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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

Date Submitted: February 11, 2011
Date Decided: June 3, 2011
Revised: June 6, 2011

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NOBLE, Vice Chancellor

We all have bad days. The unknown drafter of a disclosure statement explaining to limited partners the process for winding up a partnership had one of those days. A limited partnership, in accordance with the terms of its governing document, was coming to its end. A process had been prescribed for establishing the sale price of its assets. A law firm was retained to assure that the limited partners' rights under the limited partnership agreement would be protected. The drafter of the disclosure statement, for reasons that will never be known, wrote that the law firm was engaged to assure the limited partners that the dissolution process would be "fair." The Plaintiffs have latched on to that phrase and argue, in essence, that the use of the word "fair" imbues their challenge with all of the principles of "entire fairness," as that concept has evolved in our jurisprudence. Ultimately, that is an untenable stretch: the substantive rights of the limited partners are determined by reference to the provisions of the limited partnership agreement, and one sentence in a disclosure statement cannot change those rights. Perhaps more importantly, no reasonable limited partner would have read that sentence and accepted that her rights would be amplified in such fashion.

In this post-trial memorandum opinion, the Court addresses not only the import of the disclosure that the law firm had been retained to assure that the process would be "fair" to the limited partners, but also Plaintiffs' other challenges, including primarily: (1) whether the general partner manipulated to its

benefit the process by which the partnership assets were valued and sold and (2) whether approval by the limited partners of the sales process which established a price and provided for interest on that amount following a date certain until distribution of the sales proceeds acted to deprive the limited partners of the right to any quarterly distributions following the start of the period during which interest would be paid.

I. THE FACTS[1]

A. *Parties*

Cencom Cable Income Partnership, L.P. ("CCIP" or the "Partnership") is a Delaware limited partnership that was formed in July 1986 to acquire and operate existing cable television systems as a "multiple system operator" or "MSO."[2] The investment objectives of CCIP were (1) to generate quarterly cash distribution for its limited partner; (2) to obtain capital appreciation and the value of its holdings; and (3) to generate depreciation and other tax deductions.[3] At all relevant times, there were 149,204 units of the Partnership outstanding.[4] The Plaintiffs were limited partners of the Partnership (the "Limited Partners") during the events that resulted in these proceedings.

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[1] Although many of the Court's factual findings can be found under this heading, some factual findings are made in later sections of this memorandum opinion.
[2] Joint Pretrial Order ("JPTO") ¶¶ 1, 4.
[3] *Id.* at ¶ 6.
[4] *Id.* at ¶ 7. The initial value of each unit was $1000. *Id.*

The Partnership's general partner and manager, Defendant Cencom Properties, Inc. (the "General Partner"), is a Delaware corporation.[5] At all relevant times, the General Partner's sole shareholder was Defendant Charter Communications, Inc. ("Charter"), also a Delaware corporation.[6]

Defendants Howard L. Wood ("Wood"), Barry L. Babcock ("Babcock"), Jerald L. Kent ("Kent"), and Theodore W. Browne ("Browne") were officers of the General Partner from 1986 until shortly after the General Partner was sold to Hallmark in November in 1991.[7] Wood, Babcock, and Kent later co-founded Charter and they, as well as Browne, were officers of Charter at all relevant times.[8] Charter purchased the General Partner interests from Hallmark in 1994.[9]

At all relevant times, Defendants Charter Communications II, L.P. ("CCII") and Charter Communications Entertainment I, L.P. ("CCEI") were Delaware limited partnerships, and Defendant Charter Communications Properties, Inc. ("CCP Inc.") was a Delaware corporation. CCII, CCEI, and CCP Inc. were affiliates of the General Partner and are, collectively, the "Purchasing Affiliates."[10]

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[5] JPTO ¶ 1.
[6] *Id.* at ¶ 2.
[7] *Id.* at ¶ 3.
[8] *Id.*
[9] *Id.*
[10] *Id.* at ¶ 5.

B. *Background*

Between 1986 and 1988, the Partnership purchased nine cable systems (the "Systems") for $147 million.[11] The Systems were located in suburban (Maryville, Illinois), rural (Clarksville, Tennessee; Hopkinsville, Kentucky; and Tryon, North Carolina) and military (Fort Riley, Kansas; Camp Lejeune, North Carolina; Fort Gordon, Georgia; Fort Hood, Texas; and Fort Carson, Colorado) settings.[12] The Partnership's Amended and Restated Partnership Agreement (the "Partnership Agreement") provided for the expiration of the Partnership on September 30, 1994, and that after that date, some or all of the Partnership's assets could be sold to the General Partner or its affiliates.[13]

1. <u>Expiration of the Partnership's term and appraisal of the Systems</u>

As the Expiration Date approached, the General Partner, in preparation for selling the Partnership's assets, initiated an "Appraisal Process" that was required and defined by the Partnership Agreement.[14] The Appraisal Process specified that two independent, nationally recognized experts (one to be selected by the American Arbitration Association ("AAA") and one by the General Partner) would

[11] JX 1, the "Disclosure Statement," at P0016; JPTO ¶ 8.
[12] JPTO ¶ 8; Trial Tr. (Fineberg) at 161-63.
[13] JX 9, the "Partnership Agreement," §§ 2.4, 4.9.
[14] Trial Tr. (Kent) 395-96; Partnership Agreement §§ 1, 4.9.

appraise the Partnership's assets and that any sale of the assets would be subject to the consent of holders of a majority of the limited partnership units.[15]

As it began the Appraisal Process, the General Partner retained the law firm Husch & Eppenburger ("Husch"), which sent a letter to the Limited Partners explaining that it had undertaken a limited engagement to represent the Limited Partnership "in connection with the dissolution of the Partnership pursuant to the terms of the Partnership Agreement."[16] The letter reported that Husch had coordinated the efforts of the AAA in its selection of one of the independent appraisers, and that it "had reviewed and [would] continue to review compliance by the General Partner with the terms and provisions of the Partnership Agreement as they relate to the right of the limited partners in the dissolution of the Partnership."[17]

The AAA selected Melvin Fineberg ("Fineberg"), of Fineberg Consulting Service as one independent appraiser, and the General Partner selected Daniels & Associates ("Daniels") as the other.[18] Fineberg and Daniels determined the value each of the Systems individually and then the fair market value of all the Systems in the aggregate.[19] They initially appraised the value of the Systems as of

[15] Partnership Agreement §§ 1, 4.9.
[16] Disclosure Statement at P0024; JX 10, Oct. 14, 1994 Letter to Limited Partners of CCIP from E. Wayne Farmer, Esq. of Husch.
[17] JX 10.
[18] Disclosure Statement at P0026.
[19] Trial Tr. (Fineberg) 160.

September 30, 1994, and then updated the appraisal to assess their fair market value at $201 million as of February 28, 1995.[20]

The investment bank Kidder, Peabody & Co., Inc. ("Kidder"), one of the lead underwriters of CCIP's original offering, retained Kagan Media Appraisal, Inc. ("Kagan") to perform a third appraisal of the Cable Systems; this appraisal was outside the Appraisal Process. Kagan appraised the fair market value of the Systems at $210.30 million as of March 31, 1995.[21]

2. <u>The Sale Transaction</u>

The General Partner and the Purchasing Affiliates entered an "Asset Purchase Agreement" under which the Systems were to be sold to the Purchasing Affiliates.[22] The General Partner solicited the Limited Partners' consent to the transaction through the Disclosure Statement, dated October 3, 1995.[23] It explained that the sale was to be deemed effective as of July 1, 1995 (the "Effective Date"), but that the transaction was expected to close, following the vote of the Limited Partners and receipt of required regulatory approvals, in mid-January 1996 (the "Consummation Date").[24]

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[20] JPTO ¶¶ 24-25; Disclosure Statement at P0086 ("Fineberg Appraisal Report"); *id.* at P0143 ("Daniels Appraisal Report").
[21] JPTO ¶¶ 23, 26; Disclosure Statement at P0032; *id.* at P0161 ("Kagan Appraisal Report").
[22] Disclosure Statement at P0002-03.
[23] *Id.*
[24] *Id.* at P0002-03.

The Disclosure Statement informed the Limited Partners that the General Partner had set the purchase price for the Systems at $211.05 million (the "Purchase Price"), which represented a premium of 5% over the fair market value of the Systems as determined by Fineberg and Daniels pursuant to the Appraisal Process and a much smaller premium over Kagan's appraisal price.[25] It further explained that the General Partner had considered the following factors, in descending order of importance, when it determined the Purchase Price: (i) the results of the Appraisal Process and Kagan's appraisal; (ii) the expected benefits of the transaction to the Purchasing Affiliates; (iii) the expected effects of possible deregulation of the cable television market and recent regulatory changes that had depressed that market; (iv) capital expenditures of $3.71 million made by the Partnership since completion of the Appraisal Process; and (v) informal discussions between the General Partner and investment bankers with experience in the industry.[26] It also explained that the General Partner believed that the proposed transaction was fair to the Limited Partners and that it had retained Husch "in order to assure that the Appraisal Process and the Sale Transaction would be

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[25] *Id.* at P0002. The Purchase Price also represents a 0.3566% premium over the value of the systems as appraised by Kagan.
[26] *Id.* at P0011.

fair to the Limited Partners and to protect the rights of the Limited Partners in connection therewith."[27]

The Disclosure Statement explained that the Limited Partners would receive approximately $132,250,000 of the Purchase Price plus interest on that amount at the rate of 5.25% per annum for the period from the Effective Date through the Consummation Date.[28] Thus, according to the Disclosure Statement, a limited partner who had invested $1000 in the Partnership in 1986 would receive approximately $1705 (cumulative) if the sale closed in mid-January 1996: $886 in net sale proceeds, $26 in interest, and $793 in distributions paid from 1986 through August 31, 1995.[29] The Disclosure Statement explained that, as of the Effective Date, the "Systems will be operated for the account of the purchasing affiliates (rather than the Partnership) and no further quarterly distributions will be made in respect of the [Limited Partners' units] (other than the distribution with respect to the second quarter of 1995, which was made on August 29, 1995.)"[30]

Attached to the Disclosure Statement were copies of the three appraisal reports[31] and the form of legal opinion of Husch explaining its view that the

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[27] *Id.* at P0024-25.
[28] *Id.* at P0002. This figure represents the Purchase Price minus $74.3 million of debt and $4.5 million in accrued expenses that were outstanding as of the Effective Date. *Id.* The specified interest rate was the composite rate applicable to six month certificates of deposit as of June 30, 1995, as quoted in the *Wall Street Journal*. *Id.*
[29] *Id.*
[30] *Id.* at P0003. *See also id.* at P0005, 22.
[31] *Id.* at P0084-158.

General Partner had complied with the written requirements of the Partnership Agreement pertaining to the transaction, subject to the limitation that it had not "independently verified the accuracy, completeness or fairness of the statements contained in the Disclosure Statement."[32]

On November 1, 1995, the General Partner sent a supplemental Disclosure Statement that informed the limited partners of this lawsuit, which had been filed on October 20, 1995.[33] A second supplemental Disclosure Statement, sent on December 18, 1995, stated that the General Partner would receive a payout from the Purchase Price that was approximately one percent higher than had been reported to the Limited Partners and provided the Limited Partners with an opportunity to change their vote regarding the transaction.[34]

By voting on the transaction, Limited Partners acknowledged that:

> the undersigned Limited Partner has reviewed the Disclosure Materials; acknowledged that the term of the Partnership has expired and that the General Partner . . . is therefore proceeding with the liquidation of the Partnership's assets in accordance with [the Partnership Agreement] . . . pursuant to the Sale Transaction described more fully in the Disclosure Materials.[35]

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[32] *Id.* at P0221 ("Husch Opinion Letter").
[33] Defs.' Answering Post-Tr. Br. ("AB") at 9 n.7; JX 3.
[34] JX 8.
[35] Disclosure Statement at P0008 (the "Consent Form").

Voting on the sale concluded on January 8, 1996, with nearly 60% of outstanding units, and 83% of the units voted, approving the transaction.[36] The sale closed on March 29, 1996.[37]

On or about April 15, 1996, the Limited Partners received $805.22 per Unit as the initial distribution of the Sale Transaction proceeds, which represented $869 plus interest of $34.22 earned from June 30, 1995, through March 29, 1996, less $98 held back for contingencies; the final distributions, of $50 and $47.08 were made on December 11, 1996, and December 28, 1998, respectively.[38]

II. CONTENTIONS

The Plaintiffs assert three claims:[39]

1. The Defendants breached their voluntarily assumed duty and their representation to the Limited Partners that Husch would assure the "fairness" of the Sale Transaction.

2. The General Partner breached the Partnership Agreement by terminating the Limited Partners' priority distributions from and after September 1995, some seven months before the termination of the Partnership that ended their

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[36] JX 51, 1995 10-K, at 15-16.

[37] *Id.*; JPTO ¶ 18. Interest payments to the Limited Partners exceeded $5.1 million.

[38] JPTO ¶¶ 30-32.

[39] *See* JPTO at 6-9. These claims survived the Defendants' efforts to extract themselves from these proceedings through summary judgment. *See In re Cencom Cable P'rs, LP Litig.* ("*Cencom IV*"), 2008 WL 5050624 (Del. Ch. Nov. 26, 2008). A fourth claim—that certain cash flow projections used by the appraisers should have been disclosed to the Limited Partners—was not pursued at trial. Some refocused claims have appeared in Plaintiffs' post-trial briefing.

rights to priority participation. Because the Partnership Agreement was not amended, the intervening interest payments to the Limited Partners could not replace those priority rights.

3. The Defendants breached both the Partnership Agreement and their fiduciary duties by driving the valuation process to an appraisal of the cable Systems individually without properly including the synergistic benefits resulting from an aggregation of the business entities. In addition, they engaged in other conduct that manipulated the sale price to the detriment of the Limited Partners.

III. ANALYSIS

A. *The Role of Husch*

The Disclosure Statement that induced the Limited Partners to approve the Sale Transaction informed them:

> The General Partner believes that substantial and effective procedures were followed to ensure the fairness of the transaction. Despite the fact that the Partnership Agreement did not require it to do so, the General Partner retained [Husch] to act as special outside legal counsel on behalf of the Limited Partners in connection with the Sale Transaction. . . . The General Partner retained [Husch] 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] was instructed to oversee compliance by the Partnership and the General Partner with the terms and provisions of the Partnership Agreement relating to the Partnership's dissolution and the Appraisal Process. [Husch] 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).[40]

The Plaintiffs focus on that sentence which reads: "The General Partner retained [Husch] 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." This sentence suggests the need for two related inquiries. First: whether "a reasonably prudent Limited Partner [would be induced] to conclude that Husch would opine on (and thereby, 'assure') the fairness of the Sale Transaction."[41] This inquiry focuses on whether an actionable breach of the duty of candor occurred. Second: whether it would have been reasonable for a limited partner to infer from these words in the Disclosure Statement that the rights of the Limited Partners were being expanded by assuring that the Sale Transaction—and subsequent distribution of assets—would be "fair" in some sense different from their rights as established under the terms of the Partnership Agreement.

In assessing the sufficiency of a disclosure, a court must examine the "total mix" of information made available to the, in this instance, limited partners.[42] The sentences following the one upon which Plaintiffs have focused itemize several

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[40] Disclosure Statement at P0024-25.
[41] *Cencom IV*, 2008 WL 5050624, at *4.
[42] *See, e.g.*, *Brinckerhoff v. Tex. E. Prds. Pipeline Co.*, 2008 WL 4991281, at *6 (Del. Ch. Nov. 25, 2008).

specific procedural tasks that Husch had committed to carry out. These include overseeing compliance with the terms of the Partnership Agreement, with specific reference to the Partnership's dissolution and the appraisal process. Also, Husch was to work with the AAA in the selection of the second appraiser. Thus, the tasks which are described are, although professional, serve primarily a ministerial or compliance function. Moreover, the Husch opinion supporting the Sale Transaction is explicit in its description of what Husch, in fact, undertook:

> We have acted as special counsel for the Limited Partners . . . in connection with (i) the selection process whereby the American Arbitration Association has selected an appraiser, which appraiser, along with the appraiser selected by [Cencom], valued the Partnership, and (ii) the compliance by the General Partner with the terms and provisions of the Partnership Agreement . . . as they relate to the rights of the Limited Partners in the dissolution process of the Partnership.[43]

Thus, upon reasonable reading of the words chosen to describe Husch's role, it becomes apparent that a reasonable Limited Partner would have understood that Husch had undertaken an effort to assure that the Limited Partners received that which they contracted for through the Partnership Agreement.

Moreover, how a "fairness" notion would, or should ever, be imposed upon an express contractual relationship, evidenced by the Partnership Agreement, is unclear. Presumably, carrying out the obligations owed to the Limited Partners, as measured by the Partnership Agreement, would be, within that context, fair. It

[43] Husch Opinion Letter at P0221.

seems as if the Plaintiffs seek to import from Delaware corporate jurisprudence that notion of "entire fairness." The mere use of the word "fair," however, does not implicate those principles to override the terms of the contractual relationship, at least, where there is nothing inherently or fundamentally "unfair" about the transaction.

In addition, as set forth in the Disclosure Statement, the assets of the Partnership were, as contemplated when the Partnership was formed, going to be sold.[44] A process had been established for that sale, including the possibility of a sale to interested or conflicted parties. That an independent law firm would be retained to provide comfort to the effect that the procedures established in the Partnership Agreement were followed makes much commercial sense. Although not required by the Partnership Agreement, the retention of a firm, such as Husch, to serve that purpose benefited the Limited Partners by providing them a more substantial basis for accepting that their rights under a detailed partnership agreement would be protected. There is, however, no basis from which anyone could reasonably infer that somehow their financial rights, or financial expectations, were being increased as a result of Husch's role. In short, the disclosure regarding Husch's role was not inaccurate: Husch adequately performed the role that it undertook to perform if, as will be addressed in Part III (C) of this

[44] Disclosure Statement at P0016.

Memorandum Opinion, the requirements of the Partnership Agreement for the Sale Transaction, the Appraisal Process, and, perhaps more generally, the dissolution effort were satisfied.

B. *Termination of Priority Distributions and the Payment of Interest*

July 1, 1995, was selected as the Effective Date for the Sale Transaction. The Consummation Date was expected to occur in January 1996; regulatory and financing issues extended that until March 1996. In the interim, the Limited Partners were paid interest at the rate—which no one has suggested was unreasonable—of 5.25% per annum on the net sale price. The Partnership Agreement, however, provided for the payment of quarterly priority distributions until the termination of the partnership's interest in its operating assets and its dissolution. Those priority payments—for periods after July 1, 1995—were not made.[45]

This set of circumstances raises two questions. First: "whether the reasonably prudent limited partner asked to approve the Sale Transaction would have understood that approval was tantamount to an amendment of the Partnership Agreement authorizing termination of priority distributions."[46] Second: whether some provision of the Partnership Agreement or some equitable principle

[45] The priority payment for the quarter ending June 1995 was made in August 1995 after the Effective Date. JPTO ¶ 17.
[46] *Cencom IV*, 2008 WL 5050624, at *4.

prevented the use of the effective and closing dates with the gap bridged by interest payments instead of the priority distributions that would have otherwise accrued up until the Consummation Date.

A reasonably prudent Limited Partner, when she approved the Sale Transaction, would have understood that she would not receive any more priority distributions but, instead, would receive interest until the transaction closed. The Disclosure Statement's discussion of these aspects of the Sale Transaction was clear and unambiguous:

> The sale will be deemed to have been effected as of July 1, 1995. Accordingly, from and after July 1, 1995, the Systems will be operated for the account of the purchasers (rather than the Partnership) and no further quarterly distributions will be made in respect of the LP Units . . . .[47]
>
> If the limited partners approve the proposed sale, commencing July 1, 1995, through the date the sale is consummated, the proceeds to be distributed to the limited partners [net of certain expenses] will earn interest at the rate of 5.25% per annum . . . . The limited partners will not receive any future quarterly distributions other than the distribution with respect to the second quarter, which was paid in August 1995.[48]
>
> The approval of the limited partners of the Sale Transaction will include the limited partners' agreement and approval that, notwithstanding the Consummation Date, the sale will be deemed to have been effected as of July 1, 1995. Accordingly, from and after July 1, 1995, the systems will be operated for the account of the

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[47] Disclosure Statement, at P0003.
[48] *Id.* at P0005.

> Purchasing Affiliates (rather than the Partnership) and no further quarterly distributions will be made in respect of the LP Units . . . .[49]

In sum, the Limited Partners are charged with knowledge that their approval of the Sale Transaction would effectively eliminate their rights to quarterly priority payments and would substitute interest payments. When they approved the Sale Transaction, they demonstrated their agreement with that approach for selling the assets of the Partnership as part of the inevitable dissolution process.

The Partnership continued to own the Systems after the July Effective Date. Under the Partnership Agreement, the limited partners were to receive quarterly priority distributions until the sale of the Partnership's assets and its termination. The Plaintiffs point out that the Partnership Agreement was never formally amended, either by approval of the Sale Transaction or otherwise. From that observation, they argue that they remain entitled to quarterly distributions for the roughly nine months between the Effective Date and the Consummation Date. Moreover, they claim the right to interest payments—as compensation for the time value of the purchase price—in addition to those quarterly distributions. In other words, according to the Plaintiffs, the interest payments may not be taken as an offset against quarterly distributions to which they were otherwise entitled.

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[49] *Id.* at P0012. Moreover, the only plaintiff who testified at trial, Stanton Barnes, acknowledged as much: "Q. Was it—was it your understanding that the quarterly priority distributions would cease? A. Yeah, I think it was. Yeah, I think that's stated in the materials." Trial Tr. (Barnes) at 16.

The Court previously observed, in denying the parties' cross motions for summary judgment, that the Partnership Agreement "provides no authority to terminate the priority distributions *before* the termination of the Partnership," which only occurred after the Sale Transaction closed, rather than upon the Effective Date, and, citing *Santa Fe,* that the Court could "not now comfortably conclude that [the Court knows] that the Limited Partners did 'consent' to the termination of their priority distributions as that term is defined in the Partnership Agreement," by approving the Sale Transaction.[50] Although this language provides support for the Plaintiff's position, the Court was acting under the constraints of Court of Chancery Rule 56 when it expressed those reservations.[51] The Court, now acting in its role as fact-finder, addresses these issues with the benefit of the complete trial record before it.

Two principal reasons coalesce and call for the rejection of the Plaintiffs' claim to quarterly distribution payments in addition to the interest payments that they did receive. First, the Court can now conclude that the Limited Partners were fully informed that, if they approved the Sale Transaction, quarterly distributions would cease as of the Effective Date and that interest would be paid from the

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[50] *In re Cencom Cable Income Partners, L.P. Litig.* ("*Cencom II*"), 2000 WL 640676, at *5-*6 (Del. Ch. May 5, 2000) (citing *In re Santa Fe Pacific Shareholders Litig.,* 669 A.2d 59 (Del. 1995)) (emphasis in original).

[51] Court of Chancery Rule 56(h) was not adopted until 2005, some five years after *Cencom II* was issued. Thus, the Court did not treat the cross-motions for summary judgment as a "stipulation for decision on the merits based on the record submitted with the motions." Ct. Ch. R. 56(h).

Effective Date until the Consummation Date.[52] These and other terms of the Sale Transaction were fairly and accurately described in the Disclosure Statement.[53] Thus, the Limited Partners' vote to approve the Sale Transaction, including the payment of interest and the cessation of quarterly disbursements that were contingent upon that approval, was both fully informed and uncoerced.[54]

Second, even if the Partnership Agreement did require the payment of quarterly distributions to the Limited Partners after the Effective Date, the interest payments that the Limited Partners received were a reasonable substitute for the quarterly distributions: indeed, they were more than the amounts that would have

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[52] *See e.g.* Trial Tr. (Barnes) 16-17; *see also* Consent Form (indicating that by voting on the Sale Transaction, Limited Partners had reviewed the terms of the deal as described in the Disclosure Statement).

[53] *See* Disclosure Statement at P0003, P0012 ("The approval by the limited partners of the proposed sale will include the limited partners' agreement and approval that, notwithstanding the Consummation Date, the sale will be deemed to have been effective as of July 1, 1995. Accordingly, from and after July 1, 1995 . . . no further quarterly distributions will be made in respect of the LP units . . . ."); *id.* at P0005 ("If the limited partners approve the proposed sale, commencing July 1, 1995 through the date the sale is consummated, the proceeds to be distributed to the limited partners . . . will earn interest at the rate of 5.25% per annum , the composite rate at June 30, 1995 for six-month certificates of deposit, as published in the Wall Street Journal. The limited partners will not receive any future quarterly distributions other than with respect to the second quarter, which was paid in August 1995.").

[54] This conclusion has aspects both of acquiescence—the informed Limited Partners accepted a transaction structured this way—and waiver—unambiguous (given the clarity of the disclosures here) relinquishment of a known right to quarterly payments. *See, e.g.*, *Tristate Courier & Carriage, Inc. v. Berryman*, 2004 WL 835886, at *9 n.123 (Del. Ch. Apr. 15, 2004).

By contrast, the approval of the Sale Transaction did not amend the Partnership Agreement, as such. Under Section 10.2(A) of the Partnership Agreement, "no amendment to this Agreement may . . . . (2) . . . alter the Interest of any Partner in Net Profits, Net Losses or Cash Distributions . . . without the approval of each affected Partner . . . ." In this instance, certain Limited Partners voted against the Sale Transaction. Thus, the Sale Transaction could not have modified the terms of the Partnership Agreement to eliminate quarterly distributions. That, of course, would not necessarily preclude structuring the sale as it was.

been received as quarterly distributions.[55] The Plaintiffs argue that the interest payments cannot stand in for the quarterly distributions because both parties' experts agreed that the interest payment represented payment for the "time value of money." This argument ultimately fails. If the Limited Partners retained the right to receive quarterly distributions after the Effective Date—that is, if the Limited Partners' rights to cash distributions were to be unaffected by the Sale Transaction until the termination of the Partnership—then the rationale for paying interest on the value of their investments during that time would disappear because they then would have continued to benefit from the primary ongoing attribute of ownership—the right to quarterly distributions.[56]

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[55] This consequence of the change from quarterly distributions to interest was recognized in *Cencom IV*, 2008 WL 5050624, at *6 & n.37 (observing that the interest payments totaled almost $580,000 more than what priority distributions would have been). The Limited Partners received $5,102,313 in interest payments pursuant to the Sale Transaction. JPTO ¶ 19. The Plaintiffs' expert, Thaw, calculated that $4,522,508 should have been distributed to the Limited Partners during the three quarters following the Effective Date. Trial Tr. (Thaw) 88. Thaw reached this figure using actual projections of capital expenditures. *Id.* He later reached a higher number by "normalizing" projected capital expenditures to conform to historical levels (*id.* at 88-89), but the Court finds there is no basis for substituting such historical data for the best estimate of expenditures that would have been required in the rapidly changing industry. That increased capital expenditures will be necessary is supported by, for example, the need to increase the number of channels that could be served. *See* note 77, *infra*.

[56] The better answer view is that the Limited Partners approved the Sale Transaction knowing that that approval would result in (1) the cessation of quarterly distributions and (2) the payment of interest on their investments during the pendency of the Deal. They accepted the interest payments, and, having done so, may not now demand the quarterly distributions they bargained away.

Thus, even if the structuring of the Sale Transaction with its Effective Date and Consummation Date somehow transgressed the Partnership Agreement, the Limited Partners were not damaged.

In sum, there was nothing wrongful or inequitable about paying the Limited Partners interest in lieu of quarterly priority distributions between the Effective Date and the Consummation Date. Moreover, the approach employed in the Sale Transaction caused no cognizable damage to the Limited Partners.[57]

C. *Manipulating the Appraisal Process*

The Partnership Agreement anticipated—and allowed for—the possibility that the General Partner would be the buyer of the Systems, or any smaller number of them. Two appraisers were to be selected; they were each to perform valuations in accordance with standard appraisal techniques; they were to confer in an effort to agree on a purchase price. One appraiser—Daniels—was selected by the General Partner. The other—Fineberg—was selected by the AAA, as the designated neutral. Both appraisers were well-qualified and experienced in the

[57] Alternative means might have been employed to allow for an early actual sale date, with the cash funding to come later. Those alternatives would have carried their own complications. For example, one could envision a sale by the Partnership of the Systems with a note as evidence of the future payment obligation; Section 4.9(C) of the Partnership Agreement, however, required that "[a]ll sales of Partnership Assets must be for cash except with the Consent of the Limited Partners." Given that requirement to seek Consent, as well as the credit risks that would have been associated with such an approach, the structure that was ultimately chosen for the Sale Transaction was commercially reasonable.

cable business. They did their work and conferred and came to a sale price of $201 million for the Systems.

For reasons that are not totally clear, the investment bankers arranging the Sale Transaction had yet another appraisal performed—by Kagan, another well-qualified and experienced firm. Kagan came to a higher number, $210.3 million. The purchasers added 5% to the Daniels-Fineberg appraisal, and reached a price slightly higher than Kagan's valuation—$211.05 million.

The process—at a distance—seems fair. Qualified, independent, experienced appraisers were retained. Two worked out a number before the third came and reprised the appraisal effort, and that led to a larger purchase price.

The Plaintiffs, however, assert that the Appraisal Process was "manipulated" to the detriment of the Limited Partners. There are some troubling and inconsistent aspects of the process, but, ultimately, the process was consistent with the terms of the Partnership Agreement and the appraisal efforts were, in addition, reasonable and fair. Indeed, the Defendants have shown the numbers to be reasonable.[58] A review of Plaintiffs' complaints follows.

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[58] The better way of imposing the burden in this matter is that the Plaintiffs must prove a breach of the Partnership Agreement. The Court, to reduce doubt, especially in light of the fairness obligations assumed by Husch, will treat the burden as resting with the Defendants for the purposes of challenges to the pricing process.

Identifying the responsible party or parties, if the Plaintiffs should prove that they have been the victims of wrongful conduct, is a question that, given the outcome of these proceedings, the Court need not resolve. The contractual obligations, based on the Partnership Agreement, are those of the General Partner. The responsibility of the Individual Defendants for the acts of the

The Plaintiffs focus their challenge on how (or, perhaps more accurately, whether) synergies that would enhance the value of all nine of the Systems collectively, as opposed to individual system valuations, were captured by the Appraisal Process. This raises at least four related questions: (1) Were the Systems appraised individually or collectively? (2) If so, would that had been a matter for the professional judgment of the appraisers? (3) Were the synergistic benefits of multiple Systems already part of the financial information upon which the appraisers relied? (4) Given the significant distances between most of the individual Systems and the fact that the Systems served three markedly different cable markets, what value, if any, should have been separately ascribed to the synergistic effects when considering the Systems collectively?

The Partnership Agreement specified the "Appraisal Process" to be followed if the General Partner (or an affiliate) purchased any of the Systems. The two appraisers were to follow "standard appraisal techniques" to determine "fair market value."[59] The Plaintiffs agree that the appraisers followed standard techniques—they used income and market methodologies. Indeed, but for the

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General Partner is not as clear as perhaps it should be. Moreover, the Plaintiffs have spent much of their time criticizing the work performed by Husch. Husch, of course, is not a defendant in this proceeding, and it is one thing for the Disclosure Statement to describe why Husch was retained, but it is difficult to read the Disclosure Statement as guaranteeing (or that the Individual Defendants were somehow assuming liability for) the work that would be done by Husch.

[59] Partnership Agreement § 1.

debate about synergistic effects, the Plaintiffs' expert, Mark Thaw, did not materially disagree with their efforts to value the Systems.[60]

The evidence that Daniels and Fineberg did not consider synergies is scant. Thaw infers that they may not have considered synergies because no discussion of synergies appears in their reports. Indeed, there is no express discussion of synergies and certainly no specific quantification attributed by Daniels or Fineberg to synergistic effects.

The Systems, however, were centrally managed, if by an entity not as large as Charter had become by 1994, at least from 1988 when the Partnership purchased the last of the Systems. By 1991, when the General Partner's interests were sold to Hallmark, the Partnership had grown, through acquisitions and internal growth, to serve approximately 550,000 subscribers.[61] According to Kent, both before and after that sale (at least until 1992), the Systems were centrally managed by Cencom Cable Associates, Inc. ("CCA") an entity then affiliated with the General Partner.[62] It is undisputed that the Systems were centrally managed by Charter, which Wood,

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[60] That Daniels and Fineberg reached a different valuation from Kagan's valuation does not, as Plaintiffs argue, indicate that any of these appraisers used non-standard appraisal techniques. As explained by the Defendants' expert, Kane, "the decision whether to value [multiple Systems] in the aggregate or individual really lies with the appraiser." Trial Tr. (Kane) 354.

[61] Trial Tr. (Kent) 382.

[62] *Id.* at 382, 384, 397 ("[I]nstead of nine heads of human resources, we had one that handled the entire function for [CCA].").

Babcock, and Kent had founded in early 1993, after Charter acquired the General Partner's interests and the Systems from Hallmark in 1994.[63]

In exchange for these centrally managed services, the General Partner (regardless of the entity holding the General Partner's interests) charged a 5% management fee.[64]

Benefits accruing from economies of scale in terms of centralized management, purchasing and programming power, and other administrative and operational support were passed on to the individual Systems.[65] Thus, the synergies were, at least to some extent, "baked in" to the financial statements and, thus, were accounted for in the valuation process.[66] That said, there were geographic and market limitations on the synergies that could have been achieved. Although two of the Systems (Hopkinsville, Kentucky and Clarksville, Tennessee) were within twenty miles of each other, the rest of the Systems ranged from eastern

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[63] *See* Pls.' Post-Trial Br. at 26; Trial Tr. (Fineberg) 197; JPTO ¶ 3. The Plaintiffs highlight the fact that the Systems were managed by Charter only after 1994; they seem to argue that the systems were not centrally managed by any entity before this date. Both Fineberg and Kane testified that it was unlikely that the individual systems could have been as profitable as they were (before 1994) if they had not been operated as part of an MSO. Trial Tr. (Fineberg) 181; *id.* at (Kane) 358.

[64] Trial Tr. (Kent) 398.

[65] Through centralized management by CCA, the Systems, for example, achieved buying power greater than the Systems could have individually obtained, resulting in, among other benefits, "some of the cheapest truck costs in the industry." *Id.* at 397-98; *see also supra* note 62. Thus, whether they were managed as a group of nine or as part of a much larger MSO, the Systems received synergistic benefits from central management throughout most of the Partnership's existence.

[66] *Id.* at 356; *id.* (Kane) at 356-57.

North Carolina (Camp Lejeune) to the Rocky Mountains (Fort Carson, Colorado).[67]

Fineberg, who performed his appraisal a decade-and-a-half before he testified, recalled that he did consider synergies, both through the impact of the savings attributed to consolidated operations that were reflected on the Systems' individual financial statements and in his use of guideline companies for his market analysis.[68] Fineberg did not consider the 5% management fee charged by the General Partner when valuing the Systems, apparently because the management fee was not charged directly to the individual Systems and did not appear on the Systems' books.[69] Thus, the Systems were valued on the basis of their cash flows, including the "baked-in" synergistic savings they experienced under CCA's and Charter's management, without charging each of the Systems with the management fee.[70]

Thaw, the Plaintiffs' expert, was engaged to analyze Fineberg's and Daniels' appraisal reports; he neither performed his own appraisal nor reviewed the appraisers' work papers.[71] He opined that a three-to-five percent savings should

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[67] *Id.* (Kent) at 399.

[68] Daniels stated that its appraisal was on an operating group basis. Daniels Appraisal Report at P0158.

[69] *Id.* (Kent) at 360.

[70] Fineberg's omission of the management fee may have resulted in a higher than accurate cash flow analysis. That, of course, would have benefited—not harmed—the Limited Partners.

[71] *Id.* (Thaw) at 96-97.

have been expressly attributable to the synergistic benefits of operating the Systems together, as contrasted with an effort to value each of the Systems individually. These savings would have fallen into the "bottom line," thus resulting in a significantly higher valuation of the Systems.[72] The basis for Thaw's projection of synergistic savings, however, was subjective or intuitive.[73] Although qualified to express his opinion, Thaw, when compared to the other appraisers involved in this matter, seems to have had substantially less experience in the cable industry.[74] He was not able to provide a further explanation as to how he calculated the potential synergistic savings. Moreover, he did not appear to give sufficient weight to the limitations arising out of the geographical distances separating the Systems, or the fact that some, if not all, of the Systems' synergies were already reflected in the financial statements.

The Plaintiffs argue that the General Partner and Husch are responsible for the appraisal debate because they instructed Daniels and Fineberg to value each of the Systems individually, thereby reducing or eliminating the synergistic benefits. Husch did not require the appraisers to value the Systems only on an individual

[72] *Id.* at 114.

[73] *See id.* at 76-77 ("So I said, 'you know what, I'm a conservative guy, CPA. Three to five percent will be something that I think is reasonably achievable.'").

[74] *Id.* at 94; *id.* (Fineberg) at 139-41; *id.* (Kane) at 345-46.

basis. Instead, Husch told them to "value each cable system individually, and they also needed to value the entire assets of the partnership as a whole."[75]

Fineberg testified—and the Court accepts his recollection—that the decision to value the Systems individually was his decision (along with that of one of his colleagues). Because the Systems operated in different cable markets, the specific upsides and downsides of those separate markets should have been assessed separately.[76]

Defendants sponsored another appraiser at trial—Kane. He credibly explained the reasons for valuing the Systems on an individual basis, with an emphasis on the separate capital needs and geographical separation.[77] He also

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[75] Trial Tr. (Johnston) 288-89. Because Husch read the Partnership Agreement as giving the General Partner the right to purchase one, some, or all of the Systems, it did ask Daniels and Fineberg for an individual valuation, as well as an aggregate value.

[76] The Systems serve three discrete markets, each with a different quality of subscriber: suburban (Maryville), rural (Clarksville, Hopkinsville, and Tryon), and military (Camp Lejeune, Fort Carson, Fort Gordon, Fort Hood, and Fort Riley). For example, military subscribers were considered less valuable due to the risk of base closures and redeployments. Trial Tr. (Kane) at 350-51.

Daniels acknowledged that, in accordance with the "Procedure Letter," that it conducted its appraisal at the operating group level, i.e., one of the separate Systems, and that there might be a limited number of strategic buyers who might pay more because of the opportunity to acquire a larger number of subscribers in a single transaction or because of economies of scale. Daniels Appraisal Report at P0158. Although this suggests that means were available to have justified a somewhat higher cash flow multiple, the scope of any such increase and the likelihood that it could be realized are, at best, speculative. Moreover, it may be worth repeating that the Daniels valuation was increased by approximately 5% before the sale price was established.

It is worth emphasizing that simply because the Systems were each valued individually does not mean that the synergistic benefits of being part of the collection of Systems, or a larger entity as such, were ignored. As set forth above, synergistic benefits were already reflected in the financial statements.

[77] *Id.* (Kane) 354-55; *id.* at 351 (explaining that in 1994-1995, almost all of the Systems ran at 330 megahertz, allowing them to offer only twenty-eight to thirty-seven channels to subscribers.

explained that synergistic benefits were "baked in" to the individual Systems' financial statements and that Fineberg and Daniels had accounted for those synergies, as demonstrated by the size of the Systems' operating margins that were reported in their appraisals.[78] In short, Thaw's speculative—although not without some support—inference as to a failure to incorporate synergistic benefits cannot overcome the bulk of credible evidence that the individual appraisals fairly captured synergistic benefits and were not driven or manipulated by the Defendants (or Husch) in that regard. Instead, capable and independent appraisers exercised their reasoned and experienced judgment. That is what the Limited Partners agreed to in the Partnership; that is what they were entitled to under the Partnership Agreement; and that is what they received. More specifically, Husch satisfied the terms of its engagement, as they were reasonably disclosed to the Limited Partners, by assuring that the Sale Transaction was fair to the Limited Partners when measured against the most applicable metric: the Partnership Agreement.

The Plaintiffs have tendered other challenges to the Appraisal Process.

The industry standard was then 450 megahertz, which made offering eighty channels feasible). Further, Daniels Appraisal Report, explaining why Daniels valued the Systems individually and then aggregated the values, emphasized that the "critical characteristics of the Systems are key to determining their respective values; however, they vary significantly between the Systems." Daniels Appraisal Report at P0145, P0158.

[78] Trial Tr. (Kane) 356-60.

After Fineberg and Daniels agreed on an appropriate price for the Systems, the underwriters providing the financing for the acquisition sought yet another appraisal—this one by Kagan—who appraised the Systems on an aggregate basis and arrived at a price that was roughly $9.3 million higher than the Fineberg-Daniels valuation.[79] The reasons given for this additional effort include recognition that the cable industry was going through a favorable period, other timing issues, and that Congress might alter the regulatory landscape in a positive way.[80] One is tempted to go beyond the record and surmise that the underwriters were concerned that use of the number reached by Fineberg and Daniels would not draw enough support from the Limited Partners to approve the Sale Transaction or would result in litigation. The price paid to the Limited Partners was above Kagan's higher appraisal. The Plaintiffs argue the Kagan was improperly pressured by the General Partner during its appraisal efforts. This claim fails for a lack of proof with respect to the appraisal that generated the valuation used to support the Sale Transaction. Moreover, expressing views that diverge from those of the appraiser does not necessarily equate with undue or improper pressure.

The Plaintiffs also criticize the use of February 28, 1995, for the "as of" date for the Fineberg and Daniels appraisals. The Sale Transaction would not be submitted to the Limited Partners for another eight months, and it would be

[79] Kagan Appraisal Report at P0164.
[80] *Id.* at P0196.

roughly a year before the transaction closed. This timing decision occurred during a time of growth in the cable industry.[81] At the bottom of Plaintiffs' claim is the suggestion that the Defendants chose the February date in an effort to forestall further appreciation in the Systems' value. The Defendants offer an adequate and plausible explanation, which the Court accepts. The appraisal reports were completed in May 1995;[82] at that point, the last monthly financials that could be used were those completed for February 1995. The use of later financial reports simply would have pushed the sale process further down the road.

One technical challenge, brought by the Plaintiffs, to the work of the appraisers involved accounting for capital expenditures that were to be made after the valuation date. The credible explanation for that adjustment lies in the projection of future cash flows that were made possible by those projected capital expenditures. To the extent that projected increases in cash flow are directly attributable to future capital expenditures, then those capital expenditures may, in the opinion of the appraiser, and perhaps, must be factored into the valuation process.[83]

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[81] *See, e.g.*, Kagan Appraisal Report at P0194.
[82] Fineberg Appraisal Report at P0084.
[83] The Plaintiffs also argue that the Defendants inflated the capital expenditures that were subtracted from Kagan's appraised value of the Partnership. The evidence that these estimated future expenditures were inflated is lacking, and because they were ultimately paid for by the purchasing affiliates (Trial Tr. (Kent) 454), they were appropriated subtracted by Kagan as part of his discounted cash flow analysis.

Finally, the Plaintiffs argue that the 5% premium (over the Fineberg-Daniels valuation) that the Limited Partners received was as "sham" because it did not compensate the Limited Partners for the failure to value the Systems in the aggregate or Defendants' other manipulations of the sale price.[84] Because the Court rejects the underlying claims, it finds that they do not provide a basis for considering the premium to be a "sham." Regardless, the Sale Transaction, including the sale price, were approved by a fully informed majority of Limited Partners.

In sum, the appraisal and sale process did not deny the Limited Partners the benefit of their bargain. Under the circumstances, it was fair and, to the extent the Purchasing Affiliates, the General Partner, or Husch may have deviated from precisely meeting their obligations, the Limited Partners were not damaged.

IV. CONCLUSION

For the foregoing reasons, the Defendants are entitled to the entry of judgment in their favor and the dismissal of this action. An implementing order, also requiring the parties to bear their own costs, will be entered.

[84] Pls.' Post-Trial Tr. Br. at 35-38. Because the Court rejects the underlying claims, it finds that they do not provide a basis for considering the premium to be a "sham." Regardless, the Sale Transaction, including the sales price, were approved by a fully informed majority of Limited Partners.