IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE CENCOM CABLE INCOME PARTNERS, L.P. LITIGATION	)	C.A. No. 14634

Submitted: March 1, 2000
Decided: May 5, 2000

MEMORAND UM OPINION

Pamela S. Tikellis and James C. Strum of Chimicles & Tikellis, Wilmington, Delaware. OF COUNSEL: Lawrence P. Kolker and Robert Abrams of Wolf Haldenstein Adler Freeman & Herz LLP. Attorneys for Plaintiffs.

Daniel A. Dreisbach and Michael D. Allen of Richards, Layton & Finger, Wilmington, Delaware. OF COUNSEL: Stephen B. Higgins, Robert J. Wagner and Thompson Cobum, St. Louis, Missouri. Attorneys for Defendants.

STEELE, V.C.

This is the Court's ruling on defendants' second motion for summary judgment. The Court granted in part and denied in part an earlier motion for summary judgment. Defendants move for summary judgment on three discrete issues. Comprehensive procedural and factual background can be found in earlier opinions.[1]

I. ISSUES PRESENTED

The three issues pending are:

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 (I) using appraisals that appraised the cable systems individually rather

[1] ***In re Cencom Cable Income, Partners, L.P., Litig.***, Del. Ch., C.A. No. 14634, Steele, V.C. (Feb. 15, 1996) [hereinafter ***Cencom I]; In re Cencom Cable Income, Partners, L.P., Litig.***, Del. Ch., C.A. No. 14634, Steele, V.C. (Oct. 15, 1997) [hereinafter ***Cencom II***].

than in the aggregate; (2) failing to disclose the cash flows underlying the valuations to the Limited Partners in the Disclosure Statement; and (3) failing to provide "equal information" to each of the appraisers?

II. BACKGROUND

A. Procedural Circumstances Surrounding Pending Motion

On February 15, 1996, I denied plaintiffs' request to enjoin preliminarily the consummation of a sale of the assets of Cencom Cable Income Partners, L.P. (the "Partnership") to affiliates of the General Partner[2], Cencom Properties, Inc. (the "General Partner").[3] Plaintiffs' request for injunctive relief provided the background for my October 15, 1997 decision on defendants' motion for summary judgment.[4] Plaintiffs alleged that the General Partner breached its fiduciary duty of loyalty owed to the Limited Partners by promoting its own interest above that of the Limited Partners and by releasing false and misleading disclosures in connection with the sale of the Partnership's assets to affiliates of the General Partner. I granted defendants' motion in part and denied it in part. There were three issues on which I denied summary judgment because the state of the record disclosed that there were genuine issues of material fact

[2] The sole stockholder of the General Partner is CCI Holdings, Inc., which is wholly-owned by Charter Communications, Inc.
[3] ***Cencom I***, Del. Ch., C.A. No. 14634, Steele, V.C. (Feb. 15, 1996).
[4] ***Cencom II,*** Del. Ch., C.A. No. 14634, Steele, V.C. (Oct. 15, 1997).

still in dispute. Once more they come before me on defendants' second motion for summary judgment.'

B. Relevant Facts

Many of the background facts of the case are set forth in earlier opinions and will not be repeated. But, some basic, pertinent facts need to be set out in order to explain the pending motion and disposition.

The Partnership is a Delaware Limited Partnership formed in 1986. The General Partner is a Delaware corporation which has been operating the Partnership under the provisions of the Limited Partnership Agreement. The General Partner, under the terms of the Partnership Agreement, was obligated to liquidate the assets of the Partnership and to distribute any net cash resulting from the liquidation accordingly. The Partnership Agreement expressly provided for a termination date of September 30, 1994.

Defendants are the executive officers of the General Partner that, pursuant to the Partnership Agreement, elected to value the Partnership assets through the appraisal process and to sell the assets to the General Partner's own affiliates.[6] The Agreement provides that before selling to an affiliate, the General Partner must obtain approval of a majority of the

[5] The parties orally argued on March 1, 2000.
[6] The defendant executive officers of the General Partner are Howard L. Wood, Barry L. Babcock, Jerald L. Kent, and Theodore W. Browne.

outstanding Limited Partnership units.[7] The appraisal process requires determination of the value of the Partnership assets by two appraisers: one selected by the General Partner and one selected by the American Arbitration Association ("AAA"). The Partnership Agreement requires that the appraisers value the assets "on a going concern basis…in conformity with standard appraisal techniques."" Should the two appraisers disagree on value, they may retain a third appraiser to establish the value at a figure between the valuations reached by the first two appraisers. The General Partner retained Daniels & Associates ("Daniels") and the AAA retained Fineberg Consulting Service ("Fineberg CS") to appraise the assets. Kidder, Peabody ("Kidder"), the investment bank hired in connection with the marketing of the assets, retained Kagan Media Appraisals, Inc. ("Kagan") to perform a third appraisal.'

[7] Amended and Restated Agreement of Limited Partnership of Cencom Cable Income Partners, L.P., at A-3 [hereinafter PA].
[8] ***Zd.*** at A-2.
[9] Each appraiser valued the assets as of February 28, 1995. William Fitzgerald ("Fitzgerald") of Daniels and Melvin I. Fineberg ("Fineberg") of Fineberg CS, agreed upon a value of $201 million. The General Partner sought and received consent to purchase the assets for $211,050,000. The closing date, initially expected in January 1996, occurred on March 29, 1996.

III. ANALYSIS

A. Summary Judgment

Under Court of Chancery Rule 56, summary judgment may be granted where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[10] Summary judgment may be granted if the moving party's evidence negates the allegations of the complaint and the non-moving party fails to submit countervailing evidence.[11] Any doubt concerning the existence of genuine issues of material fact will be resolved against the moving party.[12]

Each of the three issues pending for consideration and the facts surrounding those issues are discussed below.

B. Role of Husch & Eppenberger

In Cencom *II*, I concluded that the General Partner voluntarily assumed a duty to assure that Husch & Eppenberger ("Husch") would deliver an opinion that the Appraisal Process, the Partnership solicitation of Consent and the Sale Transaction "[had] each been completed in compliance with the Partnership Agreement."[13] 1 denied the defendants' motion for

---

[10] Ch. Ct. R. 56.
[11] ***In re Wheelabrator Tech., Shareholders Litig.***, Del. Ch., 663 A.2d 1194, 1199-1200 (1995).
[12] ***Scuremart v. Judge,*** Del. Ch., 626 A.2d 5 (1992).
[13] ***Cetzcom II***, at 15-16.

summary judgment because the state of the record revealed that a genuine issue of material fact existed about whether the duty assumed by Husch "[was] 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] Again, in this second motion for summary judgment, the defendants claim that they are entitled to summary judgment concerning the scope and performance of Husch's duties. After reviewing the briefing, I conclude that a trial on the merits would better permit me to assess whether Husch fulfilled its duties outlined in the Disclosure Statement.

Defendants contend that the General Partner retained Husch only to perform a *mere process compliance checklist* and never agreed to assure the overall *fairness* of the transaction. They argue that the Limited Partners were repeatedly advised of the limited nature of Husch's engagement.[15] Plaintiffs argue, as they did in ***Cencom II***, that defendants breached their fiduciary duty of loyalty by failing to assure that both the appraisal process and the Sale Transaction would be fair to the Limited Partners. Plaintiffs

---

[14] ***Id***. at 16.

[15] Defendants maintain that the following sources reiterated Husch's role to the Limited Partners: (1) the E. Wayne Farmer letter dated October 14, 1994 which was sent to all Limited Partners; (2) Husch's draft opinion letter; (3) the final opinion letter issued by Husch dated March, 27, 1996; (4) the Disclosure Statement at 9-10; and (5) the Stanley Johnston (Husch) Deposition at 26, 62-63.

claim that the defendants designed the Disclosure Statement to persuade the Limited Partners that Husch would protect their interests and assure a fair transaction. Plaintiffs also claim that the Disclosure Statement "materially" misled the Limited Partners into voting for the Sale Transaction under the mistaken belief that Husch would assure them of both the *fairness* of the appraisal process as well as the terms of the Sale Transaction.

The Disclosure Statement described Husch's role as follows:

> 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 & Eppenberger to act as *special outside legal counsel on behalf of the Limited Partners in connection with the Sale Transaction.* Husch & Eppenberger.. .has substantial experience with limited partnerships and the cable television industry. 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 the terms and provisions of the Partnership Agreement relating to the Partnership's dissolution and the Appraisal Process. Husch & Eppenberger also assisted 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.. .As a condition to the closing of the Sale Transaction, Husch & Eppenberger will deliver an opinion that the Appraisal Process, the Partnership solicitation of Consent and the Sale Transaction have each been completed in

> compliance with the Partnership Agreement. A form of such opinion is attached hereto as Exhibit C.[16] [emphasis added].

While the parties continue to read Husch's role found in the Disclosure Statement differently, the arguments proffered are purely repetitious and more applicable on a motion for reargument rather than a summary judgment proceeding.[17] In the earlier opinion, I denied summary judgment on the basis of an insufficient record. In other words, I could not discern from the record before me whether Husch only assumed the limited duty described under the terms of the Partnership Agreement (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. I again find myself in a similar predicament. While there may have been no duty to hire Husch, as the disclosure correctly points out, the General Partner chose to obtain "special outside legal counsel on behalf of the Limited Partners." It is reasonable to read the disclosure to be an attempt to convince the prospective voting Limited Partners that special measures

[16] Disclosure Statement at 9- 10 [hereinafter DS].
[17] Plaintiffs dissect the paragraph line-by-line and attacks each isolated sentence and word. Defendants, on the other hand, ask the Court to review the disclosure as a whole, rather than piecemeal as plaintiffs suggest I do.

had been taken to protect their interests and correspondingly that their level of comfort with both the process and the terms of the sale would be enhanced.

I can not comfortably determine whether any representation or omission in the Disclosure Statement about Husch's role constitutes an actionable breach of the duty of candor without a trial on the merits.'*

I conclude that whether Husch fulfilled its duties outlined in the Disclosure Statement is a triable issue. Accordingly, summary judgment is denied.

C. Termination of Distributions

I previously concluded that the General Partner failed to provide any evidence that the Partnership Agreement permitted the termination of the

---

[18] The standard for "materiality" for even an *omitted fact* is a well-established mantra in Delaware jurisprudence:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.. .It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available."

Rosenblatt v. ***Getty Oil Co.,*** Del. Supr., 493 A.2d 943, 944 (quoting ***TSC Industries, Inc. v. Northway, Inc., 426*** U.S. 438,449 (1976)); see ***also Loudon v. Archer-Daniels-Midland Co.,*** Del. Supr., 700 A.2d 135, 143 (1997). Here, I can not say that there is no substantial likelihood that a unit holder under the language used would have expected Husch to pass on the fairness of the transaction.

priority'" distributions before the termination of the Partnership, the cancellation of the Agreement or the winding up, liquidation or distribution of its assets.[20] I denied the defendants' motion for summary judgment on the theory that, as a matter of law, the General Partner improperly terminated the distributions on terms inconsistent with the Partnership Agreement.[21]

In the pending motion, defendants assert that: (1) the Partnership Agreement vested the General Partner with unilateral authority to terminate priority distributions as of the effective date of sale;[22] (2) the Limited Partners consented to the Sale Transaction and consequent termination of priority distributions; and (3) the General Partner was not obligated to pay priority distributions following dissolution of the partnership. Plaintiffs contend the Partnership Agreement did not permit the General Partner to terminate priority distributions to the Limited Partners. With respect to defendants' assertion that the Limited Partners consented to the transaction and consequent termination, plaintiffs argue that they neither fully consented to the termination of distributions nor did they vote to amend the Partnership

---

[19] The briefing denotes the distributions as "quarterly" distributions. However, in order to be consistent with this Court's previous decisions I will refer to the distributions made under the Partnership Agreement as "priority" distributions.
[20] ***Cencom II,*** at 28.
[21] ***Id.***
[22] PA § 8.2.

Agreement to allow termination.[23] Instead, plaintiffs claim that they are entitled to summary judgment because defendants failed to produce evidence that the Partnership Agreement allows for the termination of priority distributions before the termination of the partnership.

In ***Cencom II***, the parties quarreled over the power of the General Partner, under the Partnership Agreement, to terminate distributions pursuant to § 7.3A of the Partnership Agreement.[24] I found that the defendants had failed to proffer sufficient evidence that the Partnership Agreement provided for the termination of priority distributions. My position has not changed.

Plaintiffs claim that the General Partner violated a specific provision of the contract, § 7.3A (which provides for their share of the cash available for distribution). Defendants cite PA §§ 4.2A(3), 4.9, and I 1.1A in their opening brief arguing that these provisions stand for the proposition that the Limited Partners agreed to the terms of the Sale Transaction and specifically agreed that the risks and *benefits* (including distributions) would be borne by

---

[23] ***In re Santa Fe Pacific Shareholders Litig.,*** Del. Supr., 669 A.2d 59 (1995).

[24] *Distributions of Cash Available for Distributions.* All Cash Available for Distributions of the Partnership shall be distributed as follows:

> (1) first, subject to 7.3C, one hundred (100%) percent to the Limited Partners as a class until the 11% Preferred Return is paid;
>
> (2) second, one hundred (100%) percent to the General Partner until the General Partner's Return is paid; and

the Purchaser, not the Parmership, upon the effective date of sale (i.e. July 1, 1995) through closing.[25] Defendants also argue that PA §§ 4.1 A, 4. 1B, and 8.2 granted the General Partner ample authority under the Partnership Agreement to terminate priority distributions.[26] Defendants argue that the Partnership Agreement granted the General Partner "full, exclusive and complete discretion" in managing the Partnership's affairs.[27] Furthermore, defendants assert that the Limited Partners consented to the termination of priority distributions by agreeing to the terms of the Sale Transaction.

In analyzing the Partnership Agreement, as I did in ***Cencom II***, §§ 8.1 A, 8.2, and 8.1B present clear, unambiguous language regarding the dissolution, liquidation and termination of the partnership. Section 8.1A of the Partnership Agreement states that "[t]he Partnership shall dissolve and its affairs shall be wound up upon the happening of any" one of a litany of events including the expiration of the Partnership term, defined in the Agreement as September 30, 1994.[28] According to § 8.2, the General Partner shall proceed with winding up, liquidating and distributing the

---

(3) third, ninety-nine (99%) percent to the Limited Partners and one (1%) percent to the General Partner.

[25] Memorandum in Support of Defendants' Second Motion for Summary Judgment at 13-14 [hereinafter Defs. OB].

[26] Defs. OB at 15-18.

[27] PA § 4.1A. See also PA § 8.2.

[28] PA § 2.4.

Partnership Assets upon dissolution. Dissolution of the Partnership "shall be effective on the day on which the event occurs giving rise to dissolution" but "the Partnership shall not terminate until this Agreement has been cancelled and the Partnership Assets have been distributed as provided in Section 8.2."[29] These provisions provide no authority to terminate the priority distributions *before* the termination of the Partnership. The Agreement's provisions should be interpreted using basic rules of contract law which require me to determine the intention of the parties fi-om the language in the contract.[30] In order to discern the intent of the parties, the contract should be read in its entirety and interpreted to reconcile all of the provisions of the agreement.[31]

I must conclude that on the basis of §§ 8.1A, 8.1B and 8.2 the intention of the parties is perfectly clear. Nothing in the provisions permit the termination of priority distributions before termination of the Partnership, the cancellation of the Agreement or the winding up, liquidation or distribution of its assets. It is, however, unclear whether the reasonably prudent Limited Partner asked to approve the Sales Transaction would have

---

[29] PA § 8.1B.
[30] ***Sanders v. Wang,*** Del. Ch., C.A. No. 16640, mem. op. at 16, Steele, V.C. (Nov. 8, 1999) (citing ***Kaiser Aluminum Corp. v. Matheson***, Del. Supr., 681 A.2d 392, 395 (1996)).
[31] ***Sanders***, at 16.

understood that approval was tantamount to an amendment to the Partnership Agreement authorizing termination of priority distributions or ratification of the General Partner's actions in structuring a sales transaction that effectively terminated the Limited Partners' contractual right to priority distributions.

I can not accept defendants' assertions that the Limited Partners consented to the Sale Transaction and the consequent termination of priority distributions upon the effective date of sale (stated as July 1, 1995 in the Disclosure Statement) and that voting for the sale transaction constituted ratification of the General Partner's authority to terminate priority distributions or effectively amended the Partnership Agreement. Ratification can effectively occur only where the specific transaction is clearly delineated to the investor whose approval is sought and that approval has been put to a vote.[32] In ***Santa*** Fe, the Supreme Court held that the ***Santa Fe*** stockholders, in voting on a merger transaction, were not asked to ratify the Board's unilateral decision to erect defensive measures. Therefore, absent a fully informed stockholder vote there could be no implied ratification.[33]

[32] ***In re Santa Fe,*** at 68
[33] ***Id.***

The General Partner here never specifically proposed an amendment to the Partnership Agreement. It simply structured a Sale Transaction that would suspend priority distributions on July 1, 1995 and sought the Limited Partners' approval of the terms of the Sales Transaction. Like the shareholders confronted by the defensive measures on which they had no vote in ***Santa*** Fe, the Limited Partners were not asked to approve the General Partner's unilateral decision to terminate priority distributions upon the effective date of sale; rather, they were only asked to approve the terms of the Sale Transaction as proposed in the Disclosure Statement. I can not now comfortably conclude that I know that the Limited Partners did "consent" to the termination of their priority distributions as that term is defined in the Partnership Agreement.[34]

The parties' cross-motions for summary judgment are denied.

C. Appraisal Issue

In ***Cencom II***, I acknowledged that the evidentiary record failed to address three issues of material fact: (1) what method of valuation, independent or aggregate, would be proper for valuing the Partnership as a

[34] "Consent" means the affirmative vote at a meeting of the Partnership, or the written approval, authorizing the act for which the authorization is solicited, of so many of the Limited Partners whose combined Capital Contributions represent (unless otherwise specified) a majority of the total Capital contributions of the Limited Partners. PA § 1

whole;[35] (2) whether the General Partner adequately presented the stated valuations to the Limited Partners in the Disclosure Statement;[36] and (3) whether the General Partner provided "equal information" to each of the appraisers.[37] Accordingly, I denied summary judgment. I revisit these same issues below.

1. Aggregate v. Individual Valuation

I am quite familiar with the parties diametrically opposed views regarding the proper valuation of the cable systems. Fitzergald (Daniels) and Fineberg both valued independent cable systems individually then totaled that sum to reach a value for the Partnership as a whole. Kagan, the third appraiser, used an aggregate valuation. At the time of the first motion for summary judgment, the record did not reconcile which method valued the assets of the Partnership "on a going concern basis.. .in conformity with standard appraisal techniques", as the Partnership Agreement requires.[38] At issue once again is whether "standard appraisal techniques" require that the assets be valued in the aggregate or individually and then totaled.

Defendants assert that a contractual "right of first refusal" would preclude a valuation of the cable system in the aggregate mandating a

---

[35] ***Cencom ZI,*** at 21-23.
[36] ***Id.,*** at 17-26.
[37] ***Id.*** at 19-20.
[38] PA at A-2.

conclusion that assets must be valued individually and then totaled.[39] Plaintiffs argue that valuing the systems individually directly violates the Partnership Agreement.[40] Plaintiffs also contend that "standard appraisal techniques" require partnership assets to be valued as a whole, which plaintiffs' expert suggests could "yield a greater appraised value."[41] Further, the plaintiffs regard the appraisals performed by Fineberg and Daniels as mere "summary appraisals" that fail to disclose material information.

Does a genuine issue of material fact exist over which method is consistent with "standard appraisal techniques?" At the time of the earlier opinion, I was admittedly unsure whether "standard appraisal techniques" would require considering the General Partner's "right of first refusal" to be the dominant factor in determining the fair market value of the Partnership systems. I still can not resolve on the current record which methodology for appraisal does conform with "standard appraisal techniques." Further discovery and ultimate trial with expert testimony should resolve the meaning of the term used in the Partnership Agreement and how it should be applied to the transaction. Accordingly, summary judgment is denied.

---

[39] Geffen Supp. Aff. at ¶ 16.
[40] Plaintiffs' Brief in Opposition to Defendants' Second Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment at 22-26 [hereinafter Pls. AB].
[41] Pecaro Aff. at ¶ 10(a). *See also* Supp. Pecaro Aff. at ¶ 5.

2. ***Disclosure of Valuation Summaries***

In ***Cencom II***, I denied summary judgment because 1 found that the facts needed to be "more thoroughly developed before it [was] possible to apply the law." At this juncture, the threshold issues include not only whether the parties have produced a sufficient factual record to enable me to determine whether the presentation of the appraisals conformed to standard techniques but also whether the presentation adequately disclosed all material facts. I believe the present record does not resolve this issue and accordingly, summary judgment is denied.

During ***Cencom II***, both parties presented widely divergent expert opinion on what would be considered standard practice in performing appraisals and presenting valuations in the Disclosure Statement.[42] In this pending motion, the parties again submit evidence on the propriety of the presentation of the appraisal methods attempting to shed a ray of clarity to an otherwise "impenetrable haze."[43]

---

[42] Plaintiffs' expert, Pecaro, testified that Daniels' and Fineberg's and appraisals failed to reveal material information and as a result, failed to conform to Uniform Standards of Professional Appraisal Practice ("USPAP"). Pecaro Aff. ¶ 1 O(b). Fineberg, testifying for the defendants, stated that the appraisal valuations were prepared according to "standard appraisal techniques" and disclosed all information in a manner that conformed with the Partnership Agreement. Fineberg Aff. ¶ 3.

[43] ***Cencom II,*** at 25.

Defendants contend that the General Partner did not breach its duty of candor in its presentation of the appraisals. Defendants argue that the presentation of the appraisals to the Limited Partners complied with the requirements of the Partnership Agreement.[44] Defendants state that Partnership Agreement only requires the "appraisals be 'conducted' in conformance with 'standard appraisal techniques. '"[45] Plaintiffs allege that defendants breached their duty of candor by omitting material facts – the cash flows underlying the valuations of the Partnership – in their appraisal. Plaintiffs also allege that presenting Daniels' and Fineberg's appraisals in summary form did not conform to the Partnership Agreement's requirement. Plaintiffs claim that cash flows underlying the valuations are material information which must be disclosed rather than the mere summary appraisals attached to the Disclosure Statement.

Plaintiffs' expert suggested that the appropriate method of presenting an appraisal, according to USPAP, is to supply the discounted cash flow projections and the associated calculations and assumptions.[46] On the other hand, defendants' expert opined that omitting the assumptions and

[44] Defs. OB at 29. See *also* Supp. Gefen Aff. ¶ 12, 19-21
[45] Defs. OB at 29.
[46] Pecaro Aff. ¶ 10(b), 37.

calculations underlying Daniels' and Fineberg's discounted cash flow analyses in the summary appraisals incorporated into the Disclosure Statement does in fact comport with "standard appraisal techniques" and therefore satisfies the requirements of the Partnership Agreement.[47] He explains that the appraisal reports "meet the criteria in the Partnership Agreement requiring that the systems be valued on a going concern basis in conformity with standard appraisal techniques."[48] I can not discern, at the summary judgment level in light of the experts' disagreement, whether the form ofpresentation of the appraisal does or does not conform with standard techniques.

In the alternative, defendants argue that the assumptions and calculations missing from the Disclosure Statement were not material to a reasonably prudent Limited Partner because this information is "complicated and technical" and requires a "high level of financial or technical sophistication" to understand thereby precluding any breach of the General Partner's duty of candor."[49] Defendants also contend that no investor, of the more than 10,000 who received the Disclosure Statement, ever requested the

[47] Supp. Geffen Aff. ¶ 21.
[48] ***Id***.
[49] Defs. OB at 30. *See also* Supp. Geffen Aff. ¶ 21

information which, plaintiffs suggest, should have been included in the appraisals.

The standard for materiality is well-established and is fully set forth earlier in this opinion.'" No case suggests that the absence of formal documented inquiry by an investor establishes that the information which could have been, but was not requested, was therefore immaterial. Nevertheless, for plaintiffs to prevail they must show "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the 'total mix' of information made available."[51] Whether a reasonably prudent Limited Partner would have found the omitted information material is an issue of fact, not law, and therefore inappropriate for summary judgment.

3. Equality of Information Supplied to Appraisers

In ***Cencom II,*** I concluded that a genuine issue of material fact existed over whether the General Partnership may have breached its fiduciary duty of loyalty by failing to provide equal information to each of three appraisers in an effort to minimize the purchase price that its affiliates would have to pay for either the parts or the sum of the parts of the cable systems. The

---

[50] See *supra,* note 18 and accompanying text.
[51] ***Rosenblatt***, at 944 (quoting ***TSC Industries, Inc. v. Northway, Inc., 426*** U.S 438,449 (1976)); ***see also Loudon***, at 143.

record has since been supplemented by a March 10, 1995 letter sent from Jerald L. Kent to Robin V. Flynn at Kagan, which was not previously made a part of the record.'"

Defendants maintain that the construction expenditure information Kent supplied to Kagan was tantamount to the information supplied to Daniels and Fineberg, and point out that the Kent to Kagan letter was simultaneously carbon copied to Daniels.[53] Plaintiffs argue the General Partner breached its duty of loyalty by providing Kagan capital expenditure information not previously provided to either Daniels or Fineberg, with the intent of lowering Kagan's appraisal and the purchase price.[54]

The record in ***Cencom ZZ*** did not reflect the circumstances surrounding the March 10, 1995 letter sent to Kagan. Attached to the letter is a schedule of anticipated capital expenditures. The schedule was provided to Kagan because they, unlike Daniels and Fineberg, did not conduct an independent evaluation of anticipated capital expenditures and Kent "erroneously assumed" such an evaluation would be conducted. The letter was carbon copied to Fitzgerald at Daniels so that he, along with Fineberg at

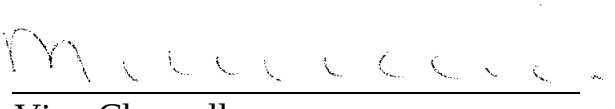
[52] March 10, 1995 Letter from Jerald L. Kent, Charter Communications to Robin V. Flynn, Kagan Media Appraisals, Inc.
[53] Fineberg (Fineberg CS) did not receive a copy of the letter, but, defendants assume that Fitzgerald (Daniels), with whom the March 10, 1995 letter was carbon copied, and Daniels consulted one another on the anticipated capital expenditures.
[54] Pls. Al3 at 20.

Fineberg CS, could modify their valuations of the Partnership's assets. Consistent with the information contained in the letter, all three appraisers were provided equal information pertaining to capital expenditure figures and accordingly, no genuine issue of material fact exists, there is no breach of duty and, as a matter of law, on this issue, defendants are entitled to summary judgment.

IV. CONCLUSION

Defendants second motion for summary judgment is ***granted in part*** and ***denied in part.*** Plaintiffs' cross motion for summary judgment is ***denied.***

IT IS SO ORDERED.



Vice Chancellor