subordination Period,” however, “Unit Majority” simply means “a majority of the Outstanding Common Units.” *Id.*

The Partnership Agreement also governs the rights and obligations of the General Partner and certain related parties, including the General Partner’s owner. Among other things, the Partnership Agreement provides that

[e]xcept as expressly set forth in this Agreement, neither the General Partner nor any other Indemnitee shall have any duties or liabilities, including fiduciary duties, to the Partnership or any Limited Partner and the provisions of this Agreement, to the extent they restrict, eliminate or otherwise modify the duties and liabilities, including fiduciary duties, of the General Partner or any other Indemnitee otherwise existing at law or in equity, are agreed by the Partners to replace such other duties and liabilities of the General Partner or such other Indemnitee.

Id. § 7.9(e).³

With respect to transactions involving potential conflicts of interest, the Partnership Agreement provides that “[u]nless otherwise expressly provided in this

³ An “Indemnitee” includes “any person who controls a General Partner”; the definition of “General Partner” includes “OTLP GP, LLC.” *Id.* § 1.1, at 10 (defining “General Partner”), 11 (defining “Indemnitee”). Because M&B wholly owned the General Partner, it was an Indemnitee and thus absolved of any fiduciary duties pursuant to § 7.9(e) of the Partnership Agreement.

Agreement or any Group Member Agreement, whenever a potential conflict of interest exists or arises between the General Partner or any of its Affiliates, on the one hand, and the Partnership, any Group Member or any Partner, on the other, any resolution or course of action by the General Partner or its Affiliates in respect of such conflict of interest shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement, of any Group Member Agreement, of any agreement contemplated herein or therein, or of any duty hereunder or stated or implied by law or equity or otherwise, if the resolution or course of action in respect of such conflict of interest is,” among other things, “approved by Special Approval.” *Id.* § 7.9(a)

The Partnership Agreement also specifically relieves the General Partner of any duties and obligations with respect to a decision as to whether to pursue a potential “[m]erger or consolidation,” providing that

the General Partner shall have no duty or obligation to consent to any merger or consolidation of the Partnership and may decline to do so free of any fiduciary duty or obligation whatsoever to the Partnership, any Limited Partner and, in declining to consent to a merger or consolidation, shall not be required to act in good faith or pursuant to any other standard imposed by this Agreement, any other agreement contemplated hereby or under the Delaware Act or any other law, rule or regulation or at equity.

Id. § 14.2.

Subject to limitations that are not implicated here, the Partnership Agreement provides that (a) “it shall be deemed not to be a breach of any fiduciary

duty or any other obligation of any type whatsoever” for M&B (and its officers and affiliates) “to engage in such business interests and activities in preference to or to the exclusion of the Partnership,” and (b) M&B (and its officers and affiliates) “shall have no obligation hereunder or as a result of any duty otherwise existing at law, in equity or otherwise, to present business opportunities to the Partnership.”

Id. § 7.5(c). The Partnership Agreement further makes clear that “[n]otwithstanding anything to the contrary in this Agreement, the doctrine of corporate opportunity, or any analogous doctrine, shall not apply to” M&B (and its officers and affiliates), even if it “acquires knowledge of a potential transaction, agreement, arrangement or other matter that may be an opportunity for the Partnership”; and M&B (and its officers and affiliates) “shall not be liable to the Partnership, to any Limited Partner or any other Person for breach of any fiduciary or other duty by reason of the fact that” it “pursues or acquires [the opportunity] for itself.” *Id.* § 7.5(c).⁴

And to the extent that any dispute arose, the Partnership Agreement contains a mandatory forum selection clause pursuant to which, “each person holding any beneficial interest in the Partnership”

irrevocably agrees that any claims, suits, actions or proceedings . . . arising out of or relating in any way to this Agreement . . . , asserting a

⁴ “Unrestricted Persons,” as used in Section 7.6, includes “each Indemnitee,” and as discussed above, “Indemnitee” includes M&B. *See id.* § 7.6(c); *id.* § 1.1, at 11 (defining “Indemnitee”), 24 (defining “Unrestricted Person”).

claim of breach of a fiduciary duty owed by any director, officer, or other employee of the Partnership or the General Partner, or owed by the General Partner, to the Partnership or the Partners . . . , or . . . asserting a claim governed by the internal affairs doctrine *shall be exclusively brought in the Court of Chancery of the State of Delaware*

Id. § 16.9(b)(i) (emphasis added).

Oiltanking made this arrangement clear to investors. It identified as a risk factor in its S-1 that its “general partner and its affiliates, including [M&B], have conflicts of interest with us and limited fiduciary duties, and they may favor their own interests to the detriment of us and our unitholders.” S-1 at 7.⁵ Oiltanking also disclosed that the Partnership Agreement “contains provisions that modify and reduce the fiduciary standards to which our general partner would otherwise be held,” “permits [its] general partner to make a number of decisions in its individual capacity,” and provides that in making such decisions, the General Partner may “consider only interests and factors that it desires and relieves it of any duty or obligation to give any consideration to any interest of, or factors affecting, us, our affiliates or our limited partners.” *Id.* at 28; *see also id.* at 129-30, 134 (same). This included “how to allocate business opportunities,” and “whether or not to consent to any merger or consolidation of the partnership.” *Id.* at 28-29; *see also*

⁵ The S-1 also disclosed that M&B “might be in direct competition with us,” and that under the Partnership Agreement, “the doctrine of corporate opportunity or any analogous doctrine does not apply.” *Id.* at 30; *see also id.* at 129 (same).

id. at 130. Moreover, the S-1 disclosed that the “general partner interest . . . may be transferred to a third party without unitholder consent.” *Id.* at 31.

The S-1 also explained the two different “Unit Majority” standards. S-1 at 138. The disclosure indicated that which standard applied depended upon when the matter was presented for unitholder approval. *Id.*

In addition to these disclosures, the S-1 repeatedly made clear that

[b]y purchasing a common unit, the purchaser agrees to be bound by the terms of our partnership agreement, and each unitholder is treated as having consented to various actions and potential conflicts of interest contemplated in the partnership agreement that might otherwise be considered a breach of fiduciary or other duties under applicable state law.

Id. at 8; *see also id.* at 29 (same), 135 (same), 139 (same). And the S-1 disclosed the terms of the mandatory forum selection provision. *Id.* at 139.

II. Enterprise buys a controlling interest in Oiltanking from M&B in the arm’s-length, third-party Equity Purchase.

In April and May 2014, Enterprise began exploring an acquisition of Oiltanking. Compl. ¶ 31; Proxy at 41. On June 11 and 12, Enterprise met with M&B, which owned 100% of the General Partner and approximately 66% of Oiltanking’s limited partner interests. Compl. ¶ 32; Proxy at 41.

According to the Plaintiffs, “M&B knew that Oiltanking’s public common unitholders would be unlikely to approve a merger providing M&B with the disparate consideration it desired.” Compl. ¶ 3 (emphasis added). As a result,

Plaintiffs allege that: (1) “*M&B* made clear to Enterprise that it would not agree to any merger structure that would entail an unaffiliated vote,” *id.* ¶ 4 (emphasis added); (2) “*M&B* informed Enterprise that ‘it would not be interested in considering a sale of its interest in the general partner of Oiltanking and its limited partner interest . . . if such a sale were subject to unitholder approval by all Oiltanking unitholders,’” *id.* (emphasis added); (3) “*M&B*” “demanded” that any “proposal . . . exclude[] . . . the acquisition of any Oiltanking common units held by public unitholders,” *id.* ¶ 45 (emphasis added); (4) “*M&B* . . . stressed that any ‘second step transaction for the remaining Oiltanking common units would need to occur after the closing of the acquisition of Oiltanking interests from M&B and its affiliates,’” *id.* ¶ 4 (first emphasis added); and (5) *M&B* did this because “a merger of all of Oiltanking into Enterprise in a single transaction did not suit *M&B*’s interest,” *id.* ¶ 35 (emphasis added). *See also* Op. Br. at 2 (“*M&B* artificially and improperly separated the merger into two integrated steps”) (emphasis added); Proxy at 41 (same).

Plaintiffs further allege that Enterprise obliged, proposing on June 19 to acquire the Oiltanking interests held by M&B. Compl. ¶ 45; Proxy at 41. M&B made a counterproposal on July 24. Compl. ¶ 46; Proxy at 41. Between July 24 and October 1, M&B and Enterprise negotiated the purchase by Enterprise of M&B’s Oiltanking interests. Compl. ¶ 47; Proxy at 41.

Plaintiffs do not allege that either Oiltanking or its General Partner was a party to these negotiations. To the contrary, Plaintiffs allege that Defendants “finally contacted the members of the Oiltanking Conflicts Committee” “three days before the public announcement” and, at that time, “apprised them of the soon-to-be announced acquisition.” Compl. ¶ 48.

On October 1, Oiltanking and Enterprise announced the Equity Purchase. Enterprise acquired all of M&B’s Oiltanking interests, including its 64.7% limited partner interest, its 2% general partner interest, and certain notes. Compl. ¶¶ 51-52; Proxy at 41. In exchange, Enterprise paid M&B approximately \$4.64 billion in cash and Enterprise common units. Compl. ¶¶ 51-52; Proxy at F-6.

III. Enterprise agrees to acquire the publicly held Oiltanking units in the Merger pursuant to the Partnership Agreement.

On the same day it announced the Equity Purchase, Enterprise proposed to the General Partner’s Conflicts Committee to acquire all of the publicly held Oiltanking common units in a unit-for-unit merger at a ratio of 1.23 Enterprise units for each outstanding Oiltanking common unit. Compl. ¶ 55; Proxy at 42. Enterprise made clear that it was not interested in selling its controlling interest in Oiltanking. Compl. ¶ 35; Proxy at 42.

The Conflicts Committee got to work. It contacted Latham & Watkins LLP the next day, and promptly engaged the firm as its independent legal advisor. Compl. ¶ 60; Proxy at 42. Shortly thereafter, the Conflicts Committee retained

Richards, Layton & Finger, P.A. “as special Delaware legal advisor.” Proxy at 42. And on October 17, it engaged Jeffries LLC as its independent financial advisor. Compl. ¶ 60; Proxy at 43.

On October 23, Enterprise sent the Conflicts Committee a draft merger agreement contemplating the same exchange ratio: 1.23 Enterprise common units for every outstanding Oiltanking common unit. Proxy at 42; Compl. ¶ 61. A week later, the Conflicts Committee countered with an exchange ratio of 1.40 Enterprise common units for each outstanding Oiltanking common unit and proposed that the merger be conditioned on the approval of holders of a majority of Oiltanking common units held by unaffiliated holders. Compl. ¶ 62; Proxy at 46.

On November 7, Enterprise increased its proposed exchange ratio from 1.23 to 1.25 Enterprise common units for each outstanding Oiltanking common unit, but rejected the Conflicts Committee’s proposal to condition the deal on approval by the unaffiliated holders of Oiltanking common units. Compl. ¶ 63; Proxy at 47. Later that day, the Conflicts Committee met and decided to drop the unaffiliated unitholder approval condition in exchange for additional consideration. Accordingly, the Conflicts Committee proposed a “best and final” offer of 1.30 Enterprise common units for each Oiltanking common unit on November 10. Compl. ¶¶ 63-64; Proxy at 48. Enterprise accepted this best and final offer, and

Jefferies opined that the Merger was fair, from a financial point of view, to the unaffiliated holders of Oiltanking. Compl. ¶ 66; Proxy at 48-49.⁶

The parties announced the Merger on November 12. Compl. ¶ 68; Proxy at 50. The press release stated that “[t]he approval and adoption of the merger agreement require approval by holders of a majority of the outstanding Oiltanking Partners common units,” and that “[a] subsidiary of Enterprise, which will own a sufficient number of Oiltanking Partners common units to approve the merger on behalf of all Oiltanking Partners unitholders, has executed a support agreement with Oiltanking Partners in which it has irrevocably agreed to consent to the merger.” Press Release, Enterprise Products Partners L.P. & Oiltanking Partners, Enterprise Products and Oiltanking Partners Announce Merger Agreement (Nov. 12, 2014) (the “Press Release”) (attached hereto as Exhibit E). The Press Release further advised that the Merger “is expected to occur in early 2015.” *Id.*

IV. Litigation ensues.

On November 20, 2014, Plaintiff Matthew Ellis—in violation of Section 16.9 of the Partnership Agreement—filed an action in the U.S. District Court for

⁶ The “merger consideration represents a 5.6% premium to the closing price of Oiltanking common units based on the closing prices of Oiltanking common units and Enterprise common units on September 30, 2014, the last trading day before Enterprise announced its initial proposal to acquire all of the Oiltanking common units owned by the public. Relative to the respective closing prices for Enterprise and Oiltanking common units on November 10, 2014, the day before the parties entered into the merger agreement, the 1.30 exchange ratio represents a 10.4% premium to Oiltanking unitholders.” Proxy at 8.

the Southern District of Texas challenging the Merger. Represented by Levi & Korsinsky, Mr. Ellis filed a “Class Action Complaint for Breach of Fiduciary Duty.”⁷ Although Mr. Ellis was on notice of the anticipated vote as a result of the Press Release, he did not make any of the claims that he asserts here. After letting the case languish for three weeks, Mr. Ellis dismissed the Texas action on December 12. After waiting another eleven days, Plaintiffs filed this action and the accompanying Motion on December 23.

Plaintiffs do not challenge the propriety of either the Equity Purchase or the Merger. They do not dispute that an independent Conflicts Committee negotiated the merger with Enterprise. They do not challenge that the Conflicts Committee engaged independent, qualified advisors. And, Plaintiffs do not take issue with the negotiations, although they do take irrelevant jabs at the Merger price.

Instead, the Complaints’ seven counts fundamentally fall into two categories. Counts I-III assert claims concerning “the proper voting standard [for] the Merger” (collectively, the “Voting Standard Claims”). Compl. ¶ 88. Counts IV-VII arise out of the purported “self-interested determination” by “Oiltanking GP” to proceed with two separate transactions (collectively, the “Transaction Structuring Claims”). *Id.* ¶ 105.

⁷ A copy of the Texas complaint is attached as Exhibit F hereto.

ARGUMENT

“This Court is used to responding to the exigencies of business and routinely hears matters on expedited schedules where required.” *Ehlen v. Conceptus, Inc.*, 2013 WL 2285577, at *1 (Del. Ch. May 24, 2013). But the Court’s “familiarity with such procedures should not mask the cost, to [business entities], to stockholders, and to the taxpayer, of the burdens caused by expedited consideration.” *Id.* As a result, “[t]his Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause.” *In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2011 WL 2410395, at *4 (Del. Ch. June 10, 2011); *see also Ehlen*, 2013 WL 2285577, at *1 (“I review seriously, therefore, requests for expedition, granting such requests only where it appears that the facts alleged justify the burdens involved.”).

Under this standard, “[a] motion to expedite should be granted only if ‘the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.’” *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1016 (Del. Ch. 2010) (quoting *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994)). “Critical to this inquiry is whether a true exigency exists that is not caused by a lack of diligence of the

plaintiff.” *In re Gen. Motors (Hughes) S’holders Litig.*, 2003 WL 26474920, at *1 (Del. Ch. Oct. 2, 2003). Any delay “add[s] to the burden of expedition, an added burden created by the Plaintiff which he must overcome through the strength of his allegations of wrongdoing.” *Ehlen*, 2013 WL 2285577, at *2.

I. The Motion should be denied because of Plaintiffs’ six-week delay.

“[A] motion for expedited proceedings . . . may be denied where the movant has not proceeded as promptly as it might and, by virtue of its torpor, has contributed to the emergency nature of its application for preliminary relief.” *CNL-AB LLC v. E. Prop. Fund I SPE (MS REF) LLC*, 2011 WL 353529, at *5 (Del. Ch. Jan. 28, 2011) (denying expedition). Such is the case here.

By November 12, 2014, *see* Ex. E, the Plaintiffs were on notice of both their purported claims and the need to move quickly in light of the “early 2015” closing. As a result, if the Plaintiffs reasonably expected that the Merger would be subject to approval by the unaffiliated unitholders (and were dissatisfied with the deal) as they now claim, they could and should have asserted their claim immediately upon the announcement of the transaction.

Of the 93 days between the announcement of the Merger on November 12, 2014 and its anticipated closing on February 13, 2015, Plaintiffs wasted 41 of them before filing their Complaint and Motion, including the time Mr. Ellis spent with his placeholder “fiduciary duty” complaint (which did not assert any of the claims

here and makes no reference to the purported ambiguity asserted here) on file in Texas, in breach of the Partnership Agreement’s forum selection clause. And with the impracticality caused by filing on December 23, Plaintiffs have wasted approximately half of the time that could have been available for the parties and the Court to prepare for a preliminary injunction hearing.⁸

“This extensive delay is unquestionably prejudicial to the defendants’ ability to present their defense. Similarly, while this court (and counsel) can act quickly when circumstances warrant prompt action, the plaintiffs’ delay in filing undoubtedly imposes additional burdens on the court and could prejudice the court’s ability to adjudicate the matter fairly.” *Oliver Press Partners, LLC v. Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005) (denying expedition); *see also Brookstone Partners Acquisition XVI, LLC v. Tanus*, 2012 WL 3711410, at *3 (Del. Ch. Aug. 22, 2012) (denying expedition; “[The Plaintiffs’] delay is prejudicial because [they] knew [they were] dealing with a finite amount of time. . . . Every day [the Plaintiffs] waited to expedite this action was another day that [the Defendants] and the Court lost to prepare for a preliminary injunction.”)

By “wast[ing] nearly half of the time potentially available to prepare, hear and decide this case” and leaving “an unreasonably short period of time . . . to do all that would need to be done,” the Plaintiffs forfeited any claim to expedition.

⁸ Curiously, Plaintiffs have moved for expedited proceedings in support of a preliminary injunction, but have not yet moved for a preliminary injunction.

Oliver Press Partners, 2005 WL 3441364, at *1. “[B]ecause of the delay between knowing of the dispute and seeking expedition of the litigation, the Plaintiffs have simply waited too long.” *BMEF San Diego, L.L.C. v. Gray E. Village San Diego L.L.C.*, 2014 WL 4923722, at *1 (Del. Ch. Sept. 30, 2014). “Whether characterized as laches or simply undue delay, imposition of the burdens of expedited proceedings upon the Defendants and the Court cannot be reconciled with the Plaintiffs’ failure to proceed with alacrity.” *Id.*; see also *Brookstone Partners*, 2012 WL 3711410, at *3 (“When time exigencies cannot be avoided, everyone involved must, and can, move quickly, but, when one of the parties creates the time exigency, it is not clear why everyone else should be forced to bear the burden.”).

Accordingly, the Motion should be denied because of Plaintiffs’ inexcusable and prejudicial delay in filing this case in the proper forum, asserting the new claims they now pursue, and seeking expedition.

- II. The Motion should be denied because Plaintiffs have not pled a colorable claim.**
- A. The Plaintiffs ignore contract provisions and Supreme Court precedent that establish that their Voting Standard Claims are not colorable.**

Plaintiffs’ Voting Standard Claims all rest upon their conclusory assertion that “any merger announced prior to the termination of the ‘Subordination Period’” was subject the Unit Majority standard applicable during the Subordination Period,

which required, among other things, “a vote of Oiltanking’s public common unitholders.” Comp. ¶ 12. *See also id.* ¶ 86 (the Merger must be approved by a majority of unaffiliated unitholders because it “was announced prior to the termination of the Subordination Period”). According to Plaintiffs, their “reasonable expectation” was “that they were entitled to a class vote in the event that a squeeze-out merger was *announced* prior to the termination of the Subordination Period,” although they do not explain why that is so. *Id.* ¶ 86 (emphasis added).⁹

Plaintiffs’ interpretation is foreclosed by the Partnership Agreement itself. Section 6.7 makes clear while that during the Subordination Period, subordinated units are not entitled to vote on matters requiring a vote of public common unitholders:

Except with respect to the right to vote on or approve matters requiring the vote or approval of a percentage of the holders of Outstanding Common Units and the right to participate in allocations of income, gain, loss and deduction and distributions made with respect to Common Units, the holder of a Subordinated Unit shall

⁹ Nor can they. As discussed in the S-1, the primary effect of subordinated units is to facilitate distributions to public unitholders. Provided that (as here) the common units have received sufficient distributions to terminate the Subordination Period in advance of the vote, there is no reason they would expect to have a right to (or need) a vote under the standard as of the time of the announcement. Indeed, under Plaintiffs’ theory, if a transaction was announced the day before the expiration of the Subordination Period, the transaction would subject to the “Unit Majority” standard they claim applies. Plaintiffs fail to explain why that should be so.

have all of the rights and obligations of a Unitholder holding Common Units hereunder.

Partnership Agreement § 6.7 (emphasis added).

The Partnership Agreement makes clear, however, that (subject to certain obligations which do not apply here) this bar is lifted “immediately” upon the automatic conversion of Subordinated Units into Common Units:

provided, however, that *immediately* upon the conversion of Subordinated Units into Common Units pursuant to Section 5.7, the Unitholder holding a Subordinated Unit shall possess *all of the rights and obligations of a Unitholder holding Common Units hereunder* with respect to such converted Subordinated Units, *including the right to vote as a Common Unitholder*”

Id. (emphasis added).

By granting an immediate right to vote, the Partnership Agreement answers the question of whether voting rights exist with respect to matters announced during the Subordination Period. The only issues on which an immediate right to vote would matter would be issues announced during the Subordination Period.¹⁰ Plaintiff’s claim would rewrite Section 6.7, in violation of settled rules of contract interpretation. *See, e.g., KFC Nat’l Council & Adver. Coop., Inc. v. KFC Corp.*, 2011 WL 350415, at *11 (Del. Ch. Jan. 31, 2011) (“If possible, a contract should be read so as to give effect to every term and not render any terms meaningless or

¹⁰ As to any matter announced as of or following the end of the Subordination Period, the subordinated units would have already converted and would never have been subject to voting restrictions during the pendency of the announcement.

superfluous.”); *see also Prokupek v. Consumer Capital Partners LLC*, C.A. No. 9918-VCN, slip op. at 17 (Del. Ch. Dec. 30, 2014) (“Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court.”) (quoting *NAMA Holdings., LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007), *aff’d*, 945 A.2d 594 (Del. 2008)).

Moreover, the Partnership Agreement’s definition of “Unit Majority” confirms that when a merger is announced during the Subordination Period, but not put to a vote until after the Subordination Period, the applicable “Unit Majority” standard cannot be what it would have been if the deal had been consummated during the Subordination Period. “[D]uring the Subordination Period,” “Unit Majority” approval requires two separate class votes: “a majority of the Outstanding Common Units (excluding Common Units owned by the General Partner and its Affiliates),” and “a majority of the Outstanding Subordinated Units.” Partnership Agreement at §1.1, at 23 (emphasis added). Because subordinated units convert into common units on the first business day after expiration of the Subordination Period, *see id.* § 5.7, it is impossible to obtain a “Unit Majority” under this standard. By the time of the vote there would be no subordinated units and, as a result, no ability to receive the required “majority of

the Outstanding Subordinated Units, voting as a class.” *Id.* at § 1.1, at 23 (defining “Unit Majority”).¹¹

Plaintiffs are also wrong under settled Delaware law. Even if the Partnership Agreement had not answered this question, the Supreme Court has addressed this very issue and confirmed Defendants’ interpretation. *See generally Berlin v. Emerald Partners*, 552 A.2d 482 (Del. 1989). In *Berlin*, stockholder

¹¹ This interpretation is also consistent with other provisions of the Partnership Agreement. Article XIV governs mergers. Section 14.3(a) requires that a merger agreement “be submitted to a vote of Limited Partners, whether at a special meeting or by written consent, in either case in accordance with the requirements of Article XIII.” Partnership Agreement § 14.3(a). Article XIII includes several provisions that govern various aspects of holding a meeting of unitholders. *See, e.g., id.* §§ 13.4 (governing the mechanics of special meetings, including purposes for which they may be called and business that may be conducted), 13.6 (governing the General Partner’s setting of a record date). Critically, Section 13.9, entitled “Quorum and Voting,” establishes that the relevant date for determining any applicable vote requirement is not, as Plaintiffs suggest, the date of the announcement:

At any meeting of the Partners duly called and held in accordance with this Agreement at which a quorum is present, the act of Partners holding Partnership Interests that in the aggregate represent a majority of the Percentage Interest of those present in person or by proxy at such meeting shall be deemed to constitute the act of all Partners, unless a greater or different percentage is required with respect to such action under the provisions of this Agreement, in which case the act of the Partners holding Partnership Interests that in the aggregate represent at least such greater or different percentage shall be required; provided, however, that if, as a matter of law or amendment to this Agreement, approval by plurality vote of Partners (or any class thereof) is required to approve any action, no minimum quorum shall be required.

Id. § 13.9 (emphasis added).

plaintiff Emerald Partners sought to enjoin the consummation of a merger between May Petroleum, Inc. and 13 corporations owned by May's Chairman and CEO, Craig Hall. *Id.* at 484. When May's board approved the merger agreement on November 30, 1987, Hall owned 52% of May, and May had a charter provision requiring supermajority approval of any merger "between May and an acquiring entity owning in excess of 30% of May stock." *Id.* at 486. "Since Hall owned or controlled approximately 52% of the May stock, the [supermajority] provisions . . . were applicable to the proposed merger with the Hall corporations." *Id.*

As the stockholder vote loomed, Hall perceived the supermajority provision as a threat. *Id.* On January 28, 1988, the board set a March 8 meeting date, with a February 2 record date. *Id.* On January 29, just before the record date, Hall transferred some of his May stock into a trust for his children to avoid the supermajority provisions, taking his personal ownership and control of May stock down from 52% to 25% days before the record date and stockholder vote. *Id.* at 486-87. Despite this transfer, "[t]he Court of Chancery granted Emerald a preliminary injunction enjoining the consummation of the merger because the stockholder approval of the merger failed to meet the supermajority voting requirements of . . . May's certificate of incorporation." *Id.* at 487.

The Supreme Court reversed. While the charter provision was silent as to whether the relevant date was the date of board approval or of the stockholder vote,

the Supreme Court held that the terms of the supermajority provision were “unambiguous”: “We find that the relevant time to assess whether the supermajority vote provision in May’s certificate of incorporation is triggered is when the merger proposal is presented to the stockholders for a vote,” a date that “is inexorably tied to the record date.” *Id.* at 489 & n.9.

The same result is compelled here. Even assuming, solely for the sake of this argument, that the Equity Purchase and subsequent Merger could be viewed as a single transaction, announced on October 1, 2014, under Delaware law the Partnership Agreement unambiguously establishes that “the relevant time to assess whether the [unaffiliated unitholder approval] provision in [Oiltanking’s partnership agreement] is triggered is when the merger proposal is presented to the [unitholders] for a vote,” a date that “is inexorably tied to the record date.” *Id.* at 489 & n.9.¹²

This defeats Plaintiffs’ implied covenant claim as well. Invoking the implied covenant, Plaintiffs claim that the Partnership Agreement “is silent with respect to whether the relevant date for determining the voting standard on the Merger is the date of the Merger’s announcement, the ‘record date’ for the special

¹² Plaintiffs are incorrect about the application of the step-transaction doctrine to the Equity Purchase and the Merger, but for purposes of the Motion, their argument is irrelevant. Under both the Partnership Agreement and *Berlin*, the date of announcement, which is the only date affected by the application of the step-transaction doctrine here, is legally irrelevant.

meeting being held in connection with approval of the Merger, or some other date.” Op. Br. at 20. But under both the Partnership Agreement and *Berlin* there is no “gap” to be filled, and the provision is unambiguous. And, because parties are presumed to know and to understand Delaware law, *see, e.g., Warner Commc’ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 969 (Del. Ch. 1989), *aff’d*, 567 A.2d 419 (Del. 1989), there can be no dispute that this result was intended by the drafters of the Partnership Agreement and understood by reasonable investors, thereby defeating Plaintiffs’ implied covenant and *contra proferentem* arguments.

As a result, Plaintiffs’ Voting Standard Claims fail.

B. The Plaintiffs’ Transaction Structuring Claims are inconsistent with their own allegations, illogical, and not colorable in light of several relevant contract provisions that they ignore.

Counts IV-VII are based upon the purported “self-interested determination” by the General Partner at the time of the Enterprise outreach “to bifurcate the Merger,” (Compl. ¶ 106; Count IV), and the other Defendants’ purported “aiding and abetting” of that decision (Counts V-VII). Not only are these claims illogical, but the Partnership Agreement forecloses them.

First, as discussed above, the Complaint actually alleges that it was M&B—the owner of the General Partner at the time—not the General Partner itself, who purportedly decided to bifurcate and delay the Merger. *See* pp. 11-13, *supra*. Recognizing that they could not even attempt to plead a claim to the extent M&B

made the decision, Plaintiffs do an about-face; they make the conclusory allegation that “*Oiltanking GP*” made “the self-interested determination that ‘any . . . second step transaction . . . would need to occur after the closing of the acquisition of Oiltanking interests from M&B.” Compl. ¶ 105.

But Plaintiffs do not explain how, in light of the alleged decision by M&B, the General Partner had any decision to make with respect to the structuring of the transaction. Nor can they; once M&B made its alleged decision, the M&B-owned General Partner was powerless to affect the transaction structure or timing.

Plaintiffs’ Transaction Structuring Claims are therefore both fundamentally inconsistent with their own allegations and illogical. As such, Plaintiffs’ allegations are insufficient to state a colorable claim and for that reason alone, the Court should deny the Motion. *See, e.g., In re Comverge, Inc. S’holders Litig.*, 2014 WL 6686570, at *8 (Del. Ch. Nov. 25, 2014) (“The Court . . . need not ‘accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party.’”) (citation omitted); *Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *11 (Del. Ch. Oct. 28, 2008) (“conclusory allegation[s]” are not sufficient to state a “colorable” claim).

Even if Plaintiffs *had* alleged *facts* suggesting that *the General Partner* actually declined to entertain an overture from Enterprise in favor of two separate transactions, the Transaction Structuring Claims still would not be colorable.

Under Plaintiffs’ Transaction Structuring Claims, the M&B-owned General Partner declined to proceed with Enterprise’s suggested merger in favor of two separate transactions. According to Plaintiffs, by doing so the General Partner “violate[d] the good faith standard enumerated in [Section 7.9(b) of] the LP Agreement.” Compl. ¶ 105 (emphasis added) (Count IV).

But Section 7.9(b) only applies “unless another express standard” governs. Partnership Agreement § 7.9(b). Here, there are “[]other express standard[s]” that govern the decision not to proceed with the proposed merger with Enterprise at the outset and instead to pursue the transaction at issue.

Section 14.2(a)—which the Plaintiffs ignore—provides “another express standard” that displaces the contractual “good faith” standard from Section 7.9(b) with respect to the decision not to proceed with the merger at the outset. It makes clear that the General Partner need not act in good faith when considering a potential merger. Instead, Section 14.2 allows the General Partner to just say no to any proposed merger, for any reason, “free of any fiduciary duty or obligation whatsoever to the Partnership [or] any Limited Partner,” including any requirement “to act in good faith or pursuant to any other standard imposed by this Agreement,

any other agreement contemplated hereby or under the Delaware Act or any other law, rule or regulation or at equity.” *Id.* § 14.2(a) (emphasis added); *see also In re K-Sea Transp. Partners L.P. Unitholders Litig.*, 2012 WL 1142351, at *6 (Del. Ch. Apr. 4, 2012) (finding that “the Court’s analysis must begin with any express provisions in the LPA regarding approval of mergers”).

Section 7.9(a) provides “another express standard” which governs the decision to proceed with the Merger. Section 7.9(a) governs any conflict-of-interest transaction between Oiltanking, on the one hand, and the General Partner and its affiliates, on the other. It provides that any transaction, such as the Merger, that has been approved by the majority of the members of the Conflicts Committee “shall be permitted and deemed approved by all Partners, and shall not constitute a breach of this Agreement, of any Group Member Agreement, of any agreement contemplated herein or therein, or of any duty hereunder or stated or implied by law or equity or otherwise.” Partnership Agreement § 7.9(a); *see also id.* § 1.1 (definition of “Special Approval”). “The layer of insulation afforded by Section 7.9(a) precludes judicial review of any conflict transaction that is the subject of ‘Special Approval,’ except for the limited purpose of determining whether the ‘Special Approval’ process itself complied with the implied covenant of good faith and fair dealing.” *Gerber v. Enter. Prods. Holdings LLC*, 67 A.3d 400, 410 (Del.

2013). Although Plaintiffs have attempted to plead an implied covenant claim, they have not done so as to the “Special Approval” by the Conflicts Committee.¹³

And because Count IV, upon which all Transaction Structuring Claims are based, fails, the remaining Transaction Structuring Claims likewise fail. *See S.E. Pennsylvania Transp. Auth. v. Volgenau*, 2013 WL 4009193, at *27 (Del. Ch. Aug. 5, 2013) (“Because the SRA Directors did not breach their fiduciary duties, Providence is entitled to judgment on the Plaintiff’s aiding and abetting claim”), *aff’d*, 91 A.3d 562 (Del. 2014).¹⁴

As a result, Plaintiffs’ claims fail under the unambiguous provisions of the Partnership Agreement that protect the General Partner from this type of challenge and authorize it to take such actions.

¹³ Because the contractual duty of good faith in Section 7.9(b) does not apply as a matter of law to the conduct of which Plaintiffs complain, their reference to the Oiltanking Code of Conduct for determining what constitutes the best interests of the partnership is irrelevant and unavailing. *See* Partnership Agreement § 7.9(b) (making clear that it only applies “unless another express standard” governs); *see also id.* §§ 14.2(a) (providing express standard to govern General Partner’s consideration of a merger), 7.9(a) (providing express standards, including “Special Approval,” for General Partner’s resolution of conflict-of-interest transactions).

¹⁴ Plaintiffs cannot repackage their claims by suggesting that M&B acted improperly. To the extent that M&B usurped a potential Oiltanking opportunity, Section 7.5 of the Partnership Agreement provides that any “Unrestricted Person” (which includes M&B) “who acquires knowledge of a potential transaction, agreement, arrangement or other matter that may be an opportunity for the Partnership . . . shall not be liable to the Partnership, to any Limited Partner or any other Person for breach of any fiduciary or other duty by reason of the fact that such Unrestricted Person (including the General Partner) pursues or acquires for itself . . . such opportunity.” Partnership Agreement § 7.5(c).

III. Alternatively, the Court should permit expedited resolution of the Plaintiffs' contract interpretation claims, but deny (or strictly limit) expedited discovery.

For the reasons discussed above, expedition should be denied, and the parties should proceed towards a motion to dismiss. However, even if the Court were to permit expedition, the issue presented is a purely legal issue of contract interpretation: What is the requisite date for determining the required "Unit Majority" under Section 14.3(b) of the Partnership Agreement? There are no facts susceptible to reasonable dispute that will bear on this issue. Despite this, the Plaintiffs served sweeping requests for production, seeking "all documents" concerning a variety of irrelevant topics, including (a) each of the two transactions, (b) "the Merger Agreement, including all drafts of the Merger Agreement," (c) "[a]ny Alternate Transaction," as well as "[d]ocuments concerning any appraisals, analyses or review of the value, market value or fair value of Oiltanking, Oiltanking GP, Oiltanking's incentive distribution rights, Oiltanking's limited partner units held by M&B, Oiltanking's publicly-owned limited partner units, Oiltanking's outstanding debt, or Oiltanking's constituent businesses," and "[a]ll insurance policies or similar agreements which may provide . . . indemnification" for the Defendants.

As a result, even if it expedites briefing on the legal issue in dispute, the Court should deny expedited discovery or strictly limit expedited discovery to

Request Nos. 1 and 2 in the Plaintiffs' Request for Production, which go to the drafting history of the Partnership Agreement. *See In re Kinder Morgan Energy Partners, L.P. Unitholders Litig.*, Consol. C.A. No. 10093-VCL, at 19 (Del. Ch. Oct. 23, 2014) (Transcript) ("I do think that if we have discovery and we've only expedited the voting rights claim, it's got to be discovery limited to the voting rights claim. It can't be broad-brush discovery into everything relating to the transaction because we're not proceeding on an expedited basis related to the valuation claims and things like that."), *id.* at 26 ("But as to sort of more general things like, you know, were the members of the conflicts committee conflicted and did they negotiate hard enough for Provision X, Y, or Z, or what's the economics of the transaction, those things aren't going to be at issue on this proceeding.").

CONCLUSION

For the foregoing reasons, the Motion should be denied.

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Dated: January 5, 2015

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MATTHEW ELLIS and CHAILE)
STEINBERG, on behalf of themselves)
and all others similarly situated,)
)
Plaintiffs,)

v.)

C.A. No. 10495-VCN

OTLP GP, LLC, OILTANKING)
HOLDING AMERICAS, INC.,)
OILTANKING GMBH, MARQUARD)
& BAHLS AG, KENNETH F. OWEN,)
CHRISTIAN FLACH, ENTERPRISE)
PRODUCTS PARTNERS L.P. and)
ENTERPRISE PRODUCTS)
HOLDINGS LLC,)
)
Defendants.)

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Ch. Ct. R. 171(d)(4) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. This brief complies with the type-volume limitation of Ch. Ct. R. 171(f)(1) because it contains 7,982 words, which were counted by Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I, David E. Ross, hereby certify that on January 5, 2015, I caused a copy of the foregoing *Defendants' Answering Brief in Opposition to Plaintiffs' Motion to Expedite the Proceedings* to be served through File & ServeXpress on the following counsel of record:

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