Unreported Cases

INTRODUCTION

UNREPORTED CASES is a continuing feature of THE DELAWARE JOURNAL OF CORPORATE LAW. All unreported cases of a corporate nature that have not been published by a reporter system will be included. The court's opinions are printed in their entirety, exactly as received.

To expedite the attorney's research, all cases are headnoted according to the National Reporter key number classification system.* Indices are provided for case names, statutes construed, rules of court, and key number and classifications for this issue.

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ADIRONDACK GP, INC. v. AMERICAN POWER CORP.

No. 15,060

Court of Chancery of the State of Delaware, New Castle

November 13, 1996

Defendants, one general and one limited partner in a Delaware Limited Partnership, failed to meet a cash call pursuant to the provisions of the limited partnership agreement. Defendants alleged that the necessity of the cash call resulted from action of the plaintiff and its parent corporation, and first-filed a derivative claim in Pennsylvania alleging fraud, breach of fiduciary duty, contract and other claims against plaintiff's parent corporation. Plaintiff later-filed this action seeking to enforce the provisions of the partnership agreement. Defendants moved to dismiss the Delaware action challenging the court's subject matter jurisdiction, or alternatively, to stay the Delaware action in favor of the prior-filed Pennsylvania action.

The court of chancery, per Vice-Chancellor Steele, denied defendants' motion to dismiss, because resolution of the dispute primarily concerned interpretation and enforcement of the partnership agreement rather than a general partner's right to serve in that capacity; therefore, section 111 was the correct jurisdictional section. The court granted the motion to stay because the actions contained substantially similar parties and issues, and there were no compelling reasons why the Pennsylvania court was unable to resolve the dispute.

1. Courts ⇐ 3, 127.5
   Partnership ⇐ 350, 351

Section 110 of the Delaware Uniform Limited Partnership Act confers jurisdiction on the court of chancery to determine, among other things, the right of any person to be a general partner of a limited partnership. DEL. CODE ANN. tit. 6, § 17-110 (1994).

2. Courts ⇐ 3, 127.5
   Partnership ⇐ 350, 351

Section 111 of the Delaware Uniform Limited Partnership Act confers jurisdiction on the court of chancery to interpret, apply or enforce the provisions of a partnership agreement, or the duties, obligations or

liabilities among partners or of partners to the limited partnership. DEL. CODE ANN. tit. 6, § 17-111 (1994).

3. Courts ⇐ 3, 127.5
Partnership ⇐ 350, 351

Section 111 of the Delaware Uniform Limited Partnership Act is the correct jurisdictional section where resolution of the parties' dispute primarily concerns interpretation and enforcement of their partnership agreement rather than a general partner's right to serve in that capacity. DEL. CODE ANN. tit. 6, § 17-111 (1994).

4. Action ⇐ 67, 69(1)
Motions ⇐ 2

Policy considerations and well-established practice criteria favor granting a stay of a Delaware action in favor of a prior-filed Pennsylvania action where governance issues are not significantly implicated and claims of the Pennsylvania action must be expected to form affirmative defenses in the Delaware action.

5. Courts ⇐ 3, 127.5
Partnership ⇐ 350, 351, 370

Pursuant to section 110 of the Delaware Uniform Limited Partnership Act, the court of chancery may hear and determine the validity of any admission, election appointment or withdrawal of a general partner of a limited partnership, and the right of any person to be a general partner of a limited partnership, and, in case the right to serve as a general partner is claimed by more than one person, may determine the person or persons entitled to serve as general partners. DEL. CODE ANN. tit. 6, § 17-110 (1994).

6. Courts ⇐ 3, 127.5
Corporations ⇐ 283(1), 283(3)

Pursuant to section 225 of the Delaware General Corporation Law, the court of chancery may hear and determine the validity of any election of any director, member of the governing body, or officer, and the right of any person to hold such office, and, in case any such office is claimed

by more than one person, may determine the person entitled thereto. DEL. CODE ANN. tit. 8, § 225 (1983).

7. Corporations ⇐ 283
Partnership ⇐ 351, 353, 370
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A challenge to a partner's right to general partnership status is analogous to a challenge to a corporate director's or officer's right to hold office. DEL. CODE ANN. tit. 6, § 17-110 (1994); DEL. CODE ANN. tit. 8, § 225 (1983).

8. Statutes ⇐ 223, 223.2

Differences between section 110 of the Delaware Uniform Limited Partnership Act and section 225 of the Delaware General Corporation Law reflect the necessary accommodation of differences in the structure and operation between partnerships and corporations. DEL. CODE ANN. tit. 6, § 17-110 (1994); DEL. CODE ANN. tit. 8, § 225 (1983).

9. Corporations ⇐ 283(3)

A claim to unseat a director under section 225 of the Delaware General Corporation Law must in some way relate to the challenged director's assumption of the office to come within the scope of the section. DEL. CODE ANN. tit. 8, § 225 (1983).

10. Corporations ⇐ 283(3)
Partnership ⇐ 350, 351
Statutes ⇐ 223.2

A challenge to a continuing right to serve as a director or partner, due to a post-election event, takes a case out of the realm of section 225 of the Delaware General Corporation Law and section 110 of the Delaware Uniform Limited Partnership Act. DEL. CODE ANN. tit. 6, § 17-110 (1994); DEL. CODE ANN. tit. 8, § 225 (1983).

11. Statutes ⇐ 187, 193, 208, 223.1

Words grouped together in a statute must be given related meaning — *noscitur a sociis.*

12. Corporations ⇐ 283(3)
Partnership ⇐ 351, 353
Statutes ⇐ 187, 204, 223.2(5)

The language of section 110 of the Delaware Uniform Limited Partnership Act and section 225 of the Delaware General Corporation Law, including the right to serve as a general partner/director, is connected both conceptually and grammatically to the process by which the occupation of the position is determined. DEL. CODE ANN. tit. 6, § 17-110 (1994); DEL. CODE ANN. tit. 8, § 225 (1983).

13. Corporations ⇐ 283(3)

Section 225 of the Delaware General Corporation Law speaks both directly to the election process, and to the director's right, if elected, to assume the office. DEL. CODE ANN. tit. 8, § 225 (1983).

14. Partnership ⇐ 351, 366, 370

Section 110 of the Delaware Uniform Limited Partnership Act describes the methods by which persons may become general partners, and then includes language analogous to that of section 225 of the Delaware General Corporation Law to describe a challenge to the right to assume office. DEL. CODE ANN. tit. 6, § 17-110 (1994); DEL. CODE ANN. tit. 8, § 225 (1983).

15. Corporations ⇐ 283(3)
Quo Warranto ⇐ 1

Section 225 of the Delaware General Corporation Law is a statutory equivalent of a common law *quo warranto* action which was designed to test the legal authority of an officeholder. DEL. CODE ANN. tit. 8, § 225 (1983).

16. Corporations ⇐ 283(3)

Section 225 of Delaware General Corporation Law has limited scope which does not include: (1) challenges to the issuance of shares, because it does not relate to the validity of the election of a director, or (2) issues collateral to the election process. DEL. CODE ANN. tit. 8, § 225 (1983).

17. Corporations ⇐ 283(3)
Partnership ⇐ 351
Statutes ⇐ 223, 223.2(5)

Where a plaintiff does not challenge the legal authority by which a general partner occupies its position but rather challenges the general partner's right to continue as such, section 225 of the Delaware General Corporation Law does not provide for such a challenge if an analogy was made in the corporate context. DEL. CODE ANN. tit. 8, § 225 (1983).

18. Corporations ⇐ 283(3)

Section 225 of the Delaware General Corporation Law is the only statute which gives the court of chancery jurisdiction to review an election. DEL. CODE ANN. tit. 8, § 225 (1983).

19. Partnership ⇐ 351, 370

Where a general partner's performance of its obligations, and not the title to the office, are in dispute, the dispute fits within section 111 of the Delaware Uniform Limited Partnership Act, which interprets, applies, or enforces the provision of an agreement, and a general partner's duties, obligations or liabilities to the limited partnership. DEL. CODE ANN. tit. 6, § 17-111 (1994).

20. Partnership ⇐ 351

A claim that does not go to the authority of a general partner's right to serve does not fall within the specific provision, section 110 of the Delaware Uniform Limited Partnership Act, as illumined by section 225 of the Delaware General Corporation Law, but properly remains within the general provision, section 111. DEL. CODE ANN. tit. 6, §§ 17-110 to -111 (1994); DEL. CODE ANN. tit. 8, § 225 (1983).

21. Action ⇐ 69(2), 69(4)

The granting of a stay is not a matter of right, but rests within the sound discretion of the court, which considers the underlying principles of comity and the orderly and efficient administration of justice.

22. Action ⇐ 69(2), 69(4)

Deference to the principles of comity and orderly and efficient administration of justice favors the granting of a stay to confine litigation to the forum where an earlier action involves substantially the same parties and issues.

23. Action ⇐ 69(2), 69(4)

If the first-filed and later-filed actions contain substantially similar parties and issues, a motion to stay should be granted subject to the consideration of the same determinative factors of a motion to dismiss for *forum non conveniens*, which include the applicability of Delaware law and the practical considerations of moving the case forward.

24. Action ⇐ 69(4)

Parties of two actions will be substantially similar where the parties are related entities.

25. Action ⇐ 69(2), 69(4)

Issues of two actions will be substantially similar where the same basic dispute underlies both actions.

26. Action ⇐ 69(2), 69(4)

If the same factual disputes must be resolved in two cases, allowing both to go forward carries the attendant risk of inconsistent verdicts and would be a waste of both courts' resources.

27. Action ⇐ 69(2), 69(4)

In the absence of some compelling reason why the court of jurisdiction of the first-filed action is unable to resolve the dispute and grant necessary an appropriate relief, the case should proceed in the first-filed jurisdiction, because the issue of standing may arise and the plaintiff will be deprived of its choice of forum.

28. Action ⇐ 68, 69(1)

Absent significant policy considerations underlying the governance of a Delaware entity or financial emergencies jeopardizing the continued financial viability of the entity, a stay of a later-filed action will not impede the orderly and efficient administration of justice.

Gregory P. Williams, Esquire, Robert J. Stearn, Jr., Esquire, and Brigitte V. Fresco, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for plaintiff.

Kurt M. Heyman, Esquire, of Wolf, Block, Schorr and Solis-Cohen, Wilmington, Delaware; and Edward F. Mannino, Esquire, Jay A. Dubow, Esquire, and Charlotte E. Thomas, Esquire, of Wolf, Block, Schorr and Solis-Cohen, Philadelphia, Pennsylvania, of counsel, for defendants.

STEELE, *Vice-Chancellor*

I. Issues Presented

Defendants make alternative motions presenting first, a challenge to the Court's subject matter jurisdiction; and second, a request to stay the proceedings.

A. Motion to Dismiss

[1-3] Section 110 of the Delaware Uniform Limited Partnership Act ("DULPA") confers jurisdiction on this Court to determine, among other things, "the right of any person to be a general partner of a limited partnership[.]" Section 111 of the DULPA confers jurisdiction on this Court "to interpret, apply or enforce the provisions of a partnership agreement, or the duties, obligations or liabilities . . . among partners or of partners to the limited partnership[.]" Defendants move to dismiss this expedited proceeding on the theory plaintiff must allege section 110 as the jurisdictional basis rather than section 111 because its claim will ultimately determine whether defendant may continue to be a general partner. I conclude section 110 is inapplicable to such a dispute and that section 111 is the correct jurisdictional section because resolution of the parties' dispute primarily concerns interpretation and enforcement of their partnership agreement rather than a general partner's right to serve in that capacity.

B. Motion to Stay Proceedings

[4] Defendants' alternative motion requests a stay of the Delaware action in favor of a prior-filed Pennsylvania action. I conclude policy considerations and well-established practical criteria favor granting the stay where, as here, governance issues are not significantly implicated and the claims of the Pennsylvania action must be expected to form the affirmative defenses of the Delaware action.

II. Background

The plaintiff in this action, Adirondack GP, Inc. ("Adirondack"), is one of two general partners in American Fiber Resources, LP ("AFR"), a Delaware Limited Partnership. Adirondack Recycle, LP ("Recycle"), is one of two limited partners of AFR. Neither AFR nor Recycle is a party named in this action. Defendant American Power Corp. ("APC"), a Pennsylvania corporation, is the second of the general partners. Defendant American Power Investors, Inc. ("API"), is the second of the limited partners.[1]

AFR recycles paper. In 1994, it began construction of a recycling facility in West Virginia. The partners financed the project with capital contributions and over $200 million in local tax exempt bonds. Before completion of the facility, AFR's finance manager predicted operating cash flow shortages. To ensure the facility's future working capital requirements, the general partners entered into the Cash Shortfall Funding Agreement (the "funding agreement").[2] Under this agreement, an upcoming shortfall required the partners to meet any and all predicted deficits to a maximum of $14.5 million. The partners were responsible for contributing the shortfall amount in the percentage equivalent to their interest in the partnership. The Adirondack Partners were responsible for just under 75% of any shortfall amount, and the American Partners just over 25%.

The partners were allowed to meet the calls in a variety of ways, including an offset against any monies owed from the partnership, but failure to meet the call was considered an "Event of Default" under the

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[1]Because they are related entities, Adirondack and Recycle will be referred to collectively as the "Adirondack Partners." For the same reason, APC and API will be referred to collectively as the "American Partners."

[2]AFR Cash Shortfall Funding Agreement, attached as Exhibit B to plaintiff's complaint.

Restated Limited Partnership Agreement (the "partnership agreement").[3] Article X of the partnership agreement permits the non-defaulting general and limited partner group, at their discretion and upon written notice, to purchase (or cause the partnership to purchase) the partnership interest of the defaulting party group, at fair market value less any damages suffered by the partnership and the non-defaulting partners as the result of the default.[4]

The facility has not been a success operationally or financially. At the outset, additional processing machinery and operational systems resulted in cost overruns. More significantly, the plant apparently has not, as of yet, produced recycled paper of the quality originally planned, or sufficient to make it profitably salable. Not surprisingly, working capital shortages were soon predicted. The American Partners did not meet a cash call pursuant to the funding agreement due in February 1996. Shortly thereafter, the Adirondack Partners began the notification and valuation procedures described in the default provisions of the partnership agreement. The American Partners responded by challenging their obligation to meet the call, arguing that the Adirondack Partners, along with their parent, Alstrom Machinery Holdings, Inc. ("AMHI"), which constructed the facility, caused the shortfall. API then filed derivative claims in Pennsylvania on behalf of the partnership and against AMHI alleging fraud, breach of fiduciary duty, contract and other claims in connection with the design construction and operation of the AFR facility. Several weeks later, Adirondack filed the instant action to enforce the default provisions of the partnership agreement. By order dated June 18, 1996, I agreed to expedite these proceedings. Defendants then brought the motions I decide today.

III. Motion to Dismiss

[5] Defendants base their motion to dismiss on plaintiff's allegation section 111[5] is the source of this Court's jurisdiction. Defendants contend section 110[6] is the sole statutory provision by which I may hear this controversy. In relevant part, sections 110 and 111 provide as follows:[7]

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[3]Restated Limited Partnership Agreement, attached as Exhibit A to plaintiff's complaint.

[4]Restated Limited Partnership Agreement § 10.3.

[5]6 *Del. C.* § 17-111 (1994).

[6]6 *Del. C.* § 17-110 (1994).

[7]Because this is the first opportunity to examine the scope of section 110, its relevant textual portions along with other sections I believe necessary to address the issue are quoted extensively.

> **§ 17-110. Contested matters relating to general partners; contested votes.** [¶] (a) Upon application of any partner, the Court of Chancery may hear and determine the validity of any admission, election, appointment or withdrawal of a general partner of a limited partnership, and the right of any person to be a general partner of a limited partnership, and, in case the right to serve as a general partner is claimed by more than 1 person, may determine the person or persons entitled to serve as general partners; and to that end make such order or decree in any such case as may be just and proper[.]
>
> **§ 17-111. Interpretation and enforcement of partnership agreement.** [¶] Any action to interpret, apply or enforce the provisions of a partnership agreement, . . . or the duties, obligations or liabilities among partners or of partners to the limited partnership, . . . may be brought in the Court of Chancery.

[6] Defendants' argument begins with the notion the instant action is the partnership analogue to an action under section 225 of the Delaware General Corporation Law.[8] In relevant part, section 225 provides:

> **§ 225. Contested election of directors; proceedings to determine validity.** [¶] Upon application of any stockholder or director, or any member of a corporation without capital stock, the Court of Chancery may hear and determine the validity of any election of any director, member of the governing body, or officer of any corporation, and the right of any person to hold such office, and, in case any such office is claimed by more than 1 person, may determine the person entitled thereto; and to that end make such order or decree in any such case as may be just and proper[.]

Defendants urge the Court to hold the scope and jurisdictional requirements of sections 110 and 225 to be analogous. Defendants argue the language of both section 110 and section 225 require service upon the legal entity involved, and there is therefore an implicit requirement the

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[8]See 8 *Del. C.* § 225 (1983).

legal entity be joined in the action. Since plaintiff in this action has neither served nor joined AFR, defendants conclude its complaint must be dismissed for failure to join a necessary party. Whether either of the sections contain such a requirement is an issue I need not decide because I conclude defendants' argument proceeds from a faulty premise. Even assuming the two sections and their jurisdictional requirements to be analogous, the plaintiff's claim is not analogous to a claim cognizable under section 225.

[7-8] While no case I am aware of has addressed any aspect of section 110, defendants have convincingly argued the parity of the two sections. Comparison of the language of the sections shows them to be too similar, in my view, not to conclude the language of section 110 was borrowed from section 225. Where there are differences, they reflect the necessary accommodation of differences in the structure and operation between partnerships and corporations. No one would argue the good sense and efficacy of interpreting and applying the same language to the same effect. The soundness of that proposition of statutory construction takes on additional practical importance when applied to statutory provisions pertaining to Delaware legal entities. I will begin, therefore, by accepting defendants' proposition that section 110 is the partnership analogue to section 225.

[9] The first question is whether, applying analogous case law decided under section 225, plaintiff's claim can properly be brought under section 110. The corporate translation of plaintiff's claim would be a director's violation of the by-laws or charter, the contravention of which would preclude them from continuing to serve as a director. Defendants would argue a claim to unseat the director falls under section 225 as one determining his "right to serve" as a director. But defendants read the statute too broadly. As I read section 225 and the cases addressing the scope of the section, a claim must in some way relate to the challenged director's assumption of the office to come within the scope of the section.

[10] Because such corporate disputes generally arise in the context of an election, cases addressing the scope of section 225 are few. While some cases have been decided outside of an election contest *per se*, the underlying claim remains a challenge to the director's legitimate right to hold the office. What is fundamentally at issue in the cases is the means by which the director attained the position, not his authority, once rightfully occupying the position, to continue to do so. It is the continuing right to serve in a position, because of some later event (here, APC's alleged default) which takes this case out of the realm of section

225 (and section 110). This is, admittedly, a fine distinction. But it is one supported by the statute and followed by the cases.

[11-14] Words grouped together in a statute must be given related meaning -- *noscitur a sociis.*[9] In my view, the language of the two sections including the right to serve as a director/general partner is connected both conceptually and grammatically to the preceding description of the process by which the occupation of the position is determined. In section 225, "the Court of Chancery may hear and determine the validity of any election of any director [or other corporate official] . . . and the right of any person to hold such office[.]"[10] The first part of the sentence speaks directly to the election process. The second quoted portion includes an aspect of that process; the director's right, if elected (or appointed) to assume the office. In the same way, section 110 first describes the methods by which persons may become general partners and then includes language analogous to that of section 225 to describe a challenge to the right to assume that office: "[T]he Court of Chancery may hear and determine the validity of any admission, election, appointment or withdrawal of a general partner . . . and the right of any person to be a general partner[.]"[11]

[15-17] The cases addressing the breadth of section 225 bear out this distinction. In ***Kahn Bros. & Co. v. Fishbach Corp.***, Chancellor Allen described section 225 as "a statutory equivalent of a common law *quo warranto* action by which title to corporate office may be determined."[12] *Quo warranto* was a common law writ designed to test the legal authority of an officeholder.[13] Despite defendants' urging to the contrary, the facts of ***Kahn Bros.*** fit within the scope of section 225 as described above. The plaintiffs there claimed a director had obtained his seat by fraud.[14] Thus, the plaintiff's claim went directly to the authority by which the director obtained the seat. Other cases similarly limit section 225's scope. In ***In re Hybrilonics, Inc.***, this Court rejected an effort to challenge the issuance of shares: "[T]he issue now being raised does not relate to the validity of any election of directors."[15] Similarly, in ***Bossier v. Connell***, this Court refused to hear issues collateral to the election process.[16] Again, in ***Bachmann v. Ontel***, the court dismissed an

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[9]It is known from its associates. *See Black's Law Dictionary* 1060 (6th ed. 1990).

[10]8 *Del. C.* § 225.

[11]6 *Del. C.* § 17-110.

[12]Del. Ch., C.A. No. 8987, Allen, C. (Nov. 15, 1988), Mem. Op. at 4.

[13]*See Black's Law Dictionary* 1256 (6th ed. 1990).

[14]*Kahn Bros., supra*, at 1.

[15]Del. Ch., C.A. No. 8635, Hartnett, V.C. (Jan. 27, 1988), Mem. Op. at 2.

[16]Del. Ch., C.A. No. 8624, Hartnett, V.C. (Oct. 7, 1986), Mem. Op. at 2-3.

affirmative defense that sought to have directors removed after they had been properly elected.[17] The hypothetical corporate analogy posed at the beginning of the discussion does not fit within the scope of section 225 as delineated by these cases. Plaintiff in this case does not challenge the legal authority by which APC occupies the position of general partner. Rather, it challenges APC's right to continue as a general partner following alleged failure to meet its obligations.

[18] None of the cases defendants have cited are inconsistent with my reading of the section. In ***Grossman v. Liberty Leasing***, for example, the plaintiff challenged the incumbent directors' decision, without shareholder vote, to create and then fill additional seats on the board.[18] The Court of Chancery did not conclude, as defendants suggest, that section 225 (and therefore section 110) "provide[s] the exclusive means for bringing a dispute to determine who has 'the right to serve as a general partner of a limited partnership.'"[19] Rather, the court held "section 225 is the only statute which gives this court jurisdiction to review an election[.]"[20] The other case offered by defendants in support of this contention was brought in federal court for the District of Delaware in 1944.[21] But ***Perrot*** stands for nothing more than the unremarkable proposition that a federal court has no authority to order a Delaware corporation to hold an election.[22]

[19] Defendants' argument that the action is "in the nature of [an] *in rem* [proceeding], the '*rem*' being the corporate [or partnership] office the title to which is in dispute[,]"[23] describes the distinction made here nicely. What is in dispute in this case is not the title to the office, but APC's performance of its obligations under the funding and partnership agreements. The dispute, therefore, fits squarely within the provisions of section 111, as it is an action to interpret, apply or enforce the provisions of an agreement, and APC's "duties, obligations or liabilities . . . to the limited partnership[.]"[24]

[20] In a last gasp effort to preclude plaintiff from invoking section 111 and to force this claim under section 110, defendants argue section 111

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[17]Del. Ch., C.A. No. 7805, Brown, C. (Nov. 7, 1984).

[18]Del. Ch., 295 A.2d 749, 752 (1972).

[19]Defs.' Reply Brief at 7 (quoting, in part, section 110).

[20]*Grossman*, 295 A.2d at 752.

[21]*Perrot v. U.S. Banking Corp.*, 53 F. Supp. 953, 957 (D. Del. 1944).

[22]*Id.* (citing section 225 as example of Delaware court statutory authority over Delaware corporations).

[23]Defs.' Op. Brief at 18 (citing *Steinkraus v. GIH Corp.*, Del. Ch., C.A. No. 11858, Allen, C. (Jan. 16, 1991)).

[24]6 *Del. C.* § 111.

is too broad. Defendants contend that since partnerships are created by contract, section 111 will never be inapplicable to a dispute involving a limited partnership. If section 111 is not restricted by defendants' reading of section 110, as the exclusive jurisdictional provision for actions affecting a general partner's position within the partnership, section 111 will swallow section 110. Defendants thus argue the specific (*i.e.* section 110) must prevail over the general (*i.e.* section 111) in order to avoid making section 110 "mere surplusage."[25] I take no exception to this general proposition. It may well be that the two sections are intended to operate in the way defendants suggest. Because plaintiff's claim does not go to the authority of a general partner's right to serve, however, it does not fall within the specific provision (section 110), but properly remains within the general provision (section 111).[26]

I find plaintiff's claim does not come within the provisions of section 110, as illumined by section 225, but does come squarely within the scope of section 111. Having so determined, I need not consider whether section 110 requires plaintiff to join the partnership in this action. Nor will I consider defendants' challenge to plaintiff's invocation of this Court's common law equity jurisdiction. Defendants' Motion to Dismiss is therefore denied.

IV. Motion to Stay

[21-23] I must next consider defendants' motion to stay this action in favor of the Pennsylvania claim. The well settled considerations regarding this motion were long ago set out in ***McWane v. McDowell-Wellman Engineering Co.***[27] The granting of a stay is not a matter of right, but rests within the sound discretion of the court.[28] Analysis of the considerations must be informed by the underlying principles of comity and the orderly and efficient administration of justice.[29] Deference to these principles generally favors the granting of a stay to confine litigation to the forum where an earlier action involves substantially the same parties and issues.[30] If the first-filed and the later-filed actions do

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[25]Defs.' Reply Brief at 8 (citing ***Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.***, Del. Supr., 636 A.2d 892, 900 (1994)).

[26]Of course, neither section 110 nor section 111 requires, by its terms, that a particular action be bought under one section to the exclusion of the other where otherwise applicable.

[27]Del. Supr., 263 A.2d 281 (1970).

[28]*Id.*

[29]*Id.* at 283.

[30]*Id.; E.I. duPont de Nemours & Co. v. CIGNA Prop. & Cas. Co.*, Del. Ch., C.A. No. 12386, Allen, C. (July 17, 1992), Mem. Op. at 9; *Schnell v. Porta Sys. Corp.*, Del. Ch., C.A.

contain substantially similar parties and issues, the motion should be granted subject to consideration of the same factors determinative of a motion to dismiss for *forum non conveniens*.[31] These factors include the applicability of Delaware law and the practical considerations of moving the case forward (*e.g.*, the relative ease of access to proof and witnesses). Ultimately, the exercise of the court's discretion will depend upon review of the relevant practical considerations keeping in mind the broader policies of comity between the states and their courts and the orderly and efficient administrative of justice.[32]

[24] As an initial matter, I must find the parties and issues of the two actions to be substantially similar. As noted above, absolute identity of the parties and claims is not required. In this case, the relationship between the parties in the two actions convinces me they are substantially the same. It will be remembered that APC and API are related entities. API is the derivative plaintiff in the Pennsylvania action, while APC and API are the defendants in this action. The defendant in the Pennsylvania action is AMHI, which is the parent company of the plaintiff in this action. In essence, AFR is controlled by two groups of closely related entities, each of which is represented in the two actions.

[25] Continuing, I find that the same basic dispute underlies both the Pennsylvania and Delaware actions. Generally speaking, the dispute centers around the operation of the West Virginia facility and its poor performance. The narrower issue in the Delaware action is the American Partners' failure to meet the capital call under the funding agreement. While not yet filed, the American Partners' represent their defenses to Adirondack's claim will soon be found in the form of their complaint in the Pennsylvania action. Specifically, the American Partners claim the Adirondack Partners, and their parent AMHI, are responsible for the capital deficits of the West Virginia facility by improper payment of bonuses and upstreaming of assets. American Partners claims these alleged acts breach an implied covenant in the funding agreement not to be the cause of a shortfall. If there is such a covenant, and if it has been breached, defendants argue, there may be no capital shortage, and thus no continuing default under the partnership agreement.

[26] At this stage of the litigation I am not required to pass on the validity of the American Partners' defenses to their alleged default under

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No. 12948, Hartnett, V.C. (April 12, 1994), Mem. Op. at 8 (parties and issues need not be identical).

[31] *Schnell, supra*, at 7-8; *Zimmerman v. Home Shopping Network, Inc.*, Del. Ch., C.A. No. 10911, Jacobs, V.C. (Sept. 11, 1989), Mem. Op. at 13.

[32] *See McWane*, 263 A.2d at 283.

the agreements. Suffice it to say, however, that the issues in the two actions are sufficiently interwoven to favor their trial in a single forum. If the same factual disputes must be resolved in both cases, allowing both to go forward carries the attendant risk of inconsistent verdicts and would be a waste of both this Court's and the Pennsylvania court's resources. [27] One further but equally important consequence is that allowing the Delaware case to proceed on an expedited basis could well deprive the derivative plaintiff in the Pennsylvania action (one of the defendants here) of standing. The plaintiff in Pennsylvania has sued derivatively on behalf of AFR. A result for plaintiff in this action would very likely deprive API of standing to sue in the Pennsylvania action.[33] While it must be true, if the issues are indeed the same, that either case would resolve these issues, the result of refusing to stay the Delaware action will be to deprive the plaintiff of its choice of forum. In the absence of some compelling reason why the Pennsylvania court is unable to resolve the dispute concerning AFR and grant necessary and appropriate relief, I see no reason why the case should not proceed in the first-filed jurisdiction. [28] Nor do the practical factors considered under a *forum non conveniens* analysis require a contrary result. Arguing against the stay, plaintiff directs my attention to ***Oralco, Inc. v. Bradley***.[34] The factors militating against a stay in that action, however, are not present in this action. It is true the time between the first- and later-filed action in ***Oralco*** and the actions in this case are the same. But in this instance, the relative procedural posture of the two actions does not favor, as in ***Oralco***, denial of the stay.[35] Similarly, in this case, though the claims in the first-filed action are broader than those in the later-filed case, as in ***Oralco***, the urgencies that impelled the Court of Chancery in ***Oralco*** to deny the stay, are not present here.[36] Specifically, ***Oralco*** was brought under section 225, and the first-filed action in that case had the effect of jeopardizing the continuing financial viability of the corporation. No such circumstances are alleged here. First, significant policy considerations underlying governance of a Delaware entity under section 225 are simply not present here. Second, no similar financial emergencies have been claimed. There is no apparent reason, therefore, that staying the later-filed action here will impede the orderly and

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[33]While Adirondack has offered to obviate this problem by agreeing not to contest the American Partners' standing in the Pennsylvania action, I agree with the American Partners that the offer does nothing to resolve the potential problem. *See* Defs.' Reply Brief at 23-26.

[34]Del. Ch., C.A. No. 12763, Chandler, V.C. (Nov. 4, 1992).

[35]*See id.* at 4 (noting the court had already set an expedited discovery schedule and trial date in the Delaware action).

[36]*See id.* at 6-7.

efficient administration of justice.[37] Accordingly, the motion to stay this action in favor of the API's prior-filed action in Pennsylvania is granted.

V. Conclusion

For the reasons set forth above, the defendants' motion to dismiss plaintiff's claim for failure to join a necessary party is denied, and defendants' motion to stay the proceedings is granted. Defendants will present an Order, approved as to form by plaintiff, implementing this Opinion.

BALIN v. AMERIMAR REALTY CO.

No. 12,896

Court of Chancery of the State of Delaware, New Castle

November 15, 1996

After the termination of his part in a business relationship with defendant corporation and directors, plaintiff brought claims, both individually and derivatively, on behalf of and against defendant corporation. Plaintiff contended that defendants' actions caused financial harm to the shareholders of the defendant corporation. Plaintiff alleged that (1) the defendants usurped corporate opportunities which belonged to the defendant corporation, (2) the defendants breached their duty of loyalty to defendant corporation and wasted its assets, (3) defendant director breached his fiduciary duty to the defendant corporation by taking for himself a contract that should have gone to the defendant corporation, (4) the defendants failed to satisfy a contract of payment to

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[37]Nor am I aware of any ease of access to proof and witness problems posed by maintenance of the action in Pennsylvania. Plaintiff also raises the spectre of the forum selection clause in their partnership agreement. However, I consider this issue to be no more than one of the many considerations of the *forum non conveniens* analysis, and not independently determinative.

the plaintiff, and (5) the defendants diverted fees from the defendant corporation. Defendants counterclaim that plaintiff breached his fiduciary duty to the defendant corporation, resulting in the loss of a management contract.

The court of chancery, per Vice-Chancellor Jacobs, denied all claims and counterclaims except for the plaintiff's claim that the defendants committed waste of the defendant corporation's assets. This issue shall await the post-trial determination as to whether the plaintiff has standing to assert this claim.

1. Corporations ⇐ 207.1

A stockholder who seeks to serve as a derivative plaintiff must be qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution.

2. Corporations ⇐ 207.1

Defendant has burden to establish a substantial likelihood that the derivative action is not being used for the benefit of all shareholders.

3. Corporations ⇐ 207.1

The adequacy of a derivative plaintiff is determined by (1) economic antagonisms between representative and class; (2) the remedy sought in derivative action; (3) indications that named plaintiff is not the driving force behind the litigation; (4) plaintiff's unfamiliarity with the litigation; (5) other litigation pending between the parties; (6) relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; (7) plaintiff's vindictiveness towards the defendants; and (8) degree of support plaintiff is receiving from the shareholder he purports to represent.

4. Corporations ⇐ 207.1

An adequate shareholder representative may exist where only the first four factors in determining the adequacy of a derivative plaintiff weigh in favor of that representative.

5. Corporations ⇐ 207.1

A plaintiff in a stockholder derivative suit will not be disqualified simply because he may have interests which go beyond the interests of the class.

6. Corporations ⇐ 207.1

Where a derivative plaintiff has a twenty-nine percent ownership stake in defendant corporation, this bespeaks a significant interest in prosecuting the derivative claims.

7. Corporations ⇐ 207.1

In determining whether a conflict of interest prevents a derivative plaintiff from representing the stockholders, the fact that the plaintiff has hostile feelings toward the stockholders is not in itself relevant to the court given the absence of any concrete facts which reveal a conflict of interest.

8. Corporations ⇐ 207.1

In a stockholder derivative suit the true measure of adequacy of representation is not how many shareholders the derivative plaintiff represents, but rather, how well he advances the interests of the other similarly situated shareholders.

9. Corporations ⇐ 69

Under the Delaware General Corporation Law, the board of directors must formally authorize any issuance of stock by the corporation. DEL. CODE ANN. tit. 8, §§ 141, 152-153 (1991).

10. Corporations ⇐ 207.1, 320(4)

For a plaintiff to have standing to assert derivative claims, he must be a shareholder at the time of the acts of which he complains. DEL. CODE ANN. tit. 8, § 327 (1974); DEL. CH. CT. R. 23.1.

11. Corporations ⇐ 207.1, 320(4)

Where standing defense was never raised until trial and an immense amount of resources have been used and the standing issue is only critical to one of many derivative claims, fairness to the litigants and considerations of judicial economy impel towards a resolution of these claims on their merits if standing can be predicated on some legally valid alternative ground.

12. Corporations ⇐ 315

Under the corporate opportunity doctrine, a corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.

13. Corporations ⇐ 315

Usurpation of a corporate opportunity is a factual question, determined by reasonable inference from objective facts.

14. Corporations ⇐ 315

In testing for a usurpation of a corporate opportunity, a corporation, which never owned a direct or indirect interest in real estate nor in the entities formed to own real estate, cannot be said to have fundamental knowledge or practical experience in acquiring or owning real estate.

15. Corporations ⇐ 315

A corporation must be in a position to commit capital to the acquisition of new assets before a stockholder can successfully assert a derivative claim against a member of the corporation for usurping corporate opportunities as to obtaining these new assets.

16. Corporations ⇐ 315

In testing for a usurpation of a corporate opportunity, a derivative plaintiff will fail to establish that the defendant corporate fiduciary placed himself in a position adverse to corporation by taking the opportunity for his own when the right to participate in real estate investments depended upon his status as an active partner in a separate limited partnership, not as a stockholder in the corporation.

17. Corporations ⇐ 307, 310(1)

There is no breach of a fiduciary duty by making uncompensated use of intangible assets of one corporation, such as its name, design logo, or good will, for another entity's purposes where the corporation was an overhead entity that was never intended to make a profit.

18. Corporations ⇐ 307, 310(1)

Directors of a corporation have a duty to assure that the corporation was adequately reimbursed for the use of its tangible resources, such as its manpower and equipment, by third parties because the corporation is intended to operate at a break even level even if it is not intended to make a profit.

19. Corporations ⇐ 310(1), 314(.5)

If a party stands on both sides of a transaction and dictates the terms of the transaction, they will bear the burden of demonstrating the entire fairness of the transaction.

20. Corporations ⇐ 310(1), 320(11)

Evidence that a corporation's deficit decreased after a cost-allocation system was instituted was not sufficient to fulfill director's duty in assuring that the corporation was adequately reimbursed for the use of its tangible resources by third parties.

21. Corporations ⇐ 320(4)

To be an indispensable party to an adjudication, there must be evidence of a cognizable beneficial or economic interest in the controversy.

22. Corporations ⇐ 314, 315

A claim that a party wrongfully attempted to compete with a corporation in order to capture a management agreement for himself that had been made with the corporation will be dismissed where there is evidence that the agreement would have been terminated with the corporation in any event, thus causing no damage to the corporation.

23. Partnership ⇐ 363

A party to an agreement cannot, after the fact, rewrite the agreement to cover a contingency that was not provided for in the agreement.

24. Corporations ⇐ 426(7), 426(11)
Estoppel ⇐ 90(1)

A party who has full knowledge of and accepts the benefits of a transaction may be denied equitable relief if he or she thereafter attacks the same transaction.

25. Corporations ⇐ 426(7), 426(11)

In considering the doctrine of acquiescence, the fact that the opposing party was, or was not, prejudiced is irrelevant.

A. Gilchrist Sparks, III, Esquire, William M. Lafferty, Esquire, and David J. Teklits, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for plaintiff.

David C. McBride, Esquire, Bruce L. Silverstein, Esquire, and John W. Shaw, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, for defendants.

JACOBS, *Vice-Chancellor*

In the course of a business relationship that spanned over fifteen years, Kenneth P. Balin ("Balin" or "plaintiff") and David G. Marshall ("Marshall") established a complicated structure of interrelated partnerships and corporations to conduct their Philadelphia, Pennsylvania-based real estate development business. Unfortunately, at times that business was conducted without adequately documented agreements or,

when there were agreements, without adhering to their terms. Despite its inadequacies, that improvisational structure sufficed as long as Marshall and Balin continued in business together. When they chose to end their relationship, the structure malfunctioned. The resulting disputes culminated in this lawsuit, which Balin commenced on March 16, 1993. Balin asserts claims, both individual and derivative, on behalf of -- and against -- Amerimar Realty Company ("Amerimar Realty"), one of the several entities the parties created and operated in their real estate business. Named as defendants in addition to Amerimar Realty are its directors, Marshall and Howard P. Treatman ("Treatman"). Amerimar Realty also interposed a counterclaim against Balin.

Balin's claims and the counterclaim were tried on December 11-15, 1995. After post-trial briefing, the matter was orally argued on July 22, 1996. This is the Opinion of the Court on the merits of all claims.[1]

Given the number of claims and issues presented, it is useful to provide a brief roadmap of this Opinion at this point. Part I summarizes the "core" facts that set the stage and provide content for the analysis of the parties' claims. Other facts are set forth where appropriate in the later sections devoted to specific claims. Part II considers the threshold procedural defenses, namely, that Balin is an inappropriate representative to assert derivative claims, and (alternatively) that he lacks standing to assert those claims. Part III addresses Balin's derivative claim that, after he left Amerimar Realty, the defendants usurped various corporate opportunities said to belong to Amerimar Realty.[2] Part IV concerns Balin's derivative claims that the defendants breached their duty of loyalty to Amerimar Realty and committed corporate waste by creating and operating Amerimar Enterprises, a company that Marshall owned. Part V treats Balin's derivative claim that Marshall breached his duty of loyalty to Amerimar Realty by obtaining for himself personally a contract to provide to the Rittenhouse Hotel services that Amerimar Realty itself was fully capable of providing. Part V also determines Amerimar Realty's breach of fiduciary duty counterclaim against Balin for causing

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[1]The Court does not address Count II, which plaintiff abandoned in the Pretrial Order, or Count V, which plaintiff abandoned in his Post-Trial Opening Brief. Nor does the Court address the plaintiff's claim for attorneys' fees, which at this stage is premature. For the reasons discussed infra, the Court concludes that all but one of the plaintiff's claims lack merit. The ruling on the single claim found to have merit is subject to a determination of whether the plaintiff has standing to assert that claim. Should the Court find that the plaintiff has standing, damages would be determined in a post-trial proceeding in which the Court would also consider plaintiff's application for attorneys' fees for prevailing on that specific claim.

[2]The 1528 Walnut Street acquisition, which occurred shortly before Balin left Amerimar Realty, is treated separately in Part III B, infra.

Amerimar Realty to lose its management contract with the Rittenhouse Hotel. Finally, Part VI addresses two claims by Balin that challenge the allocation of certain management fees generated from properties located in Denver, Colorado.

I. THE BASIC FACTS

Beginning in the 1970s, Marshall, Balin, and others pooled their efforts and financial resources to identify and acquire real estate and then to manage the resulting portfolio of investment properties.

By the mid-1980s, the structure of the real estate enterprise had evolved to include four distinct kinds of entities: (i) an "umbrella partnership" created by Marshall, Balin and their "deal partners" to pursue potential real estate investments; (ii) "investor" partnerships formed by the umbrella partnership and outside investors to invest capital in the identified properties; (iii) "ownership" entities created to hold title to the specific acquired properties; and (iv) an "overhead" entity created to centralize costs and pay salaries to those partners of the umbrella partnership who were active in searching for properties and/or managing the acquired properties.

This four-part structure acquired sharper definition in 1984, when Marshall and Balin established a business relationship with Mr. Robert Bass.[3] At that time, Amermbass Realty Company, 50% of which was owned by Robert Bass and the remaining 50% by Marshall, Balin and other investors, was established as the overhead entity. In 1986, Amermbass Realty Company was renamed Ameribass Realty Company ("Ameribass Realty").

Aphiliates, L.P was also formed in 1984 as the umbrella partnership. Aphiliates, L.P. was owned by those shareholders of Ameribass Realty who were not affiliated with Robert Bass and the Bass family, including Balin and Marshall.

The primary investment vehicle for this structure was Ameribass-Investors, L.P., whose partners were the umbrella partnership (Aphiliates, L.P.) and other investors who were affiliated with Robert Bass and with Beneficial Corporation.

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[3]Marshall began to work for the Bass family in 1976. In 1977, Balin became a partner with Marshall in David G. Marshall & Company, an entity whose purpose was to search for real estate investment opportunities on behalf of the Bass family. From 1980 to 1984, Balin and Marshall were employed by Bass Brothers Realty Company, which was owned indirectly by the Bass family. Marshall and Balin would participate in the deals they located, and their aggregate portion of the profit participation was then allocated 75% to Marshall and 25% to Balin.

This was the structure until 1987, the year Robert Bass decided to end his affiliation with Marshall and Balin. To formalize Mr. Bass's departure, the enterprise was restructured as follows: Amerimar Realty was formed to replace Ameribass Realty; Amerimar Associates, L.P. was formed to replace Aphiliates, L.P., which was merged into Amerimar Associates; and finally, Ameribass-Investors, L.P. was renamed Amerimar-Investors, L.P. This structure remained in place during the period that is critical to this lawsuit.

By 1991, the relationship between Marshall and Balin had begun to deteriorate. That relationship gradually worsened, and in April 1992, Balin was terminated as a director and an officer of Amerimar Realty. Since that time, Balin's only relevant relationship with the Amerimar group of companies has been as an Amerimar Realty shareholder and as an "inactive" partner in Amerimar Associates, L.P.[4]

After Balin was terminated, Marshall formed a wholly-owned entity, Amerimar Enterprises, Inc. ("Amerimar Enterprises"), to serve as the "overhead" entity for the post-Balin Amerimar structure. Amerimar Enterprises has no employees -- it uses Amerimar Realty's employees to identify potential acquisitions and to service the newly acquired properties. Amerimar Enterprises uses the "Amerimar" name, and holds itself out to the public as a continuation of Amerimar Realty. Marshall established a cost-allocation and reimbursement system whereby Amerimar Enterprises reimburses Amerimar Realty for its personnel and other tangible resources that Amerimar Enterprises uses to conduct its business. No compensation is paid to Amerimar Realty, however, for the use of its name or other "intangible" assets.

II. THE THRESHOLD DEFENSES

Before considering the merits of Balin's derivative claims, the Court must first address two threshold defenses that, if valid, would obviate the need to adjudicate those claims. The first threshold defense is that Balin has a conflict of interest that makes him an inadequate shareholder representative. The second is that Balin is not, and never was, a shareholder of Amerimar Realty and, therefore, lacks standing to assert his derivative claims.

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[4]As discussed in more detail in Part IIB, infra, Amerimar Realty never formally issued shares of stock to Balin or any other investor, although the investors in that corporation considered themselves at all times to be shareholders.

A. The Inadequate Representative Defense

Defendants contend that Balin is not an adequate shareholder representative because Amerimar Realty's remaining shareholders do not support him in this litigation and his interests are antagonistic to Amerimar Realty's. Balin's interests are said to be antagonistic because he is simultaneously asserting individual claims against Amerimar Realty in this lawsuit and in a companion Pennsylvania action.

Balin argues that he is an adequate shareholder representative because the claimed conflict of interest is neither "immediate and obvious" nor a "present threat" to this litigation. Youngman v. Tamoush, Del. Ch., 457 A.2d 376, 381 (1983). Balin also argues that the absence of support from other Amerimar Realty shareholders is immaterial because of his sizeable economic interest in the corporation.

[1-3] I find no basis to conclude that Balin is an inadequate representative plaintiff. A stockholder who seeks to serve as a derivative plaintiff must "be qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution." Id. at 379. It is the defendants' burden to establish a substantial likelihood that "the derivative action is not being used . . . for the benefit of all the shareholders." Id. at 381. In determining the adequacy of a derivative plaintiff, this Court must consider the:

> . . . economic antagonisms between representative and class; the remedy sought in the derivative action; indications that the named plaintiff [is] not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and the defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness towards the defendants and, finally, the degree of support plaintiff [is] receiving from the shareholder he purport[s] to represent.

Id. at 379-80 (quoting Katz v. Plant Indus., Inc., Del. Ch., C.A. No. 6407-N.C., Marvel, C. (Oct. 27, 1981), Mem. Op. at 3-4).

[4] The first four of these factors weigh strongly in favor of Balin as an adequate shareholder representative, and the remaining factors are not significant. There are no specific economic antagonisms between Balin and the shareholders whose interests he purports to represent. In prosecuting the derivative claims Balin seeks a remedy for the benefit of

all shareholders, not for himself alone. Balin is the driving force behind this lawsuit and is intimately familiar with the litigation, as he was involved in all events leading up to it.

[5] Defendants contend that Balin must be deemed inadequate because he instituted litigation in Pennsylvania and asserted individual claims against Amerimar Realty in this action. That conflict, defendants say, is disabling because Balin seeks to use both the pending Pennsylvania litigation and this derivative action as leverage to advance his own personal interests. The defendants do not assert that Balin is seeking to extract "greenmail" or otherwise use his derivative claims to force Marshall to accede to a large individual payout. See Emerald Partners v. Berlin, Del. Ch., 564 A.2d 670, 675-76 (1989). "A plaintiff in a stockholder derivative suit will not be disqualified simply because he may have interests which go beyond the interests of the class . . . ." Id. at 674. Nor would a finding for Balin on his individual claims preclude a recovery by the corporation on the derivative claims. Thus, there is no structural conflict between Balin's individual and derivative claims.

[6] The defendants suggest that because the magnitude of Balin's individual claims far exceeds the arguable value of his derivative claims, Balin's true -- and primary -- interest is in prosecuting his individual claims. But Balin's 29% ownership stake in Amerimar Realty bespeaks a significant interest in prosecuting the derivative claims. See Carlton Invs. v. TLC Beatrice Int'l, Del. Ch., C.A. No. 13950, Allen, C. (Nov. 21, 1995), Mem. Op. at 8. I am not persuaded that Balin's individual claims predominate or motivate him to prosecute his derivative claims half-heartedly. Indeed, Balin has prosecuted all of his claims with adequate (if not excessive) fervor throughout this litigation.

[7] The defendants next contend that Balin's vindictiveness towards them is so intense that it would impede his ability to pursue adequately the interests of the other shareholders. "That plaintiff may have . . . hostile feelings toward defendants is not in itself relevant to the court given the absence of any concrete fact which reveals a conflict of interest. . . ." Emerald Partners, 564 A.2d at 676 (quoting Vanderbilt v. Geo-Energy Ltd., 752 F.2d 204 (3d Cir. 1983)). No such "concrete fact" has been shown here. Indeed, as previously stated, Balin has vigorously prosecuted his derivative claims throughout this entire litigation.

[8] Finally, the defendants argue that Balin must be disqualified because he lacks the affirmative support of the other Amerimar Realty shareholders. But, there is no requirement that Balin must have the active support of the other minority shareholders. Emerald Partners, 564 A.2d at 674. "The true measure of adequacy of representation . . . is not how many shareholders the derivative plaintiff represents, but rather, how

well he advances the interests of the other similarly situated shareholders. Id. (citations omitted).

In short, the defendants have failed to show that Balin is an inadequate shareholder representative.

B. The Standing Defense.

Considerably more problematic is the standing defense. The defendants claim that Amerimar Realty never validly issued stock to Balin and, therefore, Balin lacks standing as a shareholder to maintain a derivative action on the corporation's behalf. Balin responds that even though no shares were formally issued to him, he should be deemed a stockholder because all predicate steps required to issue Amerimar Realty stock to him were taken.

[9] Under the Delaware General Corporation Law, the board of directors must formally authorize any issuance of stock by the corporation. Box v. Box, Del. Ch., C.A. No. 14238, Allen, C. (Feb. 15, 1996), Mem. Op. at 19 (citing 8 Del. C. §§ 141, 152, 153); Brandner Corp. v. Stelnick, Del. Ch., C.A. No. 14463, Jacobs, V.C. (Feb. 22, 1996), Mem. Op. at 15 (same). In this case, the trial evidence establishes that (i) Amerimar Realty's principals, including its initial directors, did intend for capital stock to be issued and (ii) they conducted the corporation's affairs as if stock had been issued. See PX 47, PX 327, PX 332.[5] Despite that, there is no evidence (such as a board resolution or minutes of a board of directors meeting) that the directors ever formally authorized the issuance of any stock. Thus, Balin has not established that the corporation ever validly issued stock to him or to anyone else.

[10-11] For Balin to have standing to assert derivative claims, he must be a shareholder at the time of the acts of which he complains. 8 Del. C. § 327; Court of Chancery Rule 23.1; 7547 Partners v. Beck, Del. Supr., 682 A.2d 160 (1996). Given this failure of proof, the Court could simply decline to adjudicate any of the plaintiff's derivative claims on the basis that Balin lacks standing to assert them. The difficulty, however, is that the standing defense was never raised until the trial, and as a result, an immense amount of resources have now been devoted to prosecuting and defending against these claims on their merits. Moreover, as a practical matter the standing issue is critical to only one of Balin's derivative claims. The remainder can be resolved by assuming, without deciding, that Balin has standing, because (as discussed

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[5]References to the trial transcript are cited throughout this Opinion as "Tr. __"; plaintiff's trial exhibits are cited as "PX __" and defendants' trial exhibits are cited as "DX __".

more fully infra) the remaining derivative claims are substantively without merit. In these circumstances, fairness to the litigants and considerations of judicial economy impel towards a resolution of these claims on their merits if standing can be predicated on some legally valid alternative ground. See In Re MAXXAM, Del. Ch., Cons. C.A. Nos. 12111, 12353, Jacobs, V.C. (September 10, 1996), Op. at 8-10.

It is theoretically possible that standing to sue might be predicated on alternative grounds (i.e., other than as a holder of issued stock). Because those grounds were never adequately developed in the briefs, the Court declines to dismiss the one meritorious claim for lack of standing at this stage.[6] Instead, it will proceed to decide the merits of all derivative claims, subject to a later determination of standing following the submission of supplemental post-trial briefs devoted exclusively to the standing question.

III. BALIN'S CORPORATE OPPORTUNITY CLAIMS

A. The "New" Deals

After Balin left Amerimar Realty, the defendants continued to make real estate acquisitions, and Balin received no equity interest in those "new deals." Balin contends that all of those real estate acquisitions and any future acquisitions were and are corporate opportunities belonging to Amerimar Realty, and in which he and Amerimar Realty's other shareholders were and are entitled to invest.

A fact that is critical (but ultimately fatal) to this claim is that the entity which invested in the properties during Balin's tenure at Amerimar Realty was Amerimar Associates, L.P., not Amerimar Realty. Balin concedes that, but argues that Amerimar Associates, L.P. was merely an acquisition vehicle owned by persons who were Amerimar Realty's stockholders and whose partnership interests were identically proportional to their Amerimar Realty stock ownership interests. Balin argues that it

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[6]The plaintiff's post-trial briefs assert only that Amerimar Realty issued stock to Balin. They did not argue or suggest any other theory under which Balin might assert standing to assert his claims. See, e.g., Danvir Corp. v. Wahl, Del. Ch., C.A. No. 8386, Berger, V.C. (Sept. 8, 1987) (denying defendants right to challenge the issuance of plaintiffs' stock where the defendants had acquiesced in the issuance of stock certificates); Jones v. Taylor, Del. Ch., 348 A.2d 188 (1975) (finding that the plaintiff had necessary equitable interest to maintain a derivative suit); but see Staar Surgical Co. v. Waggoner, Supr. Ct., 588 A.2d 1130, 1136-37 & n.2 (1991). The opportunity to provide supplemental briefing should not be construed as an invitation to advance new arguments on the merits, or as the intimation of any view by this Court that Balin does have standing.

was an investor's status as a shareholder of Amerimar Realty, not as a partner in Amerimar Associates, that established his right to participate in the real estate acquisitions. Based on that premise, Balin concludes that Marshall and Treatman usurped corporate opportunities of Amerimar Realty by (i) diverting all of the new investment opportunities to Amerimar Associates and not presenting them to all of Amerimar Realty's shareholders,[7] and (ii) using Amerimar Realty's assets (both tangible and intangible) for his new venture, Amerimar Enterprises, without paying Amerimar Realty fair compensation.

The defendants respond that none of these acquisitions were opportunities that belonged to Amerimar Realty, because that entity was never intended to -- nor did it ever -- own property or earn a profit. Rather, Amerimar Realty was an "overhead" corporation created to identify potential investments for presentation to Amerimar Associates, L.P. and to service the properties in which Amerimar Associates, L.P. chose to invest. Thus, the defendants' position is that a party's status as an "active" partner in Amerimar Associates, L.P., not as a shareholder in Amerimar Realty, is what determined his right to participate in the investments. Accordingly, defendants conclude that Balin had no right to participate in new deals after he became an "inactive" partner of Amerimar Associates. I agree.

[12] The test for a usurpation of a corporate opportunity has been recently articulated as follows:

> The corporate opportunity doctrine, as delineated by Guth v. Loft, Inc., Del. Supr., 5 A.2d 503 (1939) and its progeny, holds that a corporate officer or director may not take a business opportunity for his own if:
>
> (1) the corporation is financially able to exploit the opportunity;
>
> (2) the opportunity is within the corporation's line of business;
>
> (3) the corporation has an interest or expectancy in the opportunity; and

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[7]The only alleged opportunity that was not "new" (i.e., did not arise after Balin's departure) was the 1528 Walnut Street acquisition, which is discussed in Part III.B., infra.

(4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.

Broz v. Cellular Info. Sys., Inc., Del. Supr., 673 A.2d 148, 154-55 (1996).

[13] The Court must consider all these factors insofar as they are applicable. Id. at 155. Whether or not a corporate opportunity was usurped is a factual question, determined by "'reasonable inference from objective facts.'" Id. (quoting Johnston v. Greene, Del. Supr., 121 A.2d 919, 923 (1956)).

1. Whether Acquiring and Owning Real Estate was in Amerimar Realty's Line of Business.

The first inquiry is whether the acquisition and ownership of real estate was in Amerimar Realty's line of business, i.e., was "an activity as to which [the corporation had] fundamental knowledge, practical experience and ability to pursue." Guth v. Loft, 5 A.2d at 514. Balin contends that it was, relying primarily upon certain documents filed with the Commonwealth of Pennsylvania that describe the corporation's business as owning, operating, and managing real estate. PX 332.

In his original complaint, however, Balin alleged that Amerimar Realty was formed as an "overhead" entity that was never intended to acquire or own real estate or to generate a profit. DX 336, at 9; see also DX 338, at 10. In fact, the record shows that Amerimar Realty was intended to be funded at a break-even level. Its purpose was to serve as a vehicle to identify new properties for acquisition by the "ownership" entities, and then to service those properties.

[14] That, in fact, is how Amerimar Realty always operated: it never owned a direct or indirect interest in real estate or in the entities formed to own real estate. Amerimar Realty cannot, therefore, be said to have "fundamental knowledge" or "practical experience" in acquiring or owning real estate. Guth v. Loft, 5 A.2d at 514. Nor did that entity ever have any potential for profit, because it was never paid a market rate for the services it provided. Instead, Marshall and Balin allocated to Amerimar Realty certain management fees that were never enough to cover Amerimar Realty's expenses. Those allocations continue to fund

the servicing of "old" properties acquired before Balin's departure in April 1992.[8]

In short, Amerimar Realty's purpose has remained unchanged since its inception, and does not include the acquisition or ownership of real estate. Balin, as an Amerimar Realty stockholder, has no legal right to force the corporation to alter that structure and purpose by adopting a new line of business, simply because his individual circumstances have changed.[9]

2. Whether the Amerimar Realty Company or its Shareholders have an "Interest or Expectancy" in the New Deals.

Nor has Balin established that Amerimar Realty or its shareholders had an "interest or expectancy" in the new deals. The basis for Balin's "interest or expectancy" argument is his assertion that Amerimar Realty was formed to seek out real estate opportunities for the mutual benefit of its stockholders, who were then offered the opportunity to participate ratably as equity investors.

The evidence does not support that position. In fact, Amerimar Realty's shareholders did not participate ratably in the real estate transactions that closed before Balin's departure. A significant percentage of the equity in each acquisition was allocated by Marshall and Balin to the "deal partners" who located the property. Each percentage was individually negotiated with specific deal partners. The remaining equity interest was not allocated ratably among the Amerimar Realty shareholders either, but instead was allocated by Marshall and Balin to reward other deserving partners. PX 333-36.

Because Balin does not dispute those facts, his claim boils down to the proposition that Amerimar Realty's shareholders were entitled to participate ratably in the portion of the deal equity that remained (i) after

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[8]Amerimar Realty's only "line of business" potentially affected by Amerimar Enterprises' activities is the search for new properties to acquire. But Amerimar Enterprises was formed because, when Balin departed Amerimar Realty, he told Marshall that he did not want his contributions to Amerimar Realty (in the form of allocated management fees) to fund the searches for and the servicing of "new" (post-Balin) real estate acquisitions. Tr. 285-86. As a consequence, Marshall created Amerimar Enterprises to search for, and then service, all new acquisitions, while Amerimar Realty remained in existence to service the "old" acquisitions.

[9]See In re Reading Co., 711 F.2d 509 (3d Cir. 1983) (applying Delaware law); Nelkin v. H.J.R. Realty Corp., 255 N.E.2d 713, 716-17 (N.Y. Ct. App. 1969); Burg v. Horn, 380 F.2d 897 (2d Cir. 1967).

the deal partners had negotiated their own percentage interest and (ii) after Balin and Marshall had individually determined (on an ad hoc basis) which partners deserved "bonus" interests whose magnitude would vary from deal to deal.

Some evidence supports that proposition, but it is far from sufficient. A March 3, 1988 memorandum prepared by Balin describes a modification of the percentage ownership interests in a certain real estate deal "to reflect the corporation structure which was outlined at our Shareholders Meeting." PX 328. The minutes of the March 21, 1988 Amerimar Realty shareholders meeting state that "Mr. Marshall asked for a volunteer to prepare a monthly new deal memo to be distributed to the Shareholders . . . describing the status of pending new deals" and that each shareholder was asked to confirm that "he has reviewed all of the buy-out [of Robert Bass] transaction materials and agrees to (or not to) participate." PX 332. This evidence is far too nebulous and vague to support (let alone compel) a conclusion that shareholder status in Amerimar Realty was critical to an investor's right to participate in the real estate opportunities.

Balin's argument is also inconsistent with the Amerimar Associates, L.P. Partnership Agreement (the "Partnership Agreement"), which provides that only "active" partners are entitled to be presented with acquisition opportunities, and requires that all opportunities must be presented to the partnership. DX 178, at ¶¶3.01 and 1.02(b). Striving to reconcile this Agreement with his theory, Balin asserts that (i) all shareholders of Amerimar Realty were considered as "active" partners of Amerimar Associates, L.P., and (ii) Balin and Marshall, as officers of the corporation and as partners in the partnership, had fiduciary obligations to present those opportunities to the corporation and the partnership.

No persuasive evidence supports this assertion either. Moreover, Balin's argument that all Amerimar Realty shareholders have an absolute right to invest in real estate acquisitions -- whether or not they participate in locating or servicing them -- is inconsistent with the Partnership Agreement requirement that all partners work full time for Amerimar Associates, L.P. DX 178 at ¶1102(b).[10]

Also inconsistent with Balin's professed belief that shareholder status in Amerimar Realty conferred an "interest or expectancy" in real estate investments, is the fact that Amerimar Realty shareholders received

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[10]The parties have not brought acquisition opportunities to Amerimar Associates after Balin's departure in April, 1992. That is one example of these parties' disregard of legal formalities. No Amerimar Associates partner has complained of the nonobservance of the Partnership Agreement in this regard.

little or no value for their shares when they exited the corporation. DX 260, Tr. 763-73. In his 1991 personal financial statement, Balin valued his Amerimar Realty shares at only $1,160, but valued his net partnership interest in Amerimar Associates, L.P. at $347,421. DX 242. Balin's nominal valuation of his shares is hardly consistent with his present position that those shares had value because they entitled the holder to invest in future real estate acquisitions.

Finally, Balin's own pre-litigation statements demonstrate that even he did not believe that his status as a shareholder conferred any right to participate in real estate deals. In a memorandum discussing the Partnership Agreement, Balin confirmed that:

> "Paragraph 3.01 deals with Transaction Interests and the definition of an active and an inactive partner. The intent of the document was that everyone who was a partner would have an opportunity to participate in each transaction as they came along. In the event that someone left the organization they would be deemed to be an inactive partner. Their interest might or might not be purchased from them at the time that they would leave, but they would not participate in future transactions. The language is not intended to allow anyone in the organization to evade putting their new transactions into the company . . . .

DX 303 (emphasis added).

Balin now argues that the words "organization" and "company" refer to Amerimar Realty, but clearly he was referring to Amerimar Associates, L.P. This shows that even Balin understood that what created the entitlement to participate in new deals was his status as an Amerimar Associates, L.P. partner, not as an Amerimar Realty shareholder. See also PX 160 (Balin letter to Marshall stating that "[o]ur partnership documents provide that opportunities presented to Amerimar Realty Company are for the benefit of the partners").

Balin has failed to establish that Amerimar Realty and he (as an Amerimar Realty shareholder) had an interest or expectancy in "new" or future real estate investments.

3. Whether Amerimar Realty Had the Financial Ability to Fund the New Deals.

[15] Balin also must show that Amerimar Realty was financially capable of acquiring the new real estate opportunities. The defendants argue that Amerimar Realty never had that capability. Balin responds that Amerimar Realty had to be "actually insolvent" before it can be deemed financially incapable of taking advantage of a given opportunity, and relies upon Stephanis v. Yiannatsis, Del. Ch., C.A. No. 1508, Chandler, V.C. (Oct. 4, 1993), as legal support. His reliance is misplaced. In Stephanis, the Supreme Court expressly declined to adopt the "insolvency-in-fact" standard. Id. at 275, 279 & n.2. Moreover, as the Supreme Court has recognized, even a solvent corporation may be deemed financially incapable of availing itself of an opportunity, where the corporation "was not in the position to commit capital to the acquisition of new assets." Broz v. Cellular Info. Sys., Inc., Del. Supr., 673 A.2d 148, 155 (1996). Here, Amerimar Realty was never financially in a position to commit capital to acquiring real estate.

Balin insists that Amerimar Realty's financial status is relevant, because in actual practice the investment opportunities were first presented to its shareholders, who then created separate entities to serve as the acquisition vehicles. Therefore, Balin urges, this Court should consider only the financial capability of Amerimar Realty's shareholders. This argument lacks merit because the opportunities were never presented to the individual investors in their capacity as Amerimar Realty shareholders.

Finally, even if Amerimar Realty was entitled to receive those real estate investment opportunities, it has not been shown that the corporation was financially capable of making any acquisitions. Amerimar Realty maintains a large structural deficit and it is not creditworthy. Tr. 971-72.

In short, Balin has not established that Amerimar Realty was financially capable of investing in the real estate opportunities that arose after his departure.

4. Whether the Failure to Present the Investment Opportunities Creates Adversity Between the Defendants and Amerimar Realty.

Finally, Balin must establish that by taking the investment opportunities for themselves, the defendants placed themselves in a

position adverse to Amerimar Realty. Broz, 673 A.2d at 155. Balin has not made that showing.

[16] As previously found, Amerimar Realty's directors, officers, and stockholders understood from the outset that there would be no corporate profits or distributions and that their right to participate in real estate investments would depend upon their status as "active" partners in Amerimar Associates, L.P. For that reason, there can be no adversity or conflict between Marshall's position as a director and officer of Amerimar Realty and his participation as a partner of Amerimar Associates, L.P., in the acquisition and ownership of real estate.

To summarize, Balin has failed to establish that the real estate acquisitions after his departure were opportunities belonging to Amerimar Realty or its shareholders.

B. The 1528 Walnut Street Deal

1. Background Facts

Balin's final corporate opportunity claim arises out of the acquisition and operation of the 1528 Walnut Street property in Philadelphia ("1528 Walnut"). That claim is treated separately because it arose before Balin departed the Amerimar group of companies.

In September 1991, Keith Barket, an Amerimar Realty officer, received an opportunity to acquire 1528 Walnut and to manage the building on that site. PX 114. By February 28, 1992, the parties had agreed to the general structure of the transaction. PX 139. A limited partnership, 1528 Newco Associates ("1528 Newco"), was formed to acquire 1528 Walnut. 1528 Newco's partners were 16th and Walnut Streets Co., Inc. (an acquisition vehicle created by Marshall), and General Electric Credit Equities Inc.. PX 153. After 1528 Walnut was acquired, 1528 Newco executed an agreement with an entity called Amerimar, Walnut Management Co., Inc. ("Amerimar Walnut") to manage the 1528 Walnut property. Amerimar Walnut's shareholders, and their respective ownership interests, were identical to the shareholders of (and their ownership interests in) 16th and Walnut Streets Co., Inc. Balin received no equity interest either in 1528 Newco or in Amerimar Walnut.

Before the closing took place on March 13, 1992, Marshall proposed to Balin that the entire 1528 Walnut management fee be paid to Amerimar Realty or, alternatively, that his and Balin's share of the management fee be allocated to Amerimar Realty. PX 147, PX 158. Balin did not respond to either proposal.

On March 24, 1992, Marshall offered Balin an opportunity to participate in the 1528 Walnut transaction. Under Marshall's proposal, Balin would receive an equity interest and, in return, would pledge certain of his personal assets, but would receive no direct interest in the management fees. Instead, Balin and Marshall's share of the management fees would be paid to Amerimar Realty by the entity through which Balin and Marshall would participate as investors. PX 158.

Balin rejected this offer because it would have required him to assume the "downside" risk as an equity investor, but would deprive him of the "upside" benefit of receiving management fees, which would flow to Amerimar Realty, an entity that Marshall controlled. See PX 160.

Balin claims that the 1528 Walnut investment was a corporate opportunity for Amerimar Realty and its shareholders, and that Marshall usurped that opportunity by failing to present it to Amerimar Realty's shareholders and diverting the management fee to a new entity.

2. Analysis

As previously found, an investor's right to participate in a real estate investment flowed from his status as a partner of Amerimar Associates, L.P., not as a stockholder of Amerimar Realty. Accordingly, the 1528 Walnut Street acquisition was never a corporate opportunity of Amerimar Realty, and Balin, as an Amerimar Realty shareholder, has no right to participate as an investor in that deal. Any claim to participate that Balin may have would derive solely from his status as a partner in Amerimar Associates, L.P.. Balin makes no claim in that capacity, however.

Neither was Amerimar Associates, L.P. obligated to allocate the management contract fees to Amerimar Realty. The Amerimar Associates Partnership Agreement grants either general partner, Balin or Marshall, the right to determine the allocation of interests among "active" partners in their sole discretion.[11] DX 178, at § 3.01. Under that arrangement the overhead entities, including Amerimar Realty, historically participated only in the fees generated by certain transactions. Even then, only a portion of those fees was channelled specifically to those overhead entities. DX 367.

Balin argues that Amerimar Realty was entitled to the 1528 Walnut management fees because it was listed as a fee recipient in various Deal

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[11]In fact, Amerimar Associates, L.P. never actually participated in that equity investment. Instead, Marshall disregarded the Partnership Agreement and created separate entities to own the 1528 Walnut property and to perform the management contract.

Summaries before the closing. PX 117; PX 133; PX 139, PX 142, DX 276; DX 277. But those summaries were not legally binding, and the transaction was constantly renegotiated and restructured before it finally closed. At all times the Amerimar Associates, L.P. partners retained the discretion to reallocate the fees, and Amerimar Realty never received any binding commitment to be paid those fees.[12]

* * * * *

I find, for these reasons, that none of Balin's corporate opportunity claims has substantive merit.

IV. THE CLAIMS RELATING TO AMERIMAR ENTERPRISES

After Balin's departure, Marshall and Treatman caused Amerimar Enterprises, Marshall's wholly-owned entity, to use Amerimar Realty's employees and equipment to perform functions formerly carried out by Amerimar Realty. Balin claims that those dealings constitute a breach of the defendants' duty of loyalty and a waste of Amerimar Realty's assets, because they deprive Amerimar Realty of the ability to make a profit in the future and expend Amerimar Realty's assets and resources without paying adequate compensation.

[17] Balin's first claim lacks merit because, as previously found, Amerimar Realty was an "overhead" entity that was never intended to, or did, make a profit. Consistent with its function as an entity that serviced the overall Amerimar group of companies, Amerimar Realty never charged for the use of its "intangible" assets, such as its name, design logo, or good will. Because Amerimar Realty was never intended to have profit potential or to create value by retaining the exclusive right to use its intangible assets, the defendants breached no fiduciary by making uncompensated use of those intangible assets for Amerimar Enterprises' purposes.

[18] Balin's claim that the defendants wrongfully utilized Amerimar Realty's tangible assets (i.e., its manpower and equipment) without adequate reimbursement stands on a different footing.[13] Even though Amerimar Realty was not intended to make a profit, it was intended to

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[12]On April 7, 1992, Marshall assigned most of his interest in the 1528 Walnut management fees to Amerimar Realty. That assignment is, however, revocable. PX 162, PX 189.

[13]Although Balin does not articulate this claim in his brief in this precise manner, it is implicit in his argument and, hence, is addressed here.

operate at a "break even" level. Its directors, therefore, had a duty to assure that Amerimar Realty was adequately reimbursed for the use of its tangible resources by third parties. Marshall claims that he fulfilled his duty by instituting a cost-allocation system designed to reimburse Amerimar Realty for its costs in performing services for Amerimar Enterprises. Balin disagrees. He claims that the defendants have not proved that the cost allocation system adequately reimbursed Amerimar Realty. The issue thus becomes whether Marshall's cost-allocation system has operated to reimburse Amerimar Realty adequately.

[19] The defendants have failed to carry their burden to establish that the cost-allocation system adequately reimbursed Amerimar Realty. Marshall and Treatment were directors of Amerimar Realty when they caused it to deal with Amerimar Enterprises, of which Marshall was the owner and Treatman was an officer. Because these defendants stood on both sides of the transaction and dictated its terms, they must bear the burden of demonstrating the entire fairness of the cost allocation system. Cinerama, Inc. v. Technicolor, Inc., Del. Supr., 663 A.2d 1156 (1995).

[20] The defendants argue that Amerimar Realty received more in reimbursements from Amerimar Enterprises by this system than Marshall received in management fees from the newly acquired properties. Even if that were true, it does not necessarily establish that Amerimar Realty was adequately reimbursed for the services it provided to Amerimar Enterprises. Similarly deficient is the defendants' argument that Amerimar Realty's deficit decreased after the cost-allocation system was instituted. Again, even if that were so, it does not necessarily establish that the system adequately reimburses Amerimar Realty.[14]

The Court recognizes that under entire fairness review, "perfection is not possible, or expected." Id. at 1179 (quoting Weinberger v. UOP, Inc., Del. Supr., 457 A.2d 701, 709 n.7 (1983)). But even taking that into account, the defendants have not offered sufficient evidence to enable this Court to conclude that Amerimar Realty has been adequately reimbursed for the use of its resources in Amerimar Enterprises' business. Therefore, consistent with the parties' pretrial stipulation, the plaintiff will be entitled to prove in a post-trial proceeding what damage (if any) Amerimar Realty has sustained.[15]

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[14]Conceivably, other independent sources of income could have more than offset the expenses Amerimar Realty incurred to service the properties acquired before Balin's departure. In that case, Amerimar Realty's deficit would decrease, even though the corporation was not being adequately reimbursed for the services it provided to Amerimar Enterprises. The defendants' conclusory arguments fail to negate that possibility.

[15]Joint Pretrial Order, at 134 ("the issue of remedies or damages . . . [will] be deferred to a later accounting or damage proceeding, if necessary").

V. THE RITTENHOUSE CLAIM AND COUNTERCLAIM

A. The Facts

Balin next claims that Marshall improperly competed with, and breached his fiduciary duty to, Amerimar Realty by taking for himself personally a contract to provide certain services to the Rittenhouse Hotel. Marshall denies any wrongdoing, and through Amerimar Realty, has counterclaimed against Balin for having breached his fiduciary duty of loyalty to Amerimar Realty by wrongfully causing the loss of its contract to manage the Rittenhouse Hotel.

Under a Management Agreement dated June 1, 1989, Amerimar Hotel Company of Pennsylvania ("AHOP") was formed to provide leasing and management services to The Rittenhouse, a 33 story high-rise building in Philadelphia, Pennsylvania. AHOP is owned 70% by Amerimar Realty and 30% by Kimberly Realty Corp., a General Electric ("GE") affiliate. The parties to the Management Agreement were AHOP and the building's owner, Rittenhouse Development Company, whose controlling partner was General Electric Investment Corporation (a GE affiliate). The Management Agreement entitled AHOP to 4% of specified Rittenhouse revenues as a management fee. AHOP would then distribute that management fee to Amerimar Realty and Kimberly Realty Corp. in proportion to their respective equity interests, after reimbursing Amerimar Realty for its out-of-pocket costs. In the event of a default, GE was entitled to terminate the Management Agreement. Tr. 166, 320.

On February 28, 1992, Balin began engaging in discussions with GE officials about the possibility of Balin managing The Rittenhouse individually. DX 267, PX 157. A March 12, 1992 conversation with a GE official left Marshall with the impression that AHOP would be terminated as hotel manager and that Balin would be substituted in AHOP's place. PX 154. Thereafter, AHOP was terminated, but Balin never was hired. Instead, GE officials told Balin and Marshall, at a meeting held on April 7, 1992, that The Rittenhouse would be hiring David Benton, the Amerimar Realty employee responsible for the Hotel's day-to-day management, as manager. DX 293. Mr. Benton remains in that position, and, since July 1, 1992, AHOP has received no management fees.

After AHOP was terminated as the Rittenhouse Hotel manager, Marshall entered into an individual personal services contract with GE to handle The Rittenhouse commercial leasing and condominium sales and to serve as its "Good Will Ambassador." PX 176.

B. The Contentions

In its counterclaim, Amerimar Realty contends that Balin wrongfully attempted to misappropriate its Rittenhouse management contract for himself and that, even though Balin did not succeed, his conduct caused GE to terminate the Management Agreement with Amerimar Realty. Amerimar Realty claims that Balin is liable for all resulting damages.

Balin denies that he caused GE to terminate the Management Agreement, and denies having committed any wrongdoing in attempting to capture that contract for himself. Balin argues that all he did was listen to and consider a proposal by GE to restructure the Management Agreement. He further contends that no relief can be granted on this claim because the proper party in interest is AHOP, which is not a party to this action.

Balin claims that, by entering into the personal services contract, Marshall breached his duty of loyalty to Amerimar Realty because Marshall could not lawfully take that contract for himself, to Amerimar Realty's detriment, while he was its full-time employee.

Marshall denies any wrongdoing, and argues that this claim is one that Balin previously agreed not to raise, viz., that Marshall wrongfully acquired the personal services contract.[16] Marshall also contends that any services he provides to the Rittenhouse Hotel (unlike the services called for by the Management Agreement) are entirely personal and outside the scope of his duties as an officer and director of Amerimar Realty. Finally, Marshall argues that it was customary for Amerimar Realty employees to receive "outside compensation" and that he had no duty of loyalty to forego such opportunities, including The Rittenhouse personal services contract.

These claims are now addressed.

C. AHOP As An Indispensable Party.

[21] I reject the argument that AHOP is indispensable to the adjudication of any claim concerning Marshall's acceptance of The

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[16]Stipulation and Order entered on September 14, 1995. To preserve their ongoing business relationships with GE, the parties stipulated that no GE official would be deposed or called as a witness. See Stipulation and Order entered on September 14, 1995. Marshall accepted that stipulation on the condition that Balin would not "contend that the manner by which David Marshall came to have a personal services contract with respect to The Rittenhouse was unlawful or a breach of fiduciary duty." DX 341.

Rittenhouse personal services contract. As previously found, AHOP was merely a vehicle used to collect and distribute the management fees due under The Rittenhouse Management Agreement. As such, AHOP has no cognizable beneficial or economic interest in the controversy. Balin v. Amerimar Realty Co., Del. Ch., C.A. No. 12896, Jacobs, V.C. (April 10, 1995) Mem. Op. at 10. The proper party is Amerimar Realty, which is before the Court and has a cognizable interest in the various claims arising out of The Rittenhouse contracts.

D. Amerimar Realty Was Not Damaged By Any Conduct of Balin Touching Upon The Rittenhouse Hotel Management Contract.

Amerimar Realty asserts, by way of counterclaim, that Balin is liable for having wrongfully attempting to capture the Management Agreement for himself. The flaw in this argument is that GE would have terminated its Management Agreement with Amerimar Realty in any event. Balin's conduct caused no damage to Amerimar Realty, and therefore the counterclaim must be dismissed.

Marshall was in charge of The Rittenhouse project from its inception through January 1990. Sometime thereafter, GE became disappointed with Marshall's performance and asked Marshall to "back off." Tr. 697. To appease GE, over the course of the year 1991 Balin replaced Marshall as the person with primary responsibility for managing The Rittenhouse. DX 345; PX 122; PX 121.

GE, however, was dissatisfied with Amerimar Realty's performance as well. A letter from GE to Amerimar Realty shows that by February 19, 1991, GE was considering hiring an outside firm with greater hotel management experience. PX 321. A consultant's report commissioned by GE also advised terminating Amerimar Realty as the management company, because there was "no outwardly tangible value being contributed by Amerimar which would entitle them to a 4% fee." PX 104, at § 3.5.

Memoranda authored by Marshall and Balin describe their meetings with GE officials and confirm that by April 7, 1992, GE had decided to eliminate Amerimar Realty as the manager. PX 161, DX 293. But GE did not do that to facilitate hiring Balin as manager. To the contrary, the memoranda show that GE had decided to hire David Benton as its own employee to manage the hotel.

Marshall's memorandum states that GE told him that the Management Agreement would continue through June 30, at which point GE would reevaluate Amerimar Realty's performance. But Marshall did

not believe that there was any likelihood of Amerimar Realty retaining the contract. DX 293. He knew that GE had decided to terminate the Management Agreement as of July 1, 1992. Evidencing that fact is Marshall's own recount of his effort to delay GE's announcement that "David Benton had been hired by GE and that Amerimar Realty Company and Ken Balin would be out by June 30th." DX 293 (emphasis added).

[22] Thus, even if Balin wrongfully attempted to compete with Amerimar Realty and to obtain the management agreement for himself, that conduct caused no damage to Amerimar Realty, because the Management Agreement would have been terminated in any event. Amerimar Realty's counterclaim against Balin must therefore be dismissed.

E. The Claim That Marshall Breached his Duty of Loyalty by Accepting a Personal Contract to Provide Certain Management Services to The Rittenhouse.

Lastly, the Court considers Balin's claim that Marshall breached his duty of loyalty to Amerimar Realty by accepting a personal contract from GE to provide certain management services to The Rittenhouse.[17]

Balin characterizes his claim as follows: "Notwithstanding his duties and responsibilities to Amerimar [Realty] as a full-time employee, in May of 1992, Marshall entered into a personal service contract with GE to provide management and other services for the Rittenhouse, for which he is being substantially compensated." Pre-Trial Order, at 30. Thus, the claim is that Marshall had a fiduciary duty to present that opportunity -- regardless of how it arose -- to Amerimar Realty, and that Marshall breached his duty by not doing so.

As earlier found, any investment opportunities belonged to Amerimar Associates, L.P., not Amerimar Realty. See Part III, supra, of this Opinion. Under the Partnership Agreement, Amerimar Associates, L.P.'s general partners were entitled to allocate investment opportunities to the "active" partners in their sole discretion. Management contracts were often assigned to specific "deal partners" as a reward for discovering

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[17]The Court's evaluation of that claim is constrained by the parties' pretrial stipulation. See note 16, supra. Consequently, the Court does not consider any arguments that (i) the personal services contract was previously performed by Marshall on behalf of Amerimar Realty and was thereafter diverted by Marshall to himself, or (ii) that the personal services contract was initially offered by GE to Amerimar Realty, but was later usurped by Marshall.