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Case No. 14634-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re CENCOM CABLE INCOME PARTNERS, L.P. LITIGATION	: :	**Consolidated C.A. No. 14634-VCN**

MEMORANDUM OPINION AND ORDER

Date Submitted: May 1, 2008
Date Decided: November 26, 2008

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NOBLE, Vice Chancellor

I. INTRODUCTION

In this memorandum opinion, the Court considers the parties' third summary judgment effort. The background of this case has been detailed in a series of prior opinions by the Court,[1] and the issues in this legal saga have been whittled down to three, as framed by the Court in *Cencom III*:

> (1) Did the General Partner breach its voluntary, contractually assumed fiduciary duty to "assure" that Husch & Eppenberger opined that the appraisal process, the solicitation and the sale transaction "each had been completed in compliance with the Partnership Agreement" and "would be fair to the Limited Partners" as described in the Disclosure Statement?
>
> (2) Did the General Partner have authority to terminate priority distributions to the Limited Partners?
>
> (3) Did the General Partner breach its fiduciary duties of loyalty and candor in connection with the appraisals of the Partnership's assets by (a) using appraisals that appraised the cable systems individually rather than in the aggregate; [and] (b) failing to disclose the cash flows underlying the valuations to the Limited Partners in the Disclosure Statement?[2]

In the interim since *Cencom III*, the parties conducted additional fact discovery, including identifying and deposing expert witnesses, and the discovery

[1] *See In re Cencom Cable Income Partners, L.P. Litig.*, 1996 WL 74726 (Del. Ch. Feb. 15, 1996) [hereinafter *Cencom I*]; *In re Cencom Cable Income Partners, L.P. Litig.*, 1997 WL 666970 (Del. Ch. Oct. 15, 1997) [hereinafter *Cencom II*]; *In re Cencom Cable Income Partners, L.P. Litig.*, 2000 WL 640676 (Del. Ch. May 5, 2000) [hereinafter *Cencom III*].

[2] *Cencom III*, 2000 WL 640676, at *1. The Court, in *Cencom III*, granted summary judgment to the Defendants on a third aspect of the loyalty claim, which was whether Defendants had failed to provide "equal information" to each of the appraisers.

record is now complete.[3] The Defendants, the corporate general partner and its executive officers, have again moved for summary judgment on all three remaining issues on the grounds, *inter alia*, that the Plaintiffs, class representatives of the limited partners,[4] have not suffered and cannot prove damages. The Plaintiffs have again cross-moved for partial summary judgment on the second issue, arguing that the Defendants did not have authority under the Partnership Agreement to terminate their priority distributions and that the limited partners did not "consent" to such a termination in voting to sell the partnership assets. For the reasons set forth below, the Court grants in part and denies in part the Defendants' motion for summary judgment, and denies the Plaintiffs' motion for partial summary judgment.

II. BACKGROUND

A. *Relevant Background Facts*

The general background of this case has been set forth more fully in the Court's earlier opinions[5] and will not be repeated at length here. A review of the facts relevant to the pending motions, however, is necessary to frame the Court's analysis and decision.

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[3] The Plaintiffs also survived a motion to dismiss for failure to prosecute. *See In re Cencom Cable Income Partners, L.P.*, 2006 WL 452775 (Del. Ch. Feb. 16, 2006).

[4] This action was brought as a class action, and a class was certified in 2000. *See In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *6 (Del. Ch. Jan. 27, 2000). Most members of the class have resolved (or abandoned) their claims. Only three former limited partners continue to pursue this action.

[5] *See supra* note 1.

Nominal Defendant Cencom Cable Income Partners, L.P. (the "Partnership") is a Delaware limited partnership. Its general partner, Defendant Cencom Properties, Inc. (the "General Partner"), is a Delaware corporation.[6] Plaintiffs are the class representatives of the limited partners of the Partnership.

The Partnership owned nine geographically disparate cable television systems (the "Partnership Assets"). In 1995, the General Partner, pursuant to authority conferred by the Partnership Agreement, agreed to sell the Partnership Assets to its various affiliates, and, accordingly, it invoked the appraisal process outlined in the Partnership Agreement to accomplish that objective. That process required the appraisers to value the Partnership Assets on a "going concern basis . . . in conformity with standard appraisal techniques." In accordance with that process, two appraisers—one selected by the General Partner, Daniels & Associates ("Daniels"), and the other selected by the American Arbitration Association, Feinberg CS ("Feinberg")—valued the Partnership Assets separately, as individual cable systems, which resulted in an aggregated value of $201 million (together, the "Daniels & Feinberg Appraisal").

Kidder, Peabody, the investment bank hired in connection with the marketing of the Partnership Assets, retained Kagan Media Appraisals, Inc.

[6] The individual defendants were the executive officers of the General Partner. For convenience, the term "General Partner" may also refer to the individual defendants.

("Kagan") to perform a third appraisal, which valued the Partnership Assets collectively as a single business at $210.3 million (the "Kagan Appraisal"). Ultimately, the General Partner agreed to sell the Partnership Assets for $211.05 million, a premium to any of the appraised values for the Partnership Assets; the Asset Purchase Agreement provided for the sale to be effective on July 1, 1995, even though the actually closing would not occur for several months pending certain regulatory approvals (the "Sale Transaction").

The Sale Transaction required the approval of a majority of the outstanding limited partnership units. Accordingly, the General Partner prepared a Proxy to solicit the vote of the limited partners on the proposed sale. In connection with that effort, although not required to do so by the Partnership Agreement, the General Partner retained the law firm of Husch & Eppenberger ("Husch") to "act as special outside legal counsel on behalf of the Limited Partners in connection with the Sale Transaction."[7] The Proxy, under the heading "Recommendation of the General Partner; Fairness of the Sale Transaction," described the role of Husch as follows:

> The General Partner retained Husch & Eppenberger in order to assure that the Appraisal Process and the Sale Transaction would be fair to the Limited Partners and to protect the rights of the Limited Partners in connection therewith. Husch & Eppenberger was instructed to oversee compliance by the Partnership and the General Partner with

[7] Affidavit of Kenton E. Knickmeyer ("Knickmeyer Aff.") Ex. 2, Part B at 9.

> the terms and provisions of the Partnership Agreement relating to the Partnership's dissolution and the Appraisal Process. Husch & Eppenberger also assisted the AAA in the selection of the second appraiser, reviewed the General Partner's compliance with the terms of the Partnership Agreement relating to the rights of the Limited Partners and monitored and participated in the preparation of this Disclosure Statement (including by reviewing relevant documents and participating in certain meetings and telephone calls relating to the Disclosure Statement). As a condition to the closing of the Sale Transaction, Husch & Eppenberger will deliver an opinion that the Appraisal Process, the Partnership's solicitation of Consent, and the Sale Transaction have each been completed in compliance with the Partnership Agreement. A form of such opinion is attached . . . .[8]

III. ANALYSIS

A. *The Summary Judgment Standard*

Summary judgment is appropriate where the moving party demonstrates that there are no genuine issues of material fact in dispute and that the moving party is entitled to judgment as a matter of law.[9] The burden is on the moving party to show an absence of a material issue of fact, and the court must review all evidence in the light most favorable to the non-moving party.[10] However, if the moving party puts into the record facts which, if undenied, entitle it to summary judgment, the burden shifts to the defending party to dispute the facts by affidavit or proof of

[8] *Id.*, at 10.
[9] *Scureman v. Judge*, 626 A.2d 5, 10 (Del. Ch. 1992).
[10] *Id.* at 10-11.

similar weight;[11] *i.e.*, the party opposing summary judgment is obliged to adduce some evidence showing the existence of a dispute of material fact.[12]

B. *The Husch & Eppenberger Opinion*

In *Cencom II*, the Court held that, by retaining Husch and describing its role in the Disclosure Statement, the

> General Partner voluntarily assumed a duty to ensure that Husch would fulfill [its] obligations and that the Limited Partners could rely on the General Partner's representations that Husch would do so. This conclusion turns not on what the General Partner may or may not have understood its fiduciary obligations to entail (a meaningless, subjective inquiry), but on the fact that it actively undertook this role ostensibly (1) to actually confer a benefit on the Limited Partners or (2) to convince them the self-interested transaction would conform to the terms of the Partnership Agreement in order to induce their approval.[13]

The Court went on to hold that, although the General Partner had voluntarily assumed a duty, the scope of that duty was unclear from the record. In particular, the Court could not discern from the record before it "whether the duty assumed is limited to compliance with the express terms of the Partnership Agreement or should be read more broadly to include an opinion about the fairness of the transaction beyond a mere process compliance checklist."[14] The Court therefore

[11] *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979).
[12] *Id.*
[13] *Cencom II*, at *5.
[14] *Id.* In *Cencom III*, the Court stated that in *Cencom II* it had

> denied summary judgment on the basis of an insufficient record. In other words, [the Court] could not discern from the record before [it] whether Husch only assumed the limited duty described under the terms of the Partnership Agreement

denied summary judgment on the scope of the General Partner's voluntarily-assumed duty. In *Cencom III*, the Court again denied summary judgment on the same issue, noting that the parties' "arguments [were] purely repetitious."[15] Here, yet again, the Defendants ask this Court to grant summary judgment even though the record essentially remains unchanged regarding the scope of the General Partner's duty.

Subsequent to *Cencom III*, the parties supplemented the record with the deposition testimony of plaintiffs John Bythrow and Dana Hill. Plaintiff Bythrow testified that he was "sure [he] didn't read" the Disclosure Statement[16] and did not know what Husch was.[17] Plaintiff Hill similarly testified that she had not read that part of the disclosure statement describing Husch's role in the transaction.[18] Indeed, as the Defendants point out, there is no evidence in the record that any of the Plaintiffs read, and therefore could have relied upon, the disclosures about Husch. Apart from the evidence regarding the individual Plaintiffs' reliance,

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> (basically assure procedural compliance which would impliedly result in a transaction whose terms would be fair to the Limited Partners) or whether the disclosure statement would lead a reasonably prudent Limited Partner to conclude that Husch would opine on (and thereby "assure") the fairness of the Sale Transaction. [The Court] again found [it]self in a similar predicament.

Id. at *3.

[15] *Id.*

[16] Knickmeyer Aff. Ex. 11, at 14.

[17] *Id.* at 16.

[18] Knickmeyer Aff. Ex. 12, at 10.

however, the parties have not come forward with any new evidence bearing on the issue of whether the General Partner breached its voluntarily-assumed duty.

Citing the lack of any evidence of limited partner reliance, the Defendants urge the Court to grant summary judgment in their favor. This time, however, the Defendants have reframed the issue. Instead of asking the Court to grant summary judgment on the theory that Husch was hired to assure procedural compliance and not fairness of the transaction—a theory that would fail because, as noted, the record remains unchanged on this issue—the Defendants instead argue that the "deposition testimony raises an issue even more fundamental than the issue previously raised in *Cencom II* and *Cencom III*: whether Plaintiffs have the right to enforce any duty voluntarily undertaken by the General Partner?"[19] According to the Defendants, the Plaintiffs have no right to enforce such a duty, regardless of its scope, because "Plaintiffs neither bargained for nor gave Defendants some promise . . . to assume such a duty," and therefore "Plaintiffs' legal rights . . . must rest on principles of promissory estoppel."[20] Therefore, the Defendants conclude, because the Plaintiffs did not rely upon the disclosures regarding Husch's role in the acquisition, summary judgment is warranted.

[19] Defs.' Opening Br. in Supp. of their Mot. for Summ. J. 33.
[20] *Id.*

As noted above, the proper inquiry is "whether Husch only assumed the limited duty described under the Partnership Agreement (basically to assure procedural compliance which would impliedly result in a transaction whose terms would be fair to the Limited Partners) or whether the disclosure statement would lead *a reasonably prudent Limited Partner* to conclude that Husch would opine on (and thereby "assure") the fairness of the Sale Transaction."[21] The Court did not grant summary judgment because it could "not comfortably determine whether any representation or omission in the Disclosure Statement about Husch's role constitute[d] an actionable breach of the duty of candor without a trial on the merits."[22] The Defendants' reliance on their newly-minted promissory estoppel theory is misplaced because the duty at issue here arose not out of contract, but out of the common law. To be sure, fiduciary principles are a species of common law.[23] Of course, our case law has recognized that parties to a partnership agreement are free to alter by contract common law fiduciary principles.[24] Said another way, "principles of contract may, in appropriate circumstances, preempt fiduciary principles if the parties to a limited partnership have made their

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[21] *Cencom III*, at *3 (emphasis added).
[22] *Id.* at *4.
[23] *See, e.g.*, *In re General Motors Class H S'holders Litig.*, 734 A.2d 611, 619 (Del. Ch. 1999) (describing the distinction between claims based on breach of contract and those based on breach of common law fiduciary duties).
[24] *See, e.g.*, *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 324 (Del. Ch. 1998).

intentions to do so plain."[25] Here, however, by voluntarily undertaking to deliver to the Limited Partners an opinion by Husch, the General Partner "imported common law fiduciary duties into its relationship"[26] with the Limited Partners. Accordingly, the Defendants' contention that contractual principles are controlling and thus limiting is unavailing.

C. *Termination of Distributions*

In *Cencom III*, the parties cross-moved for summary judgment on the issue of whether the General Partner had authority to suspend the Limited Partners' priority distributions under the Partnership Agreement before the termination of the Partnership (*i.e.*, the date of the sale closing, March 29, 1996). The Court held that the Partnership Agreement provided no express authority enabling the Defendants to do so. Additionally, the Court rejected the Defendants' ratification theory because the issue of amending the Partnership Agreement to suspend the priority distributions was not put to a separate vote of the limited partners in voting on the sale of the partnership assets to the General Partner. The Court also rejected the Plaintiffs' argument that they, as a matter of law, did not consent to the termination of the distribution. The Court noted that it was "unclear whether the

[25] *Id.* at 322. The Defendants have not argued that Partnership Agreement excludes the possibility of the subsequent assumption of fiduciary obligations. Indeed, the Partnership Agreement, at Section 4.5(E) provides "The General Partner shall be under a fiduciary duty and obligation to conduct the affairs of the Partnership in the best interests of the Partnership . . . ."
[26] *Id.* at 327.

reasonably prudent Limited Partner asked to approve the Sales Transaction would have understood that approval was tantamount to an amendment to the Partnership Agreement authorizing termination of the priority distributions."[27]

Once again the parties cross-move for summary judgment on the termination issue. The Plaintiffs' arguments are purely repetitious. They advance the same argument the Court rejected—that, as a matter of law, the Limited Partners did not consent to an amendment to the Partnership Agreement to allow for the termination of their priority distributions prior to the closing date of the Sales Transaction.[28] They have not come forward with any new evidence bearing on this issue; instead, they argue that because the Defendants have not done so, this Court is now in a position to grant summary judgment in the Plaintiffs' favor. The Plaintiffs' motion is tantamount to a motion to reconsider and is therefore rejected.

The Defendants now advance a new and creative argument which ultimately fails. The Partnership Agreement requires that the General Partner make quarterly distributions from "Cash Available for Distribution."[29] Between July 1, 1995 (the "Effective Date" of the Sale) and March 28, 1996 (the "Closing Date" of the Sale)

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[27] *Cencom III*, at *5.

[28] *See, e.g.*, Pls.' Mem. of Law in Supp. of Mot. for Partial Summ. J. 6.

[29] "Cash Available for Distribution" is a defined term in the Partnership Agreement. It is defined as follows: "with respect to each calendar quarter, the excess of cash receipts of the Partnership . . . during such period over the sum of [the Partnership's cash disbursements for operating expenses, taxes and debt service]."

the Partnership had $4,522,508 available for distribution.[30] The Defendants argue, however, that while this cash was being held by the Partnership, it did not belong to the Partnership and was therefore not "available for distribution" to the Limited Partners. In particular, because the Asset Purchase Agreement was "effective" as of July 1, 1995, The Defendants argue that, as of that date, the Partnership's cable systems were being operated at the risk and for the benefit of the Purchasers, not the Partnership, and, therefore, there was no cash available for quarterly distribution to the Limited Partners.

The Defendants' argument that the Purchasers obtained "effective control" over the Partnership's assets is circuitous—it subverts the consent issue previously framed by the Court. That issue remains: would the reasonably prudent Limited Partner asked to approve the Sales Transaction have understood that approval was tantamount to an amendment to the Partnership Agreement authorizing termination of the priority distributions? The Defendants are essentially arguing that this issue is irrelevant because, irrespective of Limited Partner consent, any cash that was held in the Partnership belonged to the Purchaser. Thus, any consent given was not needed. The Defendants' argument fails.

Pursuant to the Asset Purchase Agreement, ownership of the Partnership's assets was to transfer at Closing—March 28, 1996. The Agreement does not, as

[30] Thaw Dep. at 55.

Defendants urge, contemplate the concept of "effective ownership."[31] The Defendants concede, as they must, that title to the Partnership assets did not pass until the Agreement's *Closing* Date.[32] Were this not the case, the Court would not have needed to reach the issue of consent—having the same record before it as the Court now has with respect to the termination issue, the Court could have simply held that title had transferred and there was no cash available for distribution. It did not decide *Cencom III* on these grounds because it would have been erroneous. Furthermore, the "evidence" the Defendants cite as being dispositive on the issue of "effective ownership" is beside the point. The Defendants argue that anecdotal testimony by Plaintiffs' expert, Mark Thaw, demonstrates that title to the Partnership Assets transferred, pursuant to the Asset Purchase Agreement, as of July 1, 1995.[33] However, at bottom, the Defendants' argument is that the

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[31] In their brief and at the hearing on the parties' motions, the Defendants argued that the Purchaser became the "effective owner" of the Partnership's assets as of the Effective Date of the Purchase Agreement. *See, e.g.*, Hr'g Tr. 12 (Counsel for Defendants arguing that "effective ownership of the assets transferred" as of the Effective Date of the Partnership Agreement).

[32] The Defendants even concede in their opening brief that "the Partnership maintained bare legal title to the Assets, including cash generated by operation of the cable systems, until March 28, 1996." Defs.' Opening Br. 28.

[33] The Defendants also provided a report from their expert, Mark E. Wuller, CPA. Wuller concluded in his report that

> based on the terms of the Asset Purchase Agreement it is clear that the Purchaser was entitled to the Assets and any changes to those assets after June 30, 1995. To conclude that the limited partners were entitled to distributions from or related to operations of the cable properties subsequent to that date and were damaged as a result, would not be in accordance with the stated provisions of the Asset Purchase Agreement.

Wuller Rebuttal Report (Knickmeyer Aff. Ex. 18) at 4.

Purchasers owned the Partnership's assets as of the Effective Date. Therefore, the issue is one of contract interpretation: Did the parties intend for title to the assets to transfer as of the Effective Date?[34] What Thaw has to say on the matter is largely irrelevant and not dispositive for summary judgment purposes.

In any event, the Defendants concede that "the Partnership maintained *bare legal title to the Assets*, including cash generated by operation of the cable systems, until March 28, 1996."[35] There is simply no basis at this stage to conclude that the parties intended for ownership of the Partnership Assets to pass before closing.

The Defendants point to *some* facts indicating that the parties did in fact intend for title to pass as of the Effective Date and that the priority distribution would be terminated. First, the Purchaser paid interest on the purchase price from the Effective Date to the Closing Date, an act seemingly designed to compensate the Limited Partners for amounts they would have received in priority distributions. Second, in the General Partner's Transmittal Letter to the Limited Partners—which the Limited Partners acknowledged receipt and review of—the

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[34] This is essentially the flipside of the issue framed in *Cencom III*: whether the Limited Partners consented to the termination of the priority distribution.

[35] Defs.' Opening Br. 28 (emphasis added). The Defendants' invocation of the terms "bare legal title" subverts the issue much in the same way as their use of the term "effective ownership." Put simply, legal title is possessed or it is not; an asset is owned or it is not. The Defendants' use of adjectives does not create a new sub-species of ownership rights. The drafters had great freedom in ordering the relationship among the Partnership's stakeholders. Trying to ascertain the shared material intent is the task; creative use of adjectives, at least in this instance, is not helpful.

Limited Partners were informed that they would "not receive any future quarterly distributions other than the distribution with respect to the second quarter, which was paid in August 1995."[36] However, based on these facts alone, the Court cannot conclude that the reasonably prudent limited partner would have understood that the structure of this transaction meant that their priority distribution would be terminated as of July 1, 1995. Accordingly, the motion is denied.

It should be noted, however, that the Defendants argue that the interest payments on the purchase price between the Effective Date and Closing Date paid by the Purchaser were to compensate the Limited Partners for the loss of their priority distribution, and, therefore, the Limited Partners may have suffered no cognizable loss as a result of the termination.[37] The Court, however, is unable to decide this issue without a trial on the merits.

D. *The Appraisals*

Once again, the Defendants move for summary judgment on the appraisal issue. In *Cencom II* and *Cencom III*, the Court held that the evidentiary record failed to address the following two issues of material fact: "(1) what method of valuation, independent or aggregate, would be proper for valuing the Partnership as

[36] Supp. Aff. of Kenton E. Knickmeyer, Ex. 21, at 1.

[37] In fact, assuming *arguendo* that the interest was to compensate the Limited Partners for the termination of their priority distribution, the Limited Partners received a net benefit from the termination because the interest paid on the purchase price totaled $5,102,313—$579,805 more than the priority distribution would have been.

a whole; [and] (2) whether the General Partner adequately presented the stated valuations to the Limited Partners in the Disclosure Statement . . . ."[38] Because the record remains largely unchanged, summary judgment on these two issues still is inappropriate. The Defendants move for summary judgment on a third issue which was not before the Court in *Cencom II* nor *Cencom III*; they argue that, as a matter of law, the Plaintiffs suffered no damages because even if the assets were valued in the aggregate—as opposed to individually—the final, agreed upon purchase price exceeded that valuation. For reasons discussed below, summary judgment on this issue is also inappropriate.

1. Individual v. Aggregate Valuation

Pursuant to the appraisal process prescribed in the Partnership Agreement, the General Partner was to have the Partnership Assets appraised "in conformity with standard appraisal techniques." At issue in *Cencom II* and *Cencom III* was whether "standard appraisal techniques" included—and therefore required—valuing the cable systems in the aggregate as opposed to valuing each system individually and then totaling those valuations.[39] The Plaintiffs have, since the beginning of this litigation, argued that the former valuation method was "standard," while the Defendants have argued for the latter. In both *Cencom II* and

[38] *Cencom III*, at *6 (footnote omitted).

[39] *See id.* ("At issue once again is whether 'standard appraisal techniques' require that the assets be valued in the aggregate or individually and then totaled.").

Cencom III the Court could not determine from the record before it the meaning of the phrase "standard appraisal techniques," and therefore held that "[f]urther discovery and ultimate trial with expert testimony should resolve [its] meaning."[40]

The Defendants move for summary judgment, essentially repeating old arguments this Court rejected on the prior two motions for summary judgment. Although the Court held that further discovery and ultimate trial with expert testimony should resolve the meaning of the phrase "standard appraisal techniques," the only new evidence cited by Defendants which bears on the issue comes from Thaw, the Plaintiffs' expert. However, his input confirms that there remain factual disputes regarding the definition of "standard appraisal techniques."

The Defendants point out that Thaw acknowledged that the appraisal method utilized by Fineberg and Daniels was "a generally recognized approach for merger and acquisition transactions for investors in the same industry."[41] While it is true that Thaw acknowledged as much, in the same sentence Thaw criticized Fineberg and Daniels for "never consider[ing] any synergistic value to the contemplated transaction. This we believe is a flaw in [their] appraisal, as we believe at a minimum, it should have been considered."[42] Thus, it appears from Thaw's report

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[40] *Id.* *See also Cencom II* ("It is not proper or possible at this point to determine whether the General Partner failed to follow the express terms of the Partnership Agreement until the factual dispute over the actual meaning of the terms 'going concern' and 'standard appraisal techniques' can be resolved.").
[41] Thaw Rep. (Knickmeyer Aff. Ex. 6) at 11.
[42] *Id.*

that "standard appraisal techniques" would include, at a minimum, considering the synergistic value of the cable systems, which was not done here. Therefore, the Court cannot determine, as a matter of law, the meaning of "standard appraisal techniques," as that phrase was contemplated in the Partnership Agreement.

2. Plaintiffs' Damages

The parties' dispute regarding the premium paid above the purchase price is purely a dispute of fact, not law, and therefore not ripe for summary judgment. The dispute is quite simple: Would the Purchasers have paid the five percent premium of the valuation price if the aggregate valuation method had been utilized instead of the individual valuation method?

The Defendants argue that Plaintiffs suffered no damages regardless of which valuation method was utilized because, under either method, the Plaintiffs received a premium above the valuation price. The Daniels & Feinberg Appraisal, which valued the assets individually then totaled them,[43] resulted in a valuation of $201 million. The Kagan Appraisal, which valued the Partnership Assets collectively as a single business, resulted in a valuation of $210.3 million. The final purchase price was $211.05 million. Therefore, the Defendants argue, under either valuation method, the Plaintiffs ended up receiving more—a $10.05 million

[43] Or, more accurately, utilized the market and income approach.

premium over the individual valuation method, and a $750,000 premium over the aggregate valuation method.

The Plaintiffs do not—indeed they cannot—dispute this rudimentary math. The Plaintiffs, however, argue that Defendants' formulation of the premium is conclusory because it views the application of the premium paid in hindsight instead of viewing it prospectively. In other words, had the five percent premium been paid over the aggregate valuation of $211.05 million, the total purchase price would have been $221.6 million, which would give the Plaintiffs potential damages of $10.55 million.

The Disclosure Statement addresses the premium over the Appraised Value. It states: "Pursuant to the Appraisal Process, the appraised value of the Systems was determined to be $201,000,000 (the "Appraised Value"). The Purchase Price exceeds by five percent (5%) the Appraised Value, and also exceeds the value of the Systems ($210,300,000) calculated in accordance with the Third Appraisal."[44] The Disclosure Statement goes on to describe the considerations taken into account in order to arrive at the Purchase Price, and then concludes with the following:

> The premium over the Appraised Value was not determined pursuant to any particular formula. However, in light of the factors listed above (in particular the possibility that prices for cable television systems may increase if Congress deregulates the cable television industry and that the Purchasing Affiliate and their affiliates may

[44] Disclosure Statement (Knickmeyer Aff. Ex. 2, Part A) at I-2.

> realize significant economic benefits from the economies of scale which may result from the purchase of all of the Systems), the General Partner determined that a purchase price for the Systems in excess of the Appraised Value and the Third Appraisal value was appropriate and would assure the fairness of the Sale Transaction to the Limited Partners, and, accordingly, the General Partner selected a premium over the Appraised Value of five percent (5%).[45]

There remains a factual dispute over the meaning of the Disclosure Statement's description of the premium. On the one hand, it seems to favor Defendants' argument because it describes the premium as compensation for the "significant economic benefits from the economies of scale which may result from the purchase of all of the Systems." However, the description is somewhat equivocal—it, in the same parenthetical sentence, describes the premium also as compensation for Congressional deregulation of the cable industry. The two rationales for building the five percent premium into the Purchase Price are inseparable, and the Court therefore cannot tell, as a matter of undisputed material fact, whether the Purchaser would have paid a premium over $211.05 million (the Kagan Appraisal). After all, had the parties agreed upon this aggregate valuation, it is plausible to infer that the Purchaser would still have paid a premium over that price to compensate for potential Congressional deregulation. This factual dispute cannot at this stage be resolved—a trial on the merits is necessary to do so.

[45] *Id.*

3. Disclosure of Valuation Summaries

In *Cencom III*, the Court broke down the disclosure issue into two sub-issues: (1) "whether the parties have produced a sufficient factual record to enable [the Court] to determine whether the presentation of the appraisals conformed to standard techniques"; and (2) "whether the presentation adequately disclosed all material facts."[46] For reasons discussed below, summary judgment is granted on the first issue, but not on the second.

There is now a sufficient record for the Court to determine whether the summary presentations utilized by the General Partner conform to standard appraisal techniques. They do. Plaintiffs' expert Thaw testified that, pursuant to Uniform Standards of Professional Appraisal Practice ("USPAP"), the use of summary reports is considered standard practice, provided that they are adequately disclosed as summary reports; it is undisputed that they were disclosed as such. Therefore, summary judgment is granted with respect to the use of the summary reports.

The parties have not supplemented the record with any new evidence bearing on the issue of whether the presentation adequately disclosed all material facts. Therefore, the Court remains in the same position from eight years ago, and, accordingly, the Court likewise is unable to grant summary judgment on this issue.

[46] *Cencom III*, at 7.

IV. CONCLUSION

For the foregoing reasons, the Defendants' motion for summary judgment with respect to the claim relating to standard techniques for presentation of appraisals is granted; otherwise, it is denied. The Plaintiffs' cross-motion for partial summary judgment is denied.

IT IS SO ORDERED.