Whenever in this Agreement . . . the General Partner is permitted or required to make a decision (i) in its "sole discretion" or "discretion" or under a similar grant of authority or latitude, the General Partner shall be entitled to consider only such interests and factors as it desires and shall have no duty or obligation to give any consideration to any interest of or factors affecting the Partnership, . . . the Limited Partners or the Assignees, or (ii) in its "good faith" or under another express standard, the General Partner shall act under such express standard and shall not be subject to any other or different standards imposed by this Agreement, . . . or any other agreement contemplated herein or therein. Each Limited Partner or Assignee hereby agrees that any standard of care or duty imposed in this Agreement, . . . or any other agreement contemplated herein or under the Delaware RULPA or any other applicable law, rule or regulation shall be modified, waived or limited in each case as required to permit the General Partner to act under this Agreement, . . . or any other agreement contemplated herein and to make any decision pursuant to the authority prescribed in this Section 7.10(c) so long as such action or decision does not constitute willful misconduct and is reasonably believed by the General Partner to be consistent with the overall purposes of the Partnership.

To superimpose either the substantive requirement of § 7.05 or the procedural requirement of § 7.10(a) on § 9.01 Transactions, the defendants contend, would conflict with the clear mandate of § 7.10(b) by fettering the General Partner's complete discretion with conflicting substantive and procedural "standards" and by requiring it to consider "interests of . . . or factors . . . affecting the Limited Partners."13 Rather, the only duty of the General Partner was to ensure that HGI paid a price in compliance with § 9.01(b) and that duty was carried out.

Furthermore, the defendants contend that they are entitled to summary judgment regardless of whether the Challenged Transactions were consummated in breach of the Partnership Agreement. They raise three affirmative defenses in support of this contention.

First, the defendants contend that at worst they relied on a good faith misinterpretation of the Partnership Agreement in concluding that § 9.01

13Id. (emphasis added).
governed the Transactions to the exclusion of §§ 7.05 and 7.10(a). Thus, they argue, § 17-1101(d) of the DRULPA provides them with immunity from liability. That section states:

To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited partnership or to another partner, (1) any such partner or other person acting under a partnership agreement shall not be liable to the limited partnership or to any such other partner for the partner's or other person's good faith reliance on the provisions of such partnership agreement. . . .

Relatedly, the Non-HGI Directors also rely upon § 17-1101(d)(2) of DRULPA, which permits a partnership agreement to limit the liabilities of partners even further. Section 7.06 of the Partnership Agreement utilizes that flexibility by stating as follows:

Liability of General Partner to the Partnership and Limited Partners or Assignees.

The General Partner, its Affiliates and all officers, directors, partners, employees and agents of the General Partner and its Affiliates shall not be liable to the Partnership, any Limited Partner, Assignee or any other Person who has acquired an interest to the Partnership for any losses sustained or liabilities incurred, including monetary damages, as a result of any act or omission, unless such act or omission constitutes (a) a breach of any duty of loyalty to the Partnership, (b) an act or omission in bad faith which involves intentional misconduct or a knowing violation of law, or (c) a transaction from which an improper personal benefit is derived. Finally, all the defendants proffer their alleged good faith reliance upon advice of counsel as an independent defense. Under § 7.08(b) of the Partnership Agreement:

\[146\] Del. C. § 17-1101(d)(1).
\[156\] Del. C. § 17-1101(d)(2).
\[16\](emphasis in original).
The General Partner may consult with legal counsel . . . selected by it, and any opinion of any such Person as to matters that the General Partner reasonably believes to be within its professional or expert competence (including, without limitation, any opinion of legal counsel to the effect that the Partnership would "more likely than not" prevail with respect to any matter) shall be full and complete authorization and protection with respect to any action taken, suffered or omitted by the General Partner hereunder in good faith and in accordance with such opinion.

As to all these defenses, the defendants claim that the record is indisputably clear that they had been advised by counsel that § 9.01 governed these Transactions, that they had never been advised by counsel that § 7.05 or § 7.10(a) applied, and that there is no evidence casting doubt on the good faith of any of them in structuring the Transactions in compliance with § 9.01 and not §§ 7.05 and 7.10(a).

With regard to these affirmative defenses, the Non-HGI Directors distance themselves a bit from their fellow defendants. The Non-HGI Directors note that unlike HGI or its officers, they had no reason to be other than a faithful broker in ensuring that the Transactions were fair to all Partnership constituencies, in particular to the unitholders other than to HGI. That is, the Non-HGI Directors argue that even were I to conclude that there is evidence in the record that casts a triable doubt over the good faith of the HGI Defendants and precludes an award of summary judgment to those defendants, there is nothing in the record that compromises their own good faith.

III. The Order In Which The Issues Will Be Resolved

I will address the defendants' arguments in the following order. The opinion will first examine whether the defendants are entitled to summary judgment on Gotham's Contract Claim. I will then address whether there is any room left by the Partnership Agreement for the application of general fiduciary duty principles to analyze the General Partner's conduct in the Challenged Transactions and thus whether Gotham's Fiduciary Duty Claim withstands summary judgment. Then I will tackle Gotham's self-styled "Fraud Claim," which involves a rather convoluted twist on its Contract and Fiduciary Duty Claims.

After that, I will examine separately the affirmative defenses raised by the HGI Defendants and the Non-HGI Directors.
IV. The Applicable Procedural Standards

To prevail on their motion, the defendants must persuade me that upon a review of the evidence in the light most favorable to Gotham, no genuine issues of material fact exist that preclude the entry of judgment for the defendants.\textsuperscript{17} An important element of discretion is left to the trial court in applying Rule 56, which enables the court to deny "summary judgment if it decides that a more thorough development of the record would clarify the law or its application."\textsuperscript{18} In discussing the various claims, I have consciously avoided deciding the numerous subsidiary factual skirmishes between the parties in the 223 pages of briefs they filed, and concentrate on the major questions that will determine whether a trial is necessary. Given the procedural posture, I focus in particular on the admissible evidence that bolsters Gotham's claims.

A. Gotham's Contract Claim

In addressing the Contract Claim, I apply Delaware's well-established contract interpretation principles, which direct the court in the first instance to discern the meaning of a contract and the intent of the parties from the language they used, as read from the perspective of a hypothetical, objective third party.\textsuperscript{19} It is only when that approach does not yield an unambiguous result that the court will resort to secondary techniques of construction. In the limited partnership context, those secondary methods fall into two primary categories. Where a limited partnership agreement was drafted exclusively by the general partner, the court will interpret ambiguities against the drafter, rather than examine extrinsic evidence.\textsuperscript{20} But if a limited partnership agreement was the product of negotiations among the parties, the court will resolve an

\textsuperscript{17}Ch. R. 56(c); Brown v. Ocean Drilling & Exploration Co., Del. Supr., 403 A.2d 1114, 1115 (1979).
ambiguity by examining relevant extrinsic evidence. The Partnership Agreement here appears to fall into the former category and was exclusively crafted by the General Partner.

The defendants' position that summary judgment should be granted on Gotham's Contract Claim centers on its view that § 9.01 applies to all of the Challenged Transactions, including the Odd-Lot Offer, which was the Transaction in which HGI acquired most of its Partnership units. Without belaboring what will be a major issue at trial, I conclude that a grant of summary judgment on this issue is inappropriate for two reasons.

The most important is that there is abundant record evidence that supports Gotham's assertion that the Odd-Lot Offer did not involve an issuance of units governed by § 9.01. This evidence is consistent with the Offer as being a transaction in which the Partnership took the units it purchased from tendering unitholders and simply resold those same units to HGI. In fact, most of the documents created by the defendants and their agents in connection with the Offer describe the Transaction in just such terms. Moreover, the record is devoid of any evidence that shows when the Odd-Lot Offer-related units were "issued" to HGI or that the Partnership calculated the floor price in § 9.01(b) by reference to such (unknown) date of issuance, as is required by that provision.

As such, the Transaction might well be found to fall under the plain terms of § 7.09 of the Partnership Agreement, which provides as follows:

Section 7.09 Purchase or Sale of Units. The General Partner may, on behalf of and for the account of the Partnership, purchase or otherwise acquire Units and, following any such purchase or acquisition, may sell or otherwise dispose of such Units in accordance with applicable law. In addition to the foregoing, the General Partner and its Affiliates from time to time also may purchase or otherwise acquire Units other than from the Partnership for their own account and may, subject to the provisions of Section 13.03 hereof, sell or otherwise dispose of such Units.

21 Id. at 11-3 (citing U.S. West v. Time Warner, Inc., mem. op.).
22 For many reasons discussed at oral argument, I reject: 1) the defendants' argument that § 7.09 did not provide clear authorization, as required by § 17-702(d) of DRULPA, for the General Partner to purchase units on behalf of the Partnership, hold them for the account of the Partnership, and then sell them later; and 2) Gotham's argument that the second sentence of § 7.09 implicitly precludes the General Partner from purchasing units from the Partnership itself.
If the Transaction was accomplished under authority of § 7.09 and not § 9.01, then there seems to be little doubt that both § 7.05 and § 7.10(a) would apply. Because there is a triable question regarding whether the price paid by HGI was equivalent to what a third party would have paid and because it is clear that the Audit Committee did not meet to review and approve the Transaction, the defendants' motion for summary judgment must be denied.

A second reason exists why summary judgment is unwarranted. To the extent § 9.01 applies to the units purchased by HGI in the Reverse Split, the options issued in the Option Plan, and even to the units purchased in the Odd-Lot Offer, I am not convinced that the Partnership Agreement unambiguously precludes the operation of § 7.10(a)'s Audit Committee approval requirement.

I agree with the defendants that there is no way to reconcile the substantive fair price requirement of § 7.05 with § 9.01(a)'s provision granting the General Partner the substantive discretion to issue shares to itself or affiliates on terms it establishes subject to the floor set by § 9.01(b). By contrast, however, it is conceivable to reconcile the requirement of Audit Committee "review and approval" with the discretion accorded the General Partner by § 9.01. The Audit Committee, after all, is not a separate entity from the General Partner. The Audit Committee is created by and is a constituent part of the General Partner itself. The defendants have not convinced me at this stage that the procedural requirement in § 7.10(a) that the General Partner's own Audit Committee review and approve transactions between the Partnership and the General Partner or its affiliates is inconsistent with the substantive grant of discretion to the General Partner in § 9.01. The fact that § 7.10(a) might require the General Partner to follow a certain process in "exercising its sole and complete discretion" does not so clearly create a "different standard" as to necessarily preclude a joint operation of § 7.10(a) and § 9.01 with respect to issuance to affiliates of the General Partner. 23 Indeed, it may have been thought by the drafters that the floor price in § 9.01(b) and

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23 In fairness, I note that there are other factors weighing in favor of the defendants' argument, including the fact that § 9.01(a) expressly states that the powers it sets forth are subject to §§ 9.01(b) and (c) and does not refer to § 7.10(a). As Gotham points out, however, § 9.01 nowhere expressly excludes operation of § 7.10(a), a section of the Agreement that clearly purports to have a fairly wide scope of intended operation. In other places in the Agreement, moreover, the Agreement expressly states when particular sections modify or exclude the operation of generally applicable sections. E.g., Agreement §§ 13.01(a) & 16.03 (both starting with the phrase "Except as otherwise provided in Sections . . ."). Therefore, I balk at relying on this method of resolution without the benefit of a trial and further briefing that might shed greater light on the precise contexts in which these different approaches were used in the Agreement.
the procedural protections of § 7.10(a) were sufficient to protect the unitholders from over-reaching, by the General Partner so as to eliminate the need to subject issuances to § 7.05.

Likewise, because I am not convinced that § 7.10(a) is irreconcilable with § 9.01, I will not resort to resolution of the claim on the basis that § 9.01 is the more specific provision and must trump a more general provision of the Agreement. Without certainty that the two provisions were not meant to operate in tandem, the court cannot resort to that rule of contract construction.24

Lastly, because Gotham has not moved for summary judgment, I need not address the potential applicability of the principle that contractual ambiguities should be construed against the drafter, in this case, the General Partner. Nor should Gotham read this opinion as precluding a ruling in the defendants' favor on these interpretive issues after trial. For now, I merely conclude that there is sufficient uncertainty regarding § 9.01's applicability and the implications of its applicability on the operation of § 7.10(a) as to preclude an award of summary judgment for the defendants on Gotham's Contract Claim.25

B. The Breach Of Fiduciary Duty Claim

The identical conduct that Gotham complains breached the Agreement is said by it to have breached fiduciary duties owed by the defendants to the unitholders. Thus, this court once again faces an effort by a plaintiff in the limited partnership context to bring to the fore the default rules that operate when a limited partnership agreement fails to define the duties and liabilities of the partners.26

25In re Marriott Hotel Properties II Limited Partnership Unitholders Litig. ("Marriott II"), Del. Ch., Cons. C.A. No. 14961, mem. op. at 19, Lamb, V.C. (Jan. 24, 2000) ("if a more thorough development of the record would clarify the law or its application, the court may, in its discretion, deny summary judgment") (quoting In re Dairy Mart Convenience Stores, Inc. Deriv. Litig., Del. Ch., Cons. C.A. No. 14713, mem. op. at 31, Chandler, C. (May 24, 1999)). Cf: U.S. West v. Time Warner, Inc., Del. Ch., C.A. No. 14555, mem. op. at 21 n.10, Allen, C. (June 6, 1996) (in determining whether the language of a contract is ambiguous, it is sometimes necessary to understand the context and business circumstances in which the contract was created).
26LUBAROFF & ALTMAN § 11.2.6 at 11-26.7 ("When any level of dissatisfaction concerning a matter relating to the limited partnership occurs, people are quick to complain about what has occurred in terms of a breach of fiduciary duty. While such duties do exist, it is not proper to assert or rely on such duties as a means of rewriting a partnership agreement. . . . [T]he agreement of partners concerning what the duties between them are should control. Courts and partners and their advisors should avoid making the mistake of thinking that, on the basis
Absent a contrary provision in the partnership agreement, the general partner of a Delaware limited partnership owes the traditional fiduciary duties of loyalty and care to the Partnership and its partners. But § 17-1101(d)(2) of DRULPA expressly authorizes the elimination, modification, or enhancement of these fiduciary duties in the written agreement governing the limited partnership. "When a particular limited partnership has plainly opted out of the statutory default scheme, judicial review . . . must look to the limited partnership's distinct doctrinal foundation in contract law." Therefore, where the Partnership Agreement provides the standard that will govern the duty owed by a General Partner to its partners in self-dealing transactions, it is the contractual standard and not the default fiduciary duty of loyalty's fairness standard that exclusively controls.

Here, the defendants have convinced me that the Partnership Agreement leaves no room for the application of common law fiduciary duty principles to measure the General Partner's conduct. The Partnership Agreement is hardly a model of clarity. Indeed, it is filled with provisions that appear to render illusory protections that other provisions accord the unitholders. But there is no doubt that the Agreement attempts to set forth the duties owed by the General Partner in self-dealing transactions between the Partnership and General Partner affiliates in a comprehensive manner. The provisions of the Agreement that articulate these duties fully encompass Gotham's claims.

of generalized or even specific statements of duties which are contrary to the specific provisions of a partnership agreement, it is appropriate to rewrite the understanding of partners as set forth in the partnership agreement.”


28Sonet, 722 A.2d at 323.

29Id.

30In re Marriott Hotel Properties II Limited Partnership Unitholder Litigation ("Marriott I"), Del. Ch., Cons. C.A. No. 14961, mem. op. at 11, Allen, C. (June 12, 1996) ("Where the parties have a more or less elaborated statement of their rights and duties, absent fraud, those rights and duties, where they apply by their terms, and not the vague language of a default fiduciary duty, will form the metric for determining breach of duty."); In re: Cencom Cable Income Partners, L.P. Litig., Del. Ch., Cons. C.A. No. 14634, mem. op. at 10, Steele, V.C. (Feb. 15, 1996) (DRULPA "recognizes [that] partners may modify fiduciary duties through contract. In other words, whether a general partner operates in good faith, with due care, or with requisite loyalty may be determined by the consistency with which the general partner adheres to its contractual obligations. Put another way, the limited partnership agreement may authorize actions creating a 'safe harbor' for the general partner under circumstances that might otherwise be questionable or impose a stricter standard of scrutiny than the norm.").
For example, if the defendants are correct that § 9.01 of the Agreement applies to the exclusion of §§ 7.05 and 7.10(a), then the parties to the Agreement have consciously chosen to apply another standard than "fairness" to issuances of securities to the General Partner or its affiliates. There is simply no way to square a duty of generalized fairness with the sole and complete discretion\textsuperscript{31} accorded to the General Partner under that reading of the contract.

Furthermore, because the sole and complete discretion possessed by the General Partner under that reading is as broad as it is, it would also subsume any concern that the number of units issued would have an entrenching effect, even though the Agreement does provide the limited partners with the right to remove the General Partner by a two-thirds vote. However harsh it sounds, I find no way to square a corporate law-derived Revlon\textsuperscript{32} claim with contractual provisions that give the General Partner "sole and complete" discretion to issue units to itself and to decide whether to admit unitholders as voting limited partners.\textsuperscript{33} These provisions are inconsistent with an expectation by unitholders that the General Partner would govern the Partnership subject to the identical strictures that apply to corporate boards in managing change of control situations. But they are in keeping with a contractual expectation on the part of the General Partner that it would have substantial authority to maintain its position, subject to only such constraints as are imposed by the contract itself.

In fact, the original offering prospectus for the Partnership advised investors in very plain terms that this was so:

The decision to admit an Assignee will be in the sole discretion of [the General Partner]. As a result, [the General Partner] will be able to prevent non-limited partners from voting for its removal by preventing Assignees from becoming limited partners.\textsuperscript{34}

In the Marriott Hotel limited partnership cases, the investment of power of this nature in a general partner was found by this court to be at odds with an expectancy of a control premium on the part of unitholders.\textsuperscript{35}

\textsuperscript{31}A discretion that is subject, of course, to the floor price set in § 9.01(b).
\textsuperscript{33}Partnership Agreement § 13.05.
\textsuperscript{34}See Norman Aff., Ex. 2.
\textsuperscript{35}See In re Marriott I, mem. op. at 15 (June 12, 1996); In re Marriott Hotel Properties II Limited Partnership Unitholders Litig. ("Marriott II"), Cons. C.A. No. 14961, mem. op. at 10-12, Lamb, V.C. (Sept. 17, 1997). While it is true that the Marriott cases apparently involved
The reasoning of those cases applies here and bars the use of generalized Revlon principles. If § 9.01 applies to the exclusion of §§ 7.05 and 7.10(a), then Gotham can prevail only by showing, per § 7.10(c), that the Transactions resulted from "willful misconduct" by the defendants or were not "reasonably believed . . . to be consistent with the overall purposes of the Partnership."

Similarly, if Gotham is correct about the interpretation of the Agreement, the Agreement's provisions cover any ground that might be occupied by backdoor fiduciary duties. Assuming § 7.05 applies to the Challenged Transactions, the validity of those Transactions would be measured by its terms, which in substance match the entire fairness standard. An identical result pertains to the extent that § 7.05 does not apply (because all or some of the Transactions were accomplished under § 9.01) but that § 7.10(a) does. In that scenario, Gotham might be entitled (subject to the affirmative defenses of the defendants) to relief for the failure of the defendants to comply with § 7.10(a)'s terms. But it would be inconsistent with the plain terms of the contract to superimpose a generalized fairness duty on § 9.01.

Therefore, as I understand this case, Gotham's ability to obtain relief will rise or fall with its Contract Claim. If it loses its Contract Claim, its Fiduciary Duty Claim falls as well. If it wins its Contract Claim, then it will have in substance proven that the General Partner was subject, by contract, to a fairness standard akin to the common law one applicable to self-dealing transactions by fiduciaries. In either event, the Partnership Agreement, and not default rules of fiduciary duty, control. As such, defendants' motion to dismiss Gotham's Fiduciary Duty Claim is granted as against the General Partner.

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A partnership agreement with no removal provision, the lack of such a removal provision was but one of several features that was found inconsistent with Revlon's applicability. Most important among these was the general partner's ability to defeat an insurgency by the simple measure of denying the insurgent admission as a limited partner. See Mariott II, mem. op. at 10-11 (Vice Chancellor Lamb discussing the fact that Chancellor Allen had correctly concluded that the absolute discretion the general partner had over admission decisions was "entirely inconsistent" with the existence of Revlon duties).

36Sonet, 722 A.2d at 324 n.12 (applying agreement provisions to exclusion of fiduciary duty principles while recognizing that some of the agreement's provisions were "in some sense . . . an explicit acceptance of the default duty of loyalty and fair dealing . . . .").

37Any interstitial issues in this case are best dealt with through cautious application of the implied covenant of good faith and fair dealing. If the General Partner's behavior cannot be said to violate an express term of the Agreement or an implied covenant to that Agreement, the court should be all the more reticent to conclude that the conduct was invalid on fiduciary grounds.
I leave open the following issue that was not addressed by the parties. The fiduciary duties owed by directors of a corporate general partner to the limited partnership under DRULPA have yet to be fully defined. In view of the teaching of cases like In re USACafes, L.P. Litigation, I am not confident that the HGI Directors might not be culpable for breach of fiduciary duty or as aider and abettors if they intentionally caused the General Partner to violate the Partnership Agreement. Likewise, if HGI purposefully induced a breach of contract by the General Partner, I cannot confidently conclude that it has no exposure. Thus, while I am certain that the liability of all the defendants will turn primarily on whether the General Partner complied with the Agreement, questions of fiduciary liability regarding the other HGI Defendants exist that I am presently unprepared to answer.

C. Gotham's Fraud Claim

Gotham's Fraud Claim is pled in the following conclusory manner:

**COUNT XI — FRAUD**

* * *

191. Defendants owe the Partnership and the Limited Partners a fiduciary duty of full and fair disclosure.

192. The General Partner misrepresented or concealed from the Partnership and the Limited Partners the true value of the Partnership's assets and the real reason for the transactions alleged above.

193. The General Partner acted with intent to deceive or with reckless disregard for the truth.

194. The Partnership relied to its detriment on such misrepresentations and facts which the General Partner knew to be false, causing injury to the Partnership and the Limited Partners.39

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39Am. Comp. ¶¶ 191-194.
During briefing, Gotham sought to flesh out this vague claim. Hence, it now contends that there are two specific items of information that should have been disclosed (the "Allegedly Material Facts"). First, Gotham claims that the General Partner should have disclosed the Net Asset Valuation that showed a value per unit well in excess of the Odd-Lot Offer purchase price. Second, Gotham distances itself from its complaint's claim that it was improper for the General Partner not to make a self-flagellating disclosure about its "real reasons." Gotham now claims that the General Partner should have disclosed factual information describing the effect that the resale of the Units to HGI contemplated in the Odd-Lot Offer could have had on HGI's equity share in the Partnership and thus on the unitholders' ability to remove the General Partner pursuant to the two-thirds removal provision.

But even with this additional meat on the bone, Gotham's Fraud Claim fails as a matter of law. One obvious problem with Gotham's claim is that it is unclear to whom Gotham is contending that disclosure of the Allegedly Material Facts should have been made. In this regard, it is critical that Gotham's disclosure claim rests on a fraud theory and not on the duty of disclosure owed in certain circumstances by fiduciaries.

That is, Gotham does not purport to bring this action on behalf of unitholders who sold in the Odd-Lot Offer on the basis that the General Partner breached any fiduciary duty of disclosure owed to them. As a result, any argument that the General Partner had the duty to disclose all the material facts bearing on the value of the Partnership units it sought to purchase in that Offer is unavailing to Gotham. Gotham simply cannot claim any harm to it or the unitholders who did not tender from that lack of disclosure. Rather, any harm to the non-tendering unitholders resulted not from the Odd-Lot Offer itself but from the terms and entrenching effect

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41 See In re Marriott I, mem. op. at 20 ("It is unquestioned that, in extending an offer to the limited partners to buy their limited partnership units the general partner owes a duty of full disclosure of material information respecting the business and value of the partnership which is in its possession."). I note that this statement in Marriott I does not address an offer by the limited partnership itself. If it were applied mechanistically to an offer by a limited partnership, such an application would appear to substantially limit any benefit to Delaware limited partnerships from the relaxed requirements apparently afforded to odd-lot tender offerors under federal law. In this case, there is no question that the Partnership made no attempt to make such full disclosure, and thus if this case were brought on behalf of selling unitholders a nice question of law would have been presented regarding: i) the Delaware disclosure requirements applicable in a circumstance when federal law specifically contemplates quite limited disclosures; and ii) whether the Offer was in fact one by the Partnership, the direct purchaser and conduit, or the General Partner, the ultimate purchaser.
of the resale of the purchased units to HGI. The resale was not approved by the unitholders. It was approved by the General Partner.

As a result, Gotham has failed to present evidence that would support a finding that it or any other non-tendering unitholder relied to its detriment on information omitted from the Odd-Lot Offer information sheet. Because a showing of detrimental reliance is required to prove a fraud claim, Gotham's claim fails as a matter of law.42

Recognizing this flaw in its claim, Gotham refined its fraud theory at oral argument. At that time, Gotham contended that its claim is that the Partnership itself was somehow defrauded by the failure by at least certain of the HGI Directors or HGI agents to disclose the Allegedly Material Facts to the full board of the General Partner. But this argument does not obviate a grant of summary judgment.

As the record now stands, there is no evidence from which one can infer that this particular alleged "fraud on the board" occurred. Nothing in the record suggests that the Non-HGI Directors voted to approve the Challenged Transactions in ignorance of the value of the Partnership's assets.43 While the General Partner's full board may not have considered the Net Asset Valuation in connection with these Transactions, there is no record evidence from which one can infer that the directors were unaware of the approximate value of the Partnership assets they were entrusted to manage. Nor is there a record basis to support an inference that the HGI Directors consciously decided not to make the Net Asset Valuation part of the board's deliberations. Moreover, the board packages, in connection with the Challenged Transactions, contained information regarding the effect the resales to HGI were likely to have on HGI's equity stake in the Partnership.44 Therefore, Gotham has failed to generate a triable issue that the Non-HGI Directors were deliberately misled into supporting the Transactions by non-disclosures of the Allegedly Material Facts by other directors and officers of the General Partner.45

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42The elements of common law fraud are: 1) deliberate concealment of a material past or present fact, or silence in the face of a duty to speak; 2) scienter; 3) an intent to induce reliance; 4) causation; and 5) damages resulting from the concealment. Nicolet, Inc. v. Nutt, Del. Supr., 525 A.2d 146, 149 (1987). Taken together, elements 3), 4), and 5) require the plaintiff to show that it detrimentally relied upon the defendant's disclosures.

43In contrast, there is evidence that suggests that they had no real knowledge of the Partnership's ability to secure financing for the sales at that time, or the likely effect the Split would have on the relationship between the net asset value of the Partnership and the market price of Partnership units.

44Healy Ex. 16, at HR 28168; see also Kailer Dep. at 252-253.

45I therefore do not reach the defendants' other reasons why the Fraud Claim fails, including their argument that the Allegedly Material Facts were in fact immaterial.
Granting summary judgment on Gotham’s elusive Fraud Claim does not, of course, render irrelevant the quality of the communications that occurred among directors and officers of the General Partner. Suppose evidence emerges at trial that certain of the HGI Defendants: (i) purposely misled the Non-HGI Directors about (a) the underlying value of the Partnership units or (b) the ability of the Partnership to get a higher price for the units than HGI was willing to pay, (ii) in order to induce the Non-HGI Directors to approve a sale to HGI at an unfair price. If so, that proof will be compelling evidence of a violation by the culpable defendants, even if the restrictive "willful misconduct" liability provision of § 7.10(c) of the Agreement is the measure of liability against the General Partner. Likewise, if Gotham shows that HGI had a secret plan to snatch up a large number of units that could entrench it at a bargain price before an expected up-turn in the market and did not disclose that plan to the Non-HGI Directors, that will also be evidence of willful misconduct. Such a showing will be even more powerful, of course, if the more stringent requirements of §§ 7.05 and 7.10(a) apply to the Challenged Transactions.

C. The Affirmative Defenses Asserted By The HGI Defendants

The HGI Defendants argue that they are entitled to summary judgment even if the Challenged Transactions were consummated in a manner that breached the Partnership Agreement. This argument is based on what the HGI Defendants claim is the clear and undisputed evidence that they relied in good faith on the terms of the Partnership Agreement in implementing the Transactions, a conclusion buttressed by the advice given to them by the General Partner’s counsel, Alan Kailer.

For the following reasons, the HGI Defendants have not persuaded me that they are entitled to summary judgment.

Initially, I note that there is evidence in the record that is at odds with the conclusion that the HGI Defendants acted in good faith. Start with the strong self-interest that HGI had in the Challenged Transactions. It is no small thing for the parent of a General Partner to quintuple its stake in a partnership, especially if by doing so it was putting itself in an excellent position to block a removal vote. If it could do so at a low price through Transactions that gave it all the benefits of a direct tender offer but with few of the securities law obligations that would have attended a direct tender offer, so much the better.

HGI’s self-interest is coupled with record evidence that casts doubt on the HGI Defendants’ explanation as to why the Challenged Transactions were undertaken in the manner they were. For example, the HGI
Defendants claim that the Partnership could not finance the purchase of the units sold to HGI in connection with the Challenged Transactions. Yet they rely upon stale efforts to obtain much greater financing in 1991 and 1992 as the primary evidence to support that claim and concede that they never attempted to look for financing for the Challenged Transactions themselves. In addition, there is room for doubt regarding their belief that the Partnership's own balance sheet would not have permitted it to finance the purchases, especially because the General Partner obligated the Partnership to fund the Option Plan and all the transaction costs in connection with the Transactions. The fact that the Partnership was able to refinance its whole balance sheet shortly after the Odd-Lot Tender Offer closed adds to this doubt.

Similarly, the HGI Defendants' claim that the real estate market was in the dumps in 1995 and that no one would have wished to buy into the Partnership at the time of the Challenged Transactions is, at best, debatable. At worst, it is flatly inconsistent with contemporaneous documents created by officers of the General Partner. The objective circumstances as revealed by the record do not exclude the possibility that the General Partner knew that the market was undervaluing the Partnership's units at the time of the Challenged Transactions, that the Partnership's prospects were quite promising, and that it was an advantageous time for HGI to increase its stake in and control over the Partnership at a bargain price. The chronology of events in the year of the Transactions is consistent with that possibility. In the first half of 1995, the General Partner concluded that the Partnership could not afford to fund the $4.4 million to make the purchases in the Challenged Transactions. Thus HGI bought those units for its own account. But a mere five months after the Challenged Transactions closed, the Partnership decided to engage in the Repurchase Program, during which it later bought units at an average price nearly twice that paid by HGI in the Transactions.

Contributing to my conclusion that there is a triable issue regarding good faith is the lack of any strong reason for the Odd-Lot Offer to have been undertaken when it was. Significantly, the Odd-Lot Offer was the Transaction in which HGI obtained most of its units. Although the Offer did offer liquidity to unitholders with small blocks without the obligation to pay brokerage fees, it was also made at a time when the market had not yet begun to value the units of the Partnership in a manner more in keeping with the assets it owned. Put simply, it is quite plausible that HGI realized that it was a good time to buy, but not to sell Partnership units. And the administrative cost savings likely to be achieved by reducing the number of mailings to unitholders with small blocks were so insubstantial that: (1)
the General Partner's board was not presented with any written estimate of the savings; and (2) it would take several years before the savings would exceed the costs of implementing the Transaction itself. Given these factors, why not have waited until the Partnership itself could fund the purchases so that all unitholders who chose not to sell could reap the price-bolstering benefits of the Offer?

By raising these concerns, I do not mean to imply that there was no rational business purpose for the Odd-Lot Offer. Rather, I do so because the rather tepid benefits of that Transaction to the non-HGI unitholders and the timing of the Transaction help create doubt regarding the HGI Defendants' motive for recommending that Transaction.

Thus, in view of the record evidence that suggests that HGI not only had a motive to advance its own interests at the expense of the other unitholders but in fact achieved that very result, HGI has failed to persuade me that there is no need for a trial to evaluate its good faith defense, a defense which HGI bears the burden to prove.

In view of the triable doubt that exists regarding HGI's good faith in undertaking the Transactions, I decline to grant summary judgment to the HGI Defendants on the basis of § 17-1101(d)(1) of DRULPA, which exculpates any person who relies in good faith on the provisions of a partnership agreement from liabilities for breach of duties existing "at law or in equity."

As written, § 17-1101(d)(1) appears to have quite broad application. For example, the statute quite clearly states that it applies to all claims for breach of duty at law or in equity "including" a claim for breach of fiduciary duties. The inclusion of fiduciary duty claims in this manner logically suggests that the statute reaches other claims, such as claims for breach of contract. Likewise, unlike 8 Del. C. § 102(b)(7), § 17-1101(d)(1) of DRULPA applies to all "liabilities" and not just to claims for monetary damages. This suggests that the statute may be read to bar rescissionary relief. For all these reasons, the defendants argue that the statutory exculpatory provision applies to exonerate even a breach of the partnership agreement itself so long as the breach was due solely to a good faith misreading of the partnership agreement.

Gotham retorts that, read this way, § 17-1101(d)(1) sanctions abuse because a general partner can exploit ambiguities in the partnership agreement to advance its own self-interest. Gotham also notes that the statute has, to date, apparently not been applied in any decision to exculpate a general partner against a claim for breach of a partnership agreement.
For the following reasons, I decline to make a definitive ruling about the scope of the statute at this point in the case. Initially, I note that the decisional law interpreting § 17-1101(d)(1) is slight. While there are decisions applying the statute to bar claims for breach fiduciary duty, the parties have cited only one case in which a Delaware court has discussed the applicability of the statute to a claim for breach of contract. In Continental Ins. Co. v. Rutledge & Co., this court indicated that § 17-1101(d)(1) would bar a breach of contract action in a situation where the general partner had made a good faith misreading of an ambiguous contract

66U.S. Cellular Inv. Co. of Allentown v. Bell Atlantic Mobile Systems, Inc., Del. Ch., C.A. No. 12984, mem. op., Berger, V.C. (March 11, 1994), generally supports the defendants' position, but highlights the fact that the emphasis of practice under § 17-1101(d)(1) has thus far focussed on breach of fiduciary duty claims. In that case, then Vice Chancellor Berger did not dismiss a breach of contract claim against a corporate general partner because the agreement was ambiguous and could be construed to bar the conduct about which the plaintiff complained. Id. at 3-5. Nonetheless, on the basis of § 17-1101(d)(1) she dismissed the breach of fiduciary duty claim against the general partner — which was based on the same conduct — because the complaint did not plead facts that supported an inference that the general partner's contract interpretation was made in bad faith. Id. at 5. The Supreme Court affirmed and stated:

The Court of Chancery's dismissal of the fiduciary duty claim was based on the failure of [plaintiff] to plead that [the general partner] acted in bad faith. A general partner acting in good faith reliance on the provisions of the partnership agreement is shielded from liability for breach of fiduciary duty. 6 Del. C. § 17-1101(d). The complaint as it now reads is consistent with the interpretation that [the general partner] believed its actions were permitted under the Agreement, i.e., that [it] took its action in good faith.

... [The complaint] does not assert that [the general partner] acted in knowing breach of the Agreement. The 1994 order therefore properly dismissed the complaint as failing to state a cause of action under Delaware law.


It is interesting that neither the Supreme Court nor this court resolved the breach of contract claim against the general partner on the basis of § 17-1101(d)(1). Most likely that is because no argument was made along those lines, but even so it is at least eye-brow raising that neither this court nor the Supreme Court adverted to the potentially broader applicability of § 17-1101(d)(1) in the case. In this respect, respected commentators on DRULPA center their discussion of § 17-1101(d)(1) solely on breach of fiduciary claims and not on claims based on breach of the partnership agreement itself, even though the statute itself addresses liabilities at "law or in equity." FOLK § 17-1101.4 at LP-XI-21 ("Section 17-1101(d)(1) provides a safe harbor against claims of breach of fiduciary duty for general partners who act in good faith reliance on the partnership agreement. In other words, a general partner cannot be liable to a partner for breach of fiduciary duties when the general partner relied in good faith on the provisions of the partnership agreement. Accordingly, a claim for breach of fiduciary duty maybe dismissed for failure to state a claim where it does not allege a knowing breach of the partnership agreement."); LUBAROFF & ALTMAN § 11.2.6 (focussing discussion of § 17-1101(d)(1) on claims for breach of fiduciary duty).

provision. The court held that the statute would not, however, exculpate a breach of an unambiguous contractual provision. Because the contract provision at issue in that case was unambiguous, the court refused the defendants' attempt to use § 17-1101(d)(1) to bar the plaintiffs' breach of contract claim.

The Rutledge interpretation might pose an interesting question in this case, depending on the facts. Suppose that the sales to HGI in connection with the Odd-Lot Offer are ultimately found not to have involved an issuance. As such, they would not fall under § 9.01, but § 7.09, and be governed by § 7.05 and § 7.10(a). Assume further that I conclude that the General Partner's board believed that new units would be issued to HGI but that they were not because of an administrative error. In that scenario, the agreement's terms would not be ambiguous, but the circumstances would seem to present a good case for the invocation of the statute to bar liability.

In view of the sparseness of our case law on the statute to date and the importance of the competing public policies at stake,\(^{40}\) I prefer to examine these questions on a full record. Although the statutory text and the caselaw provide me with a jumping off point, the parties have not burdened me with any of the legislative history of § 17-1101(d)(1) and it seems to me to be prudent to consider such history before opining about the statute's full scope.\(^{40}\) I am also interested in receiving more detailed

\(^{40}\)Note that the defendants' reading of § 17-1101(d)(1) diminishes the pro-unitholder effect of recent decisions holding that ambiguities in general partner-drafted partnership agreements must be resolved in favor of the unitholders. A collateral consequence may well be an increase in requests for injunctive relief to halt potential breaches before they occur and become potentially irremediable.

\(^{41}\)I note in this regard the cautious approach recently taken by this court in applying § 18-1101 of the Delaware Limited Liability Company Act, 6 Del. C. § 18-1101, which is virtually identical to § 17-1101(d)(1) of DRULPA. The court refused to use the statute to prevent relief to a member whose interest in the LLC had been taken away allegedly based on a good faith interpretation of the LLC agreement. The court found that there was no provision in the agreement on which a good faith basis for the defendants' actions could be said to rest, a finding sufficient to bar the defendants' use of the statute. Nonetheless, the court provided an additional statute-based reason for its decision:

Further, I must view the cited provision allowing members of an LLC to rely in good faith on the terms of the operating agreement in the context in which it appears in the statute, and with regard to the general tenor of the statute as a whole. This provision is intended, for example, to make clear that an apparent limit on liability for breach of fiduciary duty is to be interpreted broadly. I have no doubt that the legislature never intended this provision to allow the members of an LLC to misappropriate property from another member and avoid returning that property or otherwise compensating the wronged member.

attention to the issue of whether § 17-l 101(d)(1)'s definition of liability extends only to monetary damages, or whether it also extends, as the defendants argue, to bar an order of rescission necessary to rectify a breach of a partnership agreement.\textsuperscript{50}

My reticence to speak definitively at this juncture is overriding influenced by my view that there is a substantial fact question regarding whether the good faith element of the statute is satisfied. Even if the defendants are correct that § 17-1101(d)(1) bars any relief for breach of contract unless the plaintiff can prove a knowing breach, the HGI Defendants have not convinced me that Gotham will be unable to prove such a breach.

I conclude so despite the HGI Defendants' additional claim that they relied in good faith on the advice of Kailer that they could effect the Transactions so long as they complied with the floor price in § 9.01(b). The written work product Kailer gave to the General Partner's board indicates that the Transactions were subject to § 9.01, but did not discuss whether § 7.05 or § 7.10(a) were applicable.

But Kailer did not advise the defendants that they were free to undertake the Transactions without considering other factors so long as the § 9.01(b) floor price was met. Kailer in fact testified that he advised the board that they had to make an informed decision that the transactions were "fair" and "in the best interests of the partnership."\textsuperscript{51} Kailer was careful not to opine on the substantive merits of the Transactions but simply to inform the board that the General Partner had the authority to approve them if the board concluded that the Transactions met these criteria. Likewise, Kailer testified that the directors who were not affiliated with HGI should make the decision about the sales to HGI.\textsuperscript{52} But he did not specifically address whether Audit Committee review and approval was required.\textsuperscript{53}

Under § 7.08 of the Partnership Agreement, the General Partner is only exculpated when it relies on counsel in good faith and acts in accordance with counsel's opinion. As noted previously, there is a triable doubt regarding the HGI Defendants' good faith, a doubt that is fair to impute to the General Partner as an entity. That doubt extends to: 1) whether the General Partner in fact implemented the transactions under § 9.01 at all pursuant to Kailer's advice; and 2) whether the General Partner acted in accordance with Kailer's advice that it could approve the

\textsuperscript{50}By its own terms § 17-1101(d)(1) of DRULPA appears to sweep more widely than 8 Del. C. § 102(b)(7), which expressly addresses only "liability . . . for monetary damages."

\textsuperscript{51}Kailer Dep. at 306; see also Gumbiner Dep. at 570.

\textsuperscript{52}Kailer Dep. at 275, 314.

\textsuperscript{53}Id. at 261-262.
Transactions only if it concluded that the Transactions were fair and in the best interests of the Partnership. I address these doubts in order.

It is obvious that HGI had a substantial interest in structuring the Transactions in a manner that would avoid the strict fair price requirements of § 7.05 of the Agreement. One way of doing that was to craft the Transactions as an "issuance" of units to HGI rather than as a simple resale of existing units to it. Although the General Partner vigorously asserts that the units acquired by HGI in the Transactions were in fact "issued" to it, there is little evidence to support that assertion as to the shares HGI acquired in connection with the Odd-Lot Offer. Certainly, the Partnership did not account for the Odd-Lot-related sale to HGI as an issuance and the record is devoid of any evidence as to when the issuance occurred. Given the substantial self-interest HGI had in avoiding the application of § 7.05, the fact that there is a real question about whether the General Partner actually consummated the Odd-Lot Offer-related sale to HGI as an issuance raises the further question of whether the General Partner was simply looking for a pretext to avoid paying a fair price. While the defendants would claim that any failure to strictly comply with § 9.01 can be attributed to an honest mistake, the record as it stands does not rule out a less savory explanation.

Similarly, if the General Partner structured the Transactions to place over 20% of the units in HGI's hands at a low price even though the General Partner's officers knew that the Partnership could have financed those purchases itself, one could reasonably conclude that the General Partner did not comply in good faith with Kailer's advice that the General Partner had to determine that the Transactions were "fair" and in the "best interests of the Partnership."

I note another issue that troubles me. The defendants refused to disclose any advice that Kailer gave to officers of the General Partner that did not go to the full board of the General Partner. At an office conference that was not transcribed, then-Vice Chancellor, now Justice Steele refused to order the disclosure of such advice. It is not apparent to me whether the court knew then that the defendants would be relying so substantially upon advice of counsel as an affirmative defense. I invite the parties to revisit this issue before trial based on concerns that are best expressed by way of a hypothetical.

Suppose that Kailer gave advice to officers of the General Partner that suggested that it was unclear whether the Transactions were subject to § 7.05 and § 7.10(a) and that he could not say with certainty that § 9.01 applied to their exclusion. If Kailer then provided the full board with bullet points that do not even mention § 7.05 or § 7.10(a), would that not cast
doubt on the good faith reliance of the General Partner — as the responsible entity — on counsel? Would the knowing exploitation of an ambiguity in a partnership agreement by the General Partner with the aid of a lawyer be consistent with the good faith requirement of § 7.08 of the Partnership Agreement and § 17-1101(d)(l) of DRULPA?

This issue bleeds into another concern raised by Gotham. Gotham points out that Kailer bad a long-standing attorney-client relationship with HGI. They also note that the only lawyer who apparently did any work for HGI in connection with the Transactions was Kailer himself, the very lawyer who was supposed to be representing the Partnership. While the defendants claim that Kailer merely prepared implementing board resolutions for HGI and that performing that task did not make him HGI's lawyer in connection with the sales, the fact that the defendants have blocked inquiry into the full scope of Kailer's advice in connection with the Transactions precludes the court from accepting their contention that Kailer was not simultaneously both HGI's and the Partnership's lawyer in the Transactions.

While § 7.08 of the Agreement invests the General Partner with the flexibility to rely in good faith upon a lawyer of its own choosing, the defendants have not persuaded me that the possibility that Kailer had two conflicting masters does not bear on the question of good faith reliance. The record evidence does not rule out the possibility that the major sale to HGI was shoehorned into § 9.01 to avoid the application of § 7.05, an avoidance that benefited HGI to the exclusion of the other unitholders. Then that sale was quite possibly not even carried out as an issuance. If those possibilities are later found to have in fact occurred, the awkward position Kailer seems to have occupied as advisor to two clients with conflicting aims would contribute to concerns about the good faith with which the General Partner sought and accepted his advice. The parties' inability to point to legal precedent addressing a potential conflict situation like this in the limited partnership context also makes me reluctant to resolve this issue without the benefit of live trial testimony by Kailer and his client defendants.

2. The Affirmative Defenses Raised By The Non-HGI Directors

The Non-HGI Directors argue that their actions must be viewed in a very different light than those of the HGI Defendants. Unlike the HGI Defendants, the Non-HGI Directors had no personal pecuniary interest in favoring HGI's interests over the interests of the other unitholders other
than that they were elected to the General Partner's board with the votes of HGI.

Undoubtedly, the Non-HGI Directors were forced to balance the interests of constituencies whose interests were in conflict. By virtue of long-established principles of Delaware corporation law, the Non-HGI Directors owed fiduciary duties to the General Partner and its sole owner, HGI. Under the less venerable but largely unquestioned precedent of USACafes, the non-HGI director-defendants also owed fiduciary duties to the Partnership and its unitholders.

But the Non-HGI Directors contend that this sort of structural conflict does not preclude a grant of summary judgment to them under § 7.06 of the Partnership Agreement, which exculpates them for any breach of duty that does not involve a breach of the duty of loyalty or the receipt of an improper personal benefit.

Gotham retorts by analogy to corporation law principles. Posit a scenario in which Director Jones serves on the board of Corporation A, which is the majority stockholder of Corporation B. Assume that Director Jones also serves as a director of Corporation B. Further assume that Corporation A buys a major asset from Corporation B. In that context, Gotham claims, plain principles of Delaware corporation law would treat Director Jones who was on both boards as having her loyalty (whether framed in terms of independence or interest) compromised. If there were a triable question about the fairness of the underlying transaction, Director Jones would have a difficult time escaping a trial because her conflicted loyalties would raise a question of scienter difficult to resolve before trial. Gotham argues that the same approach must be taken in this situation involving a challenge to conduct by directors of a corporate general partner.

For the following reasons, I conclude that the analogy to corporation law Gotham seeks to make is inapt and would produce unproductive results in contexts like the ones presented here.

To understand why I reach this conclusion, it is necessary to reflect on this court's decision in USACafes. In that decision, Chancellor Allen concluded that the directors of a corporate general partner owed certain fiduciary duties to the limited partners of the limited partnership the

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55I include within this traditional concept the contract's list of bad faith acts, intentional misconduct, and knowing violations of law; a list which was obviously inspired by 8 Del. C. § 102(b)(7).
56Cf. 8 Del. C. § 144.
general partner controlled. He did so, for among other reasons, because the directors of the general partner play a key role in controlling the assets of the limited partnership for the benefit of the limited partners, a traditional indicator of a fiduciary relationship.

This decision was in some senses unorthodox. When limited partners contract to join a limited partnership run by a corporate general partner, a rote traditional approach would impose fiduciary duties solely upon the corporate general partner as an entity. After all, it is the entity that the limited partners agreed would manage their assets.

Under this more strictly traditional approach, the limited partners would therefore be able to look to only the corporate general partner in the first instance to seek redress for any breach of duty. Only if there had been abuse of the corporate form by the owners of the corporate general partner that would justify veil piercing would the limited partners be able to look beyond the corporate partner to others for redress.

As the leading treatise on Delaware limited partnerships puts it:

The directors of a corporate general partner of a Delaware limited partnership owe fiduciary duties to the stockholders of the corporate general partner. A corporate general partner itself owes a fiduciary duty to limited partners of the limited partnership of which it is a general partner . . . Prior to USACafes, L.P., the authors did not believe that the fiduciary duty of directors of a corporate general partner to the limited partners of the limited partnership of which it is a general partner would, in and of themselves, justify a court's holding that the directors of the corporate general partner owed a fiduciary duty to the limited partners of the limited partnership of which the corporation (and not the directors)

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57600 A.2d at 48-49.
58Id. The facts in USACafes involved serious accusations of actual personal self-dealing by the individual directors of a corporate general partner. Even then Chancellor Allen was careful to indicate that the scope of duty owed by the general partner's directors "may well not be so broad as the duty of the director of a corporate trustee." Id. at 49. "But [those duties] surely entail the duty not to use control over the partnership's property to advantage the corporate partner at the expense of the partnership." Id.
59The earlier decision in this case holding that the derivative demand excusal test must focus on the General Partner's ability as an entity to consider a demand reflects the more traditional approach. See Gotham I, mem. op. at 15-16 (finding that a contrary rule "would undermine this state's established policy of respecting the legal fiction of the business entity" and that any other approach "would ignore the reality that it is the general partner who owes the limited partners fiduciary duties, not the management of the general partner even though they make the decisions for the business entity.")
was the general partner. If the directors were to have managed the corporate general partner in such a way that the corporate general partner damaged a limited partnership, many practitioners believed that the stockholders of the corporate general partner might have had a cause of action against the directors of the corporate general partner for mismanagement or breach of fiduciary duty to the extent of any loss, suffered by the corporation either directly or as a result of a limited partner action against the corporate general partner resulting in a recovery by the limited partners, but that the limited partners would not have had a claim directly against the directors. The limited partners' claim would have been against the corporate general partner itself. Under such an approach, the corporate general partner is viewed as an entity with duties flowing from its relationship with the limited partnership of which it is the general partner. It was felt that such an approach would avoid putting directors in the situation of having potentially conflicting and irreconcilable fiduciary duties to stockholders of the corporation and to limited partners of the limited partnership.\textsuperscript{60}

The question presented here is whether § 7.06 of the Agreement can be read as including the structural conflict faced by the Non-HGI Directors within its concept of a loyalty breach. That is, if the Non-HGI Directors unintentionally struck a contractually improper balance between HGI's interests and the Partnership's interests that was unfair to the Partnership, would the structural conflict elevate such a breach to the level of disloyalty?

To conclude so would be to rewrite the understanding that exists between the parties to the Partnership Agreement. Regardless of the decision in \textit{USACafes}, the parties here agreed that the General Partner as an entity was the general partner. While the directors of the General Partner were not named as general partner, the Agreement does recognize that the directors of the General Partner would play a role in the decisionmaking process of the General Partner. But that recognition does not aid Gotham because the Agreement contemplates that the Non-HGI Directors would be responsible for reviewing and approving certain transactions between General Partner affiliates and the Partnerships. Put simply, the Agreement contemplates that the Non-HGI Directors will

\textsuperscript{60}LUBAROFF & ALTMAN § 11.2.11, at 11-32-11.32.1.
operate in situations involving structural conflicts as a protective mechanism for the unitholders unaffiliated with the General Partner.

As such, it is inconceivable that § 7.06 of the Agreement can be read as precluding exculpation of the Non-HGI Directors when they play the role specifically envisioned for them by the Agreement. Absent some indication that they conducted themselves in a structural conflict situation in a bad faith manner, for their own personal self-interest, or to intentionally injure the other unitholders for the benefit of the General Partner's affiliate, § 7.06 bars a recovery against them.

In an important sense, this conclusion can be said to rest on an analogy to decisional law under the Delaware General Corporation Law. On several occasions, our courts have held that directors did not lack independence simply because they were required to balance the interests of different stockholder classes whose interests were at odds as to a particular transaction.61 For example, this court recently stated:

At essence, therefore, the plaintiffs' duty of loyalty claim hinges on the following. In structuring the Hughes Transactions, the GM Board had the duty to balance fairly the interests of two groups of stockholders to whom they owed fiduciary duties. Since the two stockholders groups had potentially divergent interests, plaintiffs believe that they state a duty of loyalty claim merely by alleging that the Board treated one group unfairly — even if it was for reasons unrelated to director self-interest. In my view, that is not the law. Rather, the plaintiffs must plead facts from which one could infer disloyalty or bad faith on the part of GM's directors, in the sense that the directors acted for reasons inimical to their fiduciary responsibilities. An allegation that properly motivated directors, for no improper personal reason, advantaged one class of stockholders over the other in apportioning transactional consideration does not state a claim for breach of the duty of loyalty.62


62 In re General Motors Class H Stockholders Litig., 734 A.2d at 618-619.
This strand of our corporate decisional law logically extends to the limited partnership context, wherein it will usually be (as in this case) inferable that the limited partners explicitly recognized that the directors of the general partner would be the ones entrusted with balancing the interests of the corporate general partner and its affiliates against the interests of the other unitholders. In analogous circumstances, this court's decisions have precluded limited partners from complaining about a general partner's conflict of interest that was clearly disclosed to the limited partners in the partnership agreement.63

As a final factor, I must also confess concern that adopting Gotham's argument would create a disincentive for qualified persons to serve as directors of corporate general partners. While anyone who serves in such a capacity must expect to deal with the possibility of litigation, it is quite another thing for such a person to accept service that potentially exposes her to a triable claim for breach of the duty of loyalty whenever she makes a good-faith decision about a transaction between the partnership and an affiliate of the general partner.

For all these reasons, summary judgment will be entered for the Non-HGI Directors. Because I resolve the issue under § 7.06, I do not reach the defenses under § 17-1101(d)(1) of DRULPA and § 7.08 of the Agreement, other than to note that there is no record evidence that suggests that the Non-HGI Directors acted other than in a good faith belief that the Transactions complied with the Agreement.

V. Conclusion

In accordance with the reasons set forth in this opinion, this motion is disposed of as follows. The HGI Defendants' motion for summary judgment is DENIED as to Gotham's Contract Claim, is GRANTED as to Gotham's Fiduciary Duty against the General Partner only, and is GRANTED as to Gotham's Fraud Claims against all the HGI Defendants. The Non-HGI Directors' motion for summary judgment on all the claims

63Seaford Funding L.P. v. M& M Associates II, L.P., Del. Ch., 672 A.2d 66, 72 (1995) (stating that if limited partners had accepted an investment knowing of a conflict of interest on the part of the general partner in making certain decisions, they will be precluded from asserting a breach based on the general partner's later engagement in that contemplated conduct); Boxer v. Husky Oil Co., Del. Ch., C.A. No. 6261, 1983 WL 17937, at *6, Hartnett, V.C. (June 28, 1983) (where partnership agreement and prospectus specifically contemplated that a general partner with a disclosed conflict would play a role in selecting an appraiser, the plaintiffs could not base a cause of action on the mere fact that the general partner in fact played the very role contemplated for it when it came time to select an appraiser), aff'd, Del. Supr., 483 A.2d 633 (1984) (ORDER).
against them is GRANTED. All claims on which the defendants have obtained summary judgment are dismissed with prejudice. IT IS SO ORDERED.

GOTHAM PARTNERS, L.P. v. HALLWOOD REALTY PARTNERS, L.P.

No. 15,754-NC

Court of Chancery of the State of Delaware, New Castle

September 27, 2000
Revised October 4, 2000

Edward M. McNally, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for plaintiff.

Michael D. Goldman, Esquire, of Potter Anderson & Corroon, Wilmington, Delaware, for defendants.

Elizabeth M. McGeever, Esquire, of Prickett, Jones & Elliott, Wilmington, Delaware, for defendants.

STRINE, JR., Vice Chancellor

Plaintiff Gotham Partners, L. P. has brought a motion for partial summary judgment seeking a declaration that it has no conflict of interest that precludes it from serving as a derivative plaintiff on behalf of nominal defendant Hallwood Realty Partners, L.P. (the "Partnership") and that the unclean hands doctrine does not bar its right to assert its claims. In this opinion, I conclude that even if Gotham engaged in the improper behavior of which it is accused, that behavior neither disqualifies it as a derivative plaintiff nor constitutes unclean hands justifying a refusal to hear its claims. Rather, I find that if Gotham did engage in the inappropriate behavior, that factor may be taken into account in determining whether to award attorneys' fees for or against Gotham.
I. The Questions To Be Decided

Gotham filed this action in June 1997. Its complaint challenges three transactions (the "Challenged Transactions" or "Transactions") entered into by the Partnership: 1) a March 1995 reverse unit split (the "Split"); 2) a March 1995 stock option plan (the "Stock Option Plan"); and 3) a June 1995 odd-lot tender offer ("Odd-Lot Offer"). The units that were purchased by the Limited Partnership in connection with the Split and the Odd-Lot Offer were in turn sold by the Partnership to defendant Hallwood Group Incorporated ("HGI"), the sole owner of the Partnership's general partner, defendant Hallwood Realty Corporation ("the General Partner"). Meanwhile, the Stock Option Plan granted options to officers who owed their careers and loyalties to HGI.

Gotham alleges that the sale of the units and the issuance of the options occurred on economic terms that were unfair to the Partnership and unduly favorable to HGI. Furthermore, Gotham claims that the Challenged Transactions were designed to secure HGI's control over the Partnership and not to benefit the Partnership. The Split and Odd-Lot Offer allegedly did so by increasing HGI's equity interest in the Partnership from 5.15% to 24.7%. When the unit options issued to HGI insiders are added, HGI and its affiliates controlled 29.4% of the Partnership's Units. This increase was sufficient to have an entrenching effect, argues Gotham, because the partnership agreement states that a two-thirds vote of the limited partners is necessary to replace the General Partner.

The defendants in this action have filed a motion for summary judgment on the merits of Gotham's attack on the Challenged Transactions. That motion is addressed in a separate opinion.

This opinion focusses solely on two questions relating Gotham's status as a plaintiff. First, is Gotham entitled to an award of summary judgment declaring it a proper, non-conflicted plaintiff with standing to pursue this derivative action on behalf of the Partnership? Second, is Gotham entitled to an award of summary judgment concluding that the doctrine of unclean hands does not bar its right to seek the relief it requests?

These questions arise because of a simple factual allegation that I must accept as true for purposes of this motion. According to the defendants, Gotham's principals expressed a willingness not to pursue this action if Gotham was given a fee-generating role to pursue a financial
restructuring on behalf of the Partnership. Only when told by the General Partner that no such role would be offered did Gotham pursue this lawsuit.¹

Put simply, the defendants assert that Gotham attempted to coerce the Partnership into paying it a fee to avoid this lawsuit. Because this tactic is both inequitable and selfish, the defendants argue that Gotham should not be permitted the chance to pursue its claims and certainly not on behalf of others.

II. Legal Analysis


Although this case involves a derivative suit brought on behalf of a limited partnership rather than a corporation, the parties agree that this distinction is immaterial for purposes of articulating the standard by which to evaluate the defendants' disqualification claim. They concede that the relevant standard requires a "show[ing] that a serious conflict of interest exists, by virtue of one factor or a combination of factors, and that the plaintiff cannot be expected to act in the interests of others because doing so would harm his other interests. In effect, the defendant[s] must show a substantial likelihood that the derivative suit is not being maintained for the benefit of the [partners of the Partnership]."²

This court recently homed in on the central focus of this inquiry: "Put . . . simply . . ., the Court must ensure that the other potential beneficiaries of this suit will not be ill-affected by [the plaintiff's] continued participation as representative."³

Here, even assuming that the defendants' factual accusations are correct, I conclude that there is no triable issue of fact raised regarding Gotham's adequacy as a derivative plaintiff. By this action, Gotham seeks relief that would be of benefit to all the unitholders of the Partnership, other than HGI.

¹Gotham does not concede that this allegation is true except for purposes of this motion. Even the record evidence cited by the defendants does not rule out the possibility that it was the refusal of the defendants to commit to pursue a value-maximizing restructuring that would potentially correct any harm from the Challenged Transactions, and not the defendants' failure to hire Gotham for that purpose, that was the predominant factor in Gotham's decision to litigate.


³Id. at 23-24.
relief that would be of benefit to all the unitholders of the Partnership, other than HGI.

Assume that Gotham prevails on its claims at trial. If the Challenged Transactions are rescinded and the shares and options sold to HGI and its insiders are restored to the Partnership in exchange for it returning the sale proceeds plus interest, then all of the unitholders other than HGI will benefit because their proportionate interest in the Partnership will be increased and any economic harm to the Partnership from the Challenged Transactions will be undone. Such rescissory relief will also increase the ability of the limited partners to choose another General Partner.

Likewise, if Gotham obtains an order of monetary damages requiring the defendants to pay the difference between what HGI and the insiders paid in 1995 and what they were contractually or fiduciarily obligated to pay, then that damage award will redound to the ultimate benefit of all unitholders of the Partnership other than HGI.

Therefore, when the focus is on this action itself, there is no economic antagonism between Gotham and the other unitholders. While this suit may have its origins in unseemly behavior, there is nothing in Gotham's litigation strategy to date that suggests that the prior behavior has infected its ability to prosecute this action in a manner that is in harmony with the interests of the other unitholders.

Indeed, it is also worth noting that the unseemly behavior was in part premised on a request that was not at face value adverse to the interests of the unitholders other than HGI. It is conceded that Gotham was interested in helping the Partnership accomplish a financial restructuring that might well have benefited the unitholders in a material way. It is only the fact that Gotham allegedly (and for purposes of this motion, did) ask for a fee-earning role in seeking such a transaction in exchange for not pressing this suit that provides any legal or moral force to the defendants' disqualification argument. But without any evidence that Gotham's prior conduct has caused it to litigate this action in a manner adverse to the non-HGI unitholders, the fact is too insubstantial to buttress a conclusion that Gotham is not a proper derivative representative.

And certainly the mere fact that Gotham may wish to obtain relief that permits it a better opportunity to convince the other unitholders to sell their units to it or to replace Gotham as general partner presents no conflict. This court concluded in the Dairy Mart litigation that it would be inappropriately paternalistic to assume that security holders must be protected from receiving a legal remedy that might enable them to exercise greater influence through the ballot box — and thus obtain a greater possibility of receiving tender offers for their securities from the
representative plaintiff or other parties. When capitalists (such as the defendants) assert that other capitalists (such as the other unitholders) must be protected from themselves, it is always worthwhile for the court to inquire whether the argument is more self-interested than selfless: Here, if the defendants' motion is successful, the defendants will avoid the merits of a lawsuit that could compromise their interests and benefit the other unitholders.


The defendants' affirmative defense raises an interesting question of law. They cannot claim that Gotham's behavior in any way influenced the manner in which the Challenged Transactions were effected or that Gotham's behavior induced the consummation of those Transactions. Rather, the defendants argue that they would not be facing a challenge to those Transactions if they had acceded to Gotham's request that Gotham be paid to advise the Partnership in searching for a strategic transaction.

Having been confronted with what they regard as an extortionate overture by Gotham, the denial of which proximately resulted in the filing of this lawsuit, the defendants contend that Gotham's "inequitable conduct ... [had] an 'immediate and necessary' relation to the claims under which relief is sought." Indeed, they argue that nothing could be more necessarily related to this case than a wrongful demand that the defendants buy off Gotham with Partnership funds in order to buy litigation peace.

In response, Gotham argues that the doctrine of unclean hands does not bar relief because the connection between its own alleged wrongdoing and this lawsuit is too attenuated. Put more directly, Gotham argues that because the Challenged Transactions were already consummated by the time of Gotham's allegedly wrongful conduct, that wrongful conduct should not operate as a bar to relief for Gotham.

In resolving this motion, I am mindful that any unclean hands defense must be evaluated carefully to determine whether the public policy that undergirds the defense's existence is implicated. Here, I conclude

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*In re Dairy Mart, mem. op. at 26-27.
that even if the facts are as the defendants say they are, there is not a public policy justification for denying Gotham the ability to press its claims.

The reality is that the Challenged Transactions were either proper or improper. Gotham's allegedly wrongful conduct has no effect on that analysis. That being the case, why would it make public policy sense to deny relief that would benefit other unitholders of the Partnership simply because Gotham had expressed a willingness not to pursue valid claims if granted a fee-earning role? Such a denial now might well have the practical effect of exculpating wrongful conduct by the defendants simply because of improper behavior by one unitholder.

Furthermore, such a rigid approach is not necessary to protect the defendants from any harm they have suffered as a result of Gotham's wrongful conduct. Rather, such harm can be dealt with in an alternative manner.

At trial, I will allow the defendants to present evidence regarding the alleged wrongful conduct supporting their unclean hands defense. Such evidence can be relevant in at least two ways. If the defendants prevail on the merits of Gotham's claims and if they convince me that Gotham tried to extract a fee-paying contract in exchange for not bringing suit, they may well have a basis for requiring that Gotham pay all of the fees and expenses incurred in defending these actions. Likewise, if the defendants lose on the merits but Gotham is found to have engaged in wrongful conduct, the latter finding might be relevant to any consideration of a claim for fees and expenses made by Gotham.

Evaluation of the defendants' defense in this more nuanced manner will serve to vindicate the legitimate interests of the defendants but without injuring other unitholders who might have been harmed by the Challenged Transactions.

III. Conclusion

For the foregoing reasons, Gotham's motion for summary judgment is GRANTED. IT IS SO ORDERED.
Plaintiff Gotham Partners, L.P. has brought a motion for partial summary judgment seeking a declaration that it: 1) has standing to pursue this derivative action on behalf of nominal defendant Hallwood Realty Partners, L.P. ("the Partnership"); and 2) was a substituted limited partner of the Partnership as of 1994.

This motion is necessary because the defendants in this action, including the General Partner of the Partnership, defendant Hallwood Realty Corporation ("the General Partner"), deny that Gotham was ever admitted as a limited partner before September 11, 2000. This denial is rather unusual because the record is clear that Gotham has owned units in the Partnership since 1994, made timely application to be a limited partner, subsequently received several communications from the General Partner
addressed to "Dear Limited Partner," and brought a books and records action in this court in which the General Partner admitted that Gotham was a limited partner. Nonetheless, having "discovered" in December 1998 that Gotham was not a limited partner after all, the General Partner contends that Gotham lacks standing to press its derivative claims.

In this opinion, I grant Gotham's motion for three reasons. First, even if Gotham was simply an assignee as of the time the wrongs it complains of occurred, it still has standing pursuant to 6 Del. C. § 17-1001. Second, the only plausible reading of the record evidence is that Gotham was admitted as a limited partner and treated as such by the General Partner after the General Partner listed Gotham on the Partnership's only list of limited partners in 1994. Finally, the only alternative to a conclusion that Gotham was admitted in 1994 is a conclusion that the General Partner breached its obligation to timely consider Gotham's application. The proper remedy for that breach is admission of Gotham as of the date its application should have been considered in 1994, a date that is sufficient to give it standing.

I. A Prologue On Gotham's Current Status As A Limited Partner

When this motion was briefed and argued, the defendants took the position that Gotham was not and had never been a limited partner. That argument became difficult to maintain in its pure form, however, because the undisputed facts demonstrated that the record permitted, as shall be seen, only two alternatives. One was that Gotham had in fact been admitted as a limited partner by the General Partner in 1994, the year before the transactions at issue in this case were consummated. The other alternative is that the General Partner failed to consider Gotham's application in 1994 and thus breached the partnership agreement itself.

At oral argument, I suggested that the obvious remedy in the latter scenario was to admit Gotham as of the date its application should have been considered. Counsel for the defendants disagreed and said that the question of remedy must await a hearing. Instead of granting that request, I permitted him to file an additional submission addressing the remedy issue.

In lieu of a remedy argument, counsel for the defendants filed a letter indicating that the General Partner had decided to admit Gotham (and every other unitholder) as a limited partner. Believing I had "a good reason for taking the easy way out," I put aside this aspect of the complex motion

1J. LENNON & P. McCARTNEY, Day Tripper, Sony/ATV Songs LLC.
practice then pending in this case. I did so because I thought that the defendants would only write me such a letter if they had structured their admission of Gotham to moot the current motion and to enable Gotham to press its derivative claims.

But nay. It was not so. It took me an office conference "to find out, [b]ut I found out"2 that the General Partner had merely admitted Gotham as of September 2000 and took the position that Gotham's admission was not retroactive to 1994. Therefore, its decision to admit Gotham had no bearing on the need to determine this motion.3

Having set forth the unusual context in which this motion is now presented, I turn to its resolution.

II. The Nature Of The Underlying Litigation

Gotham filed this action in June 1997. Its complaint challenges three transactions entered into by the Partnership: 1) a March 1995 reverse unit split (the "Split"); 2) a March 1995 stock option plan (the "Stock Option Plan"); and 3) a June 1995 odd-lot tender offer (the "Odd-Lot Offer"). The units that were purchased by the Limited Partnership in connection with the Split and the Odd-Lot Offer were in turn sold by the Partnership to Defendant Hallwood Group Incorporated ("HGI"), the sole owner of the General Partner. Meanwhile, the Stock Option Plan granted options to officers who owed their careers and loyalties to HGI.

Gotham alleges that the sale of the units and the issuance of the options occurred on economic terms that were unfair to the Partnership and unduly favorable to HGI. Furthermore, Gotham claims that the Challenged Transactions were designed to secure HGI's control over the Partnership and not to benefit the Partnership. The Split and Odd-Lot Offer allegedly did so by increasing HGI's equity interest in the Partnership from 5.15% to 24.7%. When unit options to HGI insiders are added, HGI and its affiliates controlled 29.4% of the Partnership's Units. This increase was sufficient to have an entrenching effect, argues Gotham, because the partnership agreement for the Partnership (the "Agreement") states that a two-thirds vote of the limited partners is necessary to replace the General Partner.

\(^2\)Id.
\(^3\)Id. ("Now she's a big teaser, She took me half the way there . . . It took me so long to find out, But I found out").
III. Legal Analysis

This opinion focuses solely on Gotham's status as a plaintiff. Namely, is Gotham entitled to an award of summary judgment declaring that it has standing to pursue its derivative claims on behalf of the Partnership? The answer to that question turns on two subsidiary questions: 1) whether Gotham has standing as an assignee to assert its derivative claims; and 2) whether Gotham is entitled to summary judgment declaring it a limited partner of the Partnership as of 1994. If the answer to either question is yes, Gotham may maintain this action.

I address these issues using the well-established standard applicable under Court of Chancery Rule 56. That standard requires that I draw all reasonable inferences from the record in favor of the defendants and only grant Gotham's motion if its legal entitlement to summary judgment is clear based on the undisputed facts in the record.

A. Gotham Has Standing As An Assignee To Bring Its Derivative Claims

Section 17-1001 of the Delaware Revised Uniform Limited Partnership Act [?] ("DRULPA") was amended on August 1, 1998 to provide that a derivative claim may be prosecuted by a "limited partner or an assignee of a partnership interest." The plaintiff must have had that status at the time the derivative action was commenced and at the time of the challenged transaction or conduct.3

The defendants admit that Gotham is an assignee and has been one continuously since before the Challenged Transactions occurred. Nonetheless, they contend that Gotham cannot bring this derivative action unless it was a limited partner in 1994 because § 17-1001 of DRULPA was not amended to give standing to assignees until a year after this action was filed.

But, contrary to the defendants' position, I conclude that the General Assembly has expressed its intent to retroactively apply its 1998 amendment to § 17-1101. In August 1999, § 17-1108 was amended to provide that:

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3 Del. C. § 17-1001.
4 Del. C. § 17-1002.
5 I use the words "as of 1994" or "in 1994" as a short-hand that means before the Challenged Transactions, which were consummated in 1995.
Unless expressly stated to the contrary in this chapter, all amendments of this chapter shall apply to limited partnerships and partners whether or not existing as such at the time of the enactment of any such amendment.7

The synopsis to that legislation makes clear that the General Assembly's intent was to make all amendments to DRULPA retroactive regardless of when the amendments were made:

This section amends § 17-1108 of the Act to confirm the intended retroactive effect of amendments of the Act heretofore, now and hereafter enacted.8

There is nothing "expressly stated to the contrary" in §§ 17-1001 or 1002 to indicate that the 1998 amendments to those sections were not intended to be retroactive.9 Therefore, Gotham's conceded assignee status establishes standing with respect to its derivative claims.10

B. Is Gotham Entitled To Summary Judgment Declaring It A Limited Partner As Of 1994?

1. Facts Bearing On Gotham's Status As A Limited Partner As Of 1994

Gotham made its first purchases of units in the Partnership in March 1994 and has owned units continuously ever since. As of October 1994, Gotham owned 207,000 pre-Reverse Split units or 41,400 post-Split units. By May of 1995, Gotham had increased its ownership to 46,400 units.

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7 Del. C. § 17-1108. See also M. LUBAROFF & P. ALTMAN, LUBAROFF & ALTMAN ON DELAWARE LIMITED PARTNERSHIPS § 11.10 at 11-46 (2000) ("With respect to amendments of the Act enacted prior to August 1, 1999, the synopsis attached to the Senate Bill containing the 1999 amendments of the Act provides that the new amendment confirms the intended retroactive effect of amendments of the Act heretofore enacted.").

8 Senate Bill No. 177, 140th General Assembly, 72 Del. Laws c. 128 (July 2, 1999) (emphasis added).

9 Del. C. § 17-1108.

10 Because the General Assembly has made its intentions plain, I need not address Gotham's alternative argument that the amendment to § 17-1001 should apply retroactively because it was simply a clarification of who could press claims on behalf of the Partnership for which a legal basis already existed. See Hubbard v. Hibbard Brown & Co., Del. Supr., 633 A.2d 345, 354 (1993) ("As a general rule statutes relating to remedies and procedure are given a retrospective construction.") (quotations and citation omitted).
Thus, there is no question that Gotham owned units before the Challenged Transactions and has held units continuously since then.

Indeed, Gotham currently owns 218,217 units, or 14.8% of the Partnership. It cannot buy materially more units without triggering the Partnership's Rights Plan, or poison pill.

Like many market participants and most other unitholders in the Partnership, Gotham's units are held by the Depository Trust Company ("DTC") in the name of Cede & Co. ("Cede") through accounts maintained by Gotham's brokers at DTC. For most of the relevant period, Gotham's broker was Bear Stearns Securities Corporation.

2. The Process By Which Gotham Allegedly Made Application

The Partnership was created in 1990 by the roll-up of several other limited partnerships into one (the "Roll-Up"). The persons who were unitholders and participated in the Roll-Up became limited partners of the Partnership. But any persons who acquired units since that time have had to obtain limited partnership status in accordance with the Agreement's provisions for admission.

Under the Agreement:

[E]ach assignee of a Unit . . . shall be deemed to have applied to become a Substituted Limited Partner with respect to the Unit transferred to such Person by executing and delivering to the Transfer Agent a Transfer Application\(^\text{11}\) at the time of such transfer as provided in Section 13.03 hereof or by otherwise becoming an assignee as provided for herein.\(^\text{12}\)

Thus, the Agreement is written to make the application process as automatic as possible. A unitholder was deemed to have applied either by: 1) submitting a transfer application; or 2) "otherwise becoming an assignee."

Taking these provisions out of order, the defendants do not dispute that Gotham is an assignee. The defendants are unable to explain why this status alone was insufficient to make Gotham an applicant for full admission as a limited partner under the plain language of § 13.05(a).\(^\text{13}\)

\(^{11}\)Article I of the Partnership Agreement defines "Transfer Application" as "[a]n application and agreement in the form set forth on the back of the Certificate . . . ." Agreement at G-5.

\(^{12}\)Agreement § 13.05(a) (emphasis added).

\(^{13}\)See Agreement § 13.03(c) (showing the simplicity with which this process was
Likewise, the record is clear that Gotham sought admission by having a transfer application filed on its behalf as to units it purchased in 1994. There is no dispute that such documentation was submitted by DTC to the Transfer Agent for the Partnership on behalf of Bear Stearns as to at least some of its units beneficially owned by Gotham before the time of the Challenged Transactions.

Of great significance is the fact that the certificates sent to the Transfer Agent included a section entitled "APPLICATION FOR TRANSFER OF UNITS" that says that the applicant, who was Cede, "requests admission as a Substituted Limited Partner in the Partnership and agrees to be bound by the Partnership Agreement as it may be amended from time to time and to execute any document that the General Partner may reasonably require to be executed in connection with the transfer and admission of the Applicant as a Substituted Limited Partner . . . ."15

The Agreement clearly contemplated that a large number of limited partners would hold their units as beneficial owners through brokers that used the services of DTC and Cede. Thus, the Agreement expressly states:

A request by any broker, dealer, bank, trust company, clearing corporation or nominee holder to register transfer of a Unit, however signed (including by any stamp, mark, or symbol executed or adopted with intent to authenticate the Certificate), shall be deemed to be an execution of a Transfer Application by and on behalf of the beneficial owner of such Unit.16

As a result, the undisputed facts demonstrate that Gotham timely applied to become a limited partner of the Partnership.

3. The General Partner's Obligations And Practices With Regard To Processing Applications For Admission

Section 13.05(b) of the Agreement establishes a process for processing Transfer Applications. The first step requires that the Transfer

supposed to work by indicating that a request for admission as a limited partner could be made orally or "by such other action such as payment for a Unit or acceptance of a Certificate").
14The Partnership engaged a transfer agent, Equiserve, L.P., to assist it in maintaining its unitholder list, processing transfer applications, and making necessary securities and tax law filings and communications.
15Hille Aff. Ex. C.
16Agreement § 13.03(f).
Agent prepare a monthly list of transfers and send it to the General Partner. The second step requires the General Partner to decide whether to admit "any one or more" of the assignees listed on the transfer list as a limited partner no later than 30 days after receiving the list.

Although § 13.05(c) of the Agreement indicates that the General Partner must give "written consent" to any application for limited partnership status and has "sole and absolute" discretion to withhold or grant such consent, the Agreement does not state what form that consent must take. But the Agreement does clearly define a "limited partner" as:

Any person shown as a limited partner of the Partnership on the books and records of the Partnership. *A person shall be admitted as a limited partner at the time such person is listed as a limited partner on the books and records of the Partnership.*

As one would expect from an entity that was doing business in today's securities markets under agreement provisions such as those set forth above, the Partnership had a system for tracking beneficial owners. To that end, it engaged Wall Street Concepts, Inc. ("WSC") as its agent to identify beneficial owners and produce a "Street Name Investors Report" for it. And each month, Gotham's broker Bear Stearns provided WSC with a list of its client's purchases, including those made by Gotham. WSC then included that information in its reports to the Partnership on units held in street name. At year end 1994, for example, WSC's records indicated that Gotham owned 207,000 pre-Split Units.

The Partnership used the information it received from WSC as well as from the Transfer Agent to create a unitholder list from its Partnership Unit Accounting System or "PUA," which I will henceforth refer to as the "Unitholder List." WSC provided information regarding units held in street name and the Transfer Agent provided information regarding record holders. The Unitholder List prepared from the PUA is used for, among other things, preparing IRS Schedule K-1s for tax reporting purposes. The

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17Agreement § 13.05(b).
18Id.
19Agreement § 13.05(c).
20Agreement at G-3 (emphasis added).
21Scott Aff. Ex. B.
22Takvorian Aff. ¶ 5.
23Scott Aff. ¶ 7, Ex. D.
24Scott Aff. Ex. D.
25Schaeffer Aff. Ex. 20, Kelley Dep. at 74.
forms distributed to Gotham by the Partnership from this system for 1994 and subsequent year accurately track each of its transactions in Partnership units. 26 Thus the Unitholder List contained Gotham as of 1994. [27]

 Nonetheless, it appears that the General Partner did not take measures to ensure strict compliance with § 13.05(b)’s requirement that it receive a monthly transfer list which the General Partner was to use to make limited partner admission decisions. 28 The contract with WSC called for a monthly report, which along with the information provided by the Transfer Agent, would have enabled the General Partner to comply with its obligations to consider applications on a timely month-to-month basis. 29 But it is not clear exactly how the General Partner used this information or if it consistently received such reports.

 The record reveals that the General Partner did not give much detailed attention to the admission process but appears to have been willing to admit every assignee as a limited partner by listing the assignee on the Partnership's books and records and assuming that this was sufficient written consent to accord the assignees limited partner status. Such an approach would have comported with the virtually automatic application process set up by the Agreement and the simple definition of limited partner in the Agreement as someone admitted as such on the Partnership's books and records.

 Nevertheless, to win this motion, the General Partner has taken the unusual tack of arguing (in the alternative) that it completely ignored its contractual duty to timely consider any applications. The General Partner faces a record that indicates that the Transfer Agent received an extremely large number of Transfer Applications and an Agreement that deems every assignee to have made application for admission. Nonetheless, the General Partner asserts that "no assignees requested admission of Substituted Limited Partners in accordance with the requirements of the Partnership

27The defendants could not produce a Unitholder List for 1994 or 1995. There is no dispute, however, that the list would have contained Gotham as of those years and as of the time of the Challenged Transactions. In this regard, it is noteworthy that Gotham received a K-1 for 1994 generated from the PUA database containing the Unitholder List. Schaeffer Aff. Ex. 20, Kelley Dep. at 73-76; Scott Aff. ¶ 7.
28Schaeffer Ex. 10, at 122-124; Ex. 24 at 82-83. For example, the Partnership's Transfer Agent account representative testified that he was not even sure what a Transfer Application was. Schaeffer Ex. 10, at 62-64.
29See Scott Aff. ¶ 7, Ex. B (indicating that WSC standard service included monthly reports plus a year-end tape).
Agreement . . ." and that the General Partner had "not admitted any assignees as Substituted Limited Partners" before September 11, 2000.  
Put simply, the General Partner argues that no unitholder was granted admission as a limited partner in the decade between the Roll-up and September 11, 2000. So fervent is the defendants' desire to deny Gotham standing that the defendants even go as far as to argue as a litigation posture that the General Partner did not even admit itself as a limited partner even though its President, defendant William L. Guzetti, testified that the General Partner had been admitted in 1995 at the time of the Challenged Transactions.

But, as will be seen, the record is replete with evidence that the defendants only recently discovered that this was the situation and that before this litigation heated up the General Partner believed and acted as if it had admitted Gotham and many other unitholders as limited partners.

4. The PUA Generated Unitholder List Is The Only Partnership List Of Limited Partners

When required to produce to Gotham the Partnership's "list of Limited Partners" by a stipulated order in a prior books and records case between Gotham and the Partnership, the General Partner produced a copy of the Unitholder List derived from the PUA.

What is of more significance is the fact that the defendants now maintain that the Unitholder List is not a list of limited partners, but simply a list of all unitholders, be they mere assignees or full-fledged limited partners. This claim is striking for a few obvious reasons. One is that it is at odds with the belief of the officer of the General Partner responsible for producing that List, Executive Vice President John Tuthill, who testified as follows:

Q: Was it your understanding at the time, Mr. Tuthill, that that was a list of the limited partners of the Partnership?

A: Yes.

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30Shaeffer Exs. 49 & 50.
31Id.
32Schaeffer Aff. Ex. 39, ¶(g).
This claim is also quite notable because it rests on the assertion that the General Partner has not maintained *any* list of limited partners in the books and records of the Partnership. At oral argument, counsel for the General Partner admitted that at that time the Partnership had no list of limited partners, but could figure out if it had to which, if any of the unitholders, were limited partners.

This struck me as peculiar. One would expect, in view of the Agreement, that the General Partner would contend that it had complied with its clear duties under § 13.05(b) by admitting limited partners through inclusion in the Unitholder List. Because the General Partner's obligations under § 13.05(b) are mandatory and clear, because the Agreement defines a limited partner as anyone listed as such in the Partnership's books and records, because the General Partner affirmatively listed on the Unitholder List all beneficial owners on behalf of whom transfer applications had been submitted, and because there is no evidence that the General Partner ever denied any of the thousands of transfer applications received by the Transfer Agent, such an assertion would have made abundant sense.

But in order to justify their position that Gotham was not a limited partner in 1994, the defendants instead advance a position that rests on an admission that the General Partner has breached § 13.05(b) of the Agreement. By contending that the Unitholder List is not a list of Limited Partners and by failing to present any evidence that the General Partner ever used any other process besides such inclusion to determine whether to admit an assignee as a Limited Partner, the defendants concede a clear breach of contract.

The defendants' bewildering fog of an argument cannot, however, obscure the clear fact that the only list the General Partner maintains of "limited partners" has contained Gotham for all relevant periods. Nor can it obscure the clear fact, as I will next discuss, that the key employees of the General Partner in charge of dealing with relations with unitholders assumed that all the unitholders on the Unitholder List were in fact limited partners of the Partnership.

5. **The General Partner Acted As If Gotham And Other Unitholders Were Limited Partners**

The record reveals that the relevant officers of the General Partnership used the term "unitholder" interchangeably with the words
"limited partner" until they were instructed to do otherwise in connection with this litigation.\(^\text{34}\)

The post-hoc nature of the distinction the General Partner now makes between mere "unitholders," on the one hand, and "limited partners," on the other, is further solidified by the complete lack of understanding possessed by the relevant officers of the General Partner regarding how in fact one becomes a limited partner of the Partnership. They just did not know how the admission process worked. For example, Richard Kelley, the individual responsible for dealing with the Transfer Agent beginning in 1994, and an individual defendant designated under Rule 30(b)(6) as having knowledge about the admission of limited partners,\(^\text{35}\) testified as follows:

Q: Do you have an understanding at all, sir, sitting here today as to what the procedures are for admission of limited partners to the Partnership?

A: I do not have an understanding of the procedures.\(^\text{36}\)

* * *

Q: Mr. Kelley, who is knowledgeable at the General Partner as to the process or procedures by which persons or entities are admitted as limited partners to the Partnership?

A: I don't know.

Q: You have no understanding as to who you would go to discuss that subject at the General Partner?

A: Since it is a legal issue, I would say counsel if that situation ever arises in my department.\(^\text{37}\)

\(^{34}\)Schaeffer Aff. Ex. 23, Gent Dep. at 126-127 & Ex. 20, Kelley Dep. at 264.

\(^{35}\)Id. Ex. 55

\(^{36}\)Id. Ex. 20, Kelley Dep. at 259.

\(^{37}\)Id. Ex. 20, Kelley Dep. at 261-62.
William Guzzetti, the President of the General Partner, and the only other person designated by the General Partner under Rule 30(b)(6) as having knowledge on this issue was similarly uninformed:38

Q: Yes. Are you familiar with the procedures of the partnership agreement for the admission of substitute limited partners?
A: No.

Q: Do you have any understanding of what is required for admittance?
A: Generally speaking, an application and a consent by the General Partner.

Q: Are you familiar with how an assignee can apply for admission?
A: No.39

John Tuthill, the Executive Vice President of the General Partner, testified to the same effect:

Q: Are you familiar with the procedures for admission of assignees as limited partners?
A: No.40

Because the General Partner had treated all unitholders on the Unitholder List as limited partners before this litigation, it appears that the officers of the General Partner did nothing affirmative in response to the voluminous numbers of Transfer Applications the Partnership's Transfer Agent received, and instead appears to have relied on WSC to prepare a list reflecting unitholders who the General Partner then simply treated as limited partners because the General Partner affirmatively included them on the Unitholder List.

38Id. Ex. 55.
39Id. Ex. 33, Guzzetti Dep. at 160.
40Id. Ex. 24, Tuthill Dep. at 72.
Official communications between the Partnership and Gotham also reflect the General Partner's practice of treating everyone on the Unitholder List as a Limited Partner. For example, the K-1 the Partnership sends each year is addressed to Gotham as "Dear Limited Partner." Although the defendants claim that the K-1s are sent to each unitholder because each is considered a "limited partner" under federal tax laws, they cite no federal requirement that the salutation be imprecise. Nothing would bar the General Partner from addressing assignees as "assignees" and explaining that assignees are "limited partners" for purposes of federal tax laws only. This was never done.

Likewise, the General Partner's internal behavior reflects its belief that the holders on the Unitholder List had been admitted as limited partners. For example, during the Odd-Lot Offer, an officer of the General Partner created a chart tracking the effect unit purchases would have on the General Partner's ability to block a removal vote. The chart identified the percentage of votes held by unitholders unaffiliated with the General Partner that would be necessary to remove the General Partner. At one point, therefore, the chart indicated that 87.28% of the unaffiliated units would have to vote for removal in order to replace the General Partner. A core assumption of this chart was that all the unitholders had voting rights.

Likewise, a memorandum provided to the General Partner's board of directors in January 1996 listed Gotham as one of the Partnership's "Top Four Limited Partner Groups."

Notably, when the General Partner realized that Gotham was approaching the 15% trigger for the Partnership's poison pill, it contacted Gotham. Thus this was a context in which the General Partner was clearly acting with an awareness of the possibility that Gotham might seek to make a tender offer to secure a sufficient number of voting units to remove the General Partner. Yet the General Partner never informed Gotham of the most formidable barrier to such a move — the fact that the General Partner had not admitted Gotham and that Gotham itself had no voting rights. The

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41Ackman Aff. Exs. D-I.
42Admittedly, there were other communications from the General Partner addressed "Dear Unitholder." Norman Aff. Exs. 42-45. As indicated, however, the General Partner equated the terms unitholder and limited partner.
43E.g., Schaeffer Ex. 26.
44Id.
45Kelley Aff. ¶ 7 (author admitting that he assumed all holders had the right to vote).
46Schaeffer Ex. 25, at HR 28227.
fact that the General Partner did not do so bolsters the conclusion that it believed that Gotham was a limited partner.

Finally, in connection with an earlier books and records action in this court, the General Partner evidenced its belief that Gotham was a limited partner. In responding to Gotham's demand, the General Partner alleged that Gotham was seeking "preferential treatment for [itself] to the detriment of the other partners of the Partnership ...." When the parties could not work out the demand themselves and Gotham filed suit, the General Partner answered the complaint by admitting that Gotham was a limited partner but otherwise mounting a feisty defense.

Not until the defendants answered the complaint in this action in December 1998 did the General Partner first "discover" and assert that Gotham was not a limited partner. Although this court properly permitted an amendment to the answer in the books and record action to enable the Partnership to withdraw its admission and contest Gotham's status as a limited partner on the merits in this litigation, the fact that the General Partner did not happen to notice that Gotham was not a limited partner until late 1998 remains highly probative of whether Gotham was previously admitted as a limited partner by the General Partner. It is telling, to say the least, that none of the officers of the General Partner could come up with this defense on their own or even with the assistance of able counsel in the books and records action.

6. Conclusion: Gotham Is Entitled To Summary Judgment Declaring It A Limited Partner As Of 1994

On this record, I have no hesitation in concluding that Gotham has demonstrated its entitlement to summary judgment on the basis of the undisputed facts.

The evidence clearly demonstrates that one of two things happened with Gotham's application. The overwhelmingly most probable is that the General Partner exercised its discretion to grant all applications it received by affirmatively including the assignees in the Unitholder List. Engaging in such a practice was clearly consistent with the virtually automatic limited partner application and admission process set up by the Agreement. By including an assignee on the Unitholder List, the General Partner

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47Schaeffer Ex. 36 (emphasis added).
48Schaeffer Ex. 38, § 7.
signified its written consent to the assignee's admission as a limited partner in a manner that comport ed with the Agreement's definition of a limited partner as being a person who was recognized as such in the Partnership's books and records. And while it is true that the General Partner had discretion not to admit limited partner, it is implausible that the General Partner consciously chose to silently deny every application it received. That makes no sense, especially because no officer or director of the General Partner was aware of this rather important policy and because there is no written record reflecting the General Partner's decision to take such an extraordinary approach.

A less probable scenario is that the General Partner simply failed to consider any of the numerous applications for admission it has received in the decade since the Roll-up. If that is in fact the case, the General Partner breached § 13.05(b) and cannot rely upon that breach to support its argument that Gotham was not a limited partner as of 1994. The General Partner's obligation to make a timely determination about Gotham's transfer applications in 1994 was mandatory.

In this respect, I reject the defendants' argument that the General Partner's admission of Gotham as of September 11, 2000 is an adequate remedy for a breach of that mandatory duty. That the General Partner would now grant Gotham's application leaves me with little doubt that it would have admitted Gotham in 1994. As of September 11, 2000, the General Partner had the motive to defeat this litigation and to insulate itself from a fight for control by an entity it has come to regard as an unethical capitalist, yet was willing to admit Gotham as a limited partner on that date.30 The concerns the General Partner now harbors about Gotham's suitability emerged well after it was to have considered Gotham's initial application in 1994. Given this fact and the fact that the General Partner consistently assumed that Gotham was in fact admitted as a limited partner until late 1998, there is no record support to buttress a conclusion that the General Partner would have denied Gotham's application in 1994. And to the extent there exists uncertainty about what the General Partner would have done in 1994 had it complied with its contractual duties, that uncertainty must be resolved against the General Partner, the breaching party, and in favor of Gotham, which made a proper application at that time.

30For example, February 15, 2000, the General Partner caused the Partnership to sue Gotham in federal court in New York. The complaint alleges violations of the federal securities laws.
Indeed, the public policy implications of accepting the defendants' argument would be quite disturbing. Taken at face value, the defendants' argument is that they are now insulated from defending a derivative suit because the General Partner breached its obligations to timely consider applications for limited partnership admission. That is, the General Partner's breach was, under the defendants' theory, an insurance policy against liability to the Partnership's unitholders.

The defendants also ignore the fact that the sometimes metaphysical distinction between derivative and individual actions is clear in the scenario wherein the General Partner had simply failed to act on the transfer applications. To the extent that the General Partner breached its contractual obligation to consider transfer applications promptly, the unitholders adversely affected by that breach obviously possess individual claims against the General Partner and other culpable parties for redress for any harm flowing from the breach of this duty. Such harm would include loss of the right to press a derivative suit.\(^5\) The only sufficient and fitting remedy for such harm is an order requiring the General Partner to admit Gotham as a limited partner as of 1994 and exposing the General Partner and any other culpable defendant to the same liability as they would have faced in this suit had the General Partner complied in a timely way with its contractual duties.

Because Gotham ultimately must be accorded limited partnership status as of 1994 under either scenario possibly supported by the record facts, I conclude that Gotham is entitled to summary judgment on its claim that it is a limited partner as of that time.\(^5\) It would be wasteful to determine which scenario is the real one, when the legal consequences of that determination are insignificant.\(^5\)

Finally, I note that my rejection of the defendants' arguments is consistent with this court's well-reasoned decision in the case of *In Re American Tax Credit Properties Limited Partnerships*.\(^5\) In that case, a General Partner tried to deny that it had admitted an assignee as a

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\(^5\)Assuming that the defendants' are correct and I am wrong about the effect of 6 Del. C. § 17-1007.

\(^6\)The defendants' motion for summary judgment predicated on the fact that Gotham is not a limited partner is denied.

\(^7\)As mentioned, the record evidence, in my view, is strongly supportive of the scenario whereby the General Partner gave written consent as a virtually automatic matter through the Unitholder list process. All of its behavior is consistent with that scenario and the lack of knowledge of the admission process displayed by General Partner representatives is most plausibly read as simply reflecting their lack of attention to a process they believed was on autopilot.

\(^8\)Del. Ch., 714 A.2d 87 (1997).
substituted limited partner under a partnership agreement utilizing the same sort of virtually automatic application process as issue in this case. To support its position, the general partner in American Tax Credit also relied on its own ignorance of how the application process worked, its own failure to maintain a list of limited partners, its discretion to deny admission for any reason, its assertion that no request for admission had ever been made by an assignee, and the fact that the only list of unitholders maintained by the partnership's transfer agent did not distinguish between assignees and limited partners.55

Vice Chancellor Lamb rejected the defense. The heart of his ruling was that, in accordance with common industry practice, the partnership agreement's admission processes were designed to be as efficient and automatic as possible given the unique tax-code driven legal restraints on free transferability that apply in the limited partnership context. Because: (i) the plaintiff had made proper application under the agreement; (ii) the partnership's transfer agent had listed the plaintiff on the only list of limited partners maintained on behalf of the partnership; (iii) correspondence between the partnership and the plaintiff was thereafter addressed to the plaintiff as a limited partner; and (iv) the General Partner had essentially delegated the application process to its transfer agent, the court concluded that the plaintiff had been admitted as a limited partner. Similarly, Vice Chancellor Lamb inferred that the General Partner's ignorance about the application process was evidence not of a considered decision to deny all applications, but of its decision to delegate the function to its transfer agent because the General Partner had no reason to deny an application for limited partner status until the basis for litigation with the plaintiff arose.56

The reasoning of American Tax Credit thus fully supports the conclusion I reach in this case.

55Id. at 95. To be fair, there is also a part of the decision that indicates that the transfer agent's records referred to the plaintiff as a partner, id. at 92, although the latter part of the opinion seems to accept the proposition that the transfer agent list made no distinction. Id. at 95. The important point the opinion was making, however, is that: i) when a partnership agreement sets up an easy application process that enables admission by a writing adding the applicant to the partnership's only list of partners; ii) when an applicant submits an application and its name is added to the only list of partners; iii) when no denial of the application is sent to the applicant; and iv) when the applicant is thereafter treated as if it is a limited partner, it is appropriate for the court to conclude that the applicant was admitted and to disregard a self-serving disavowal of that status by a general partner whose defense rests on a breach of its own contractual obligations to properly consider applications.

56Id.
IV. Conclusion

For the foregoing reasons, Gotham's motion for summary judgment is GRANTED and the defendants' motion for summary judgment is DENIED.

GRACE BROTHERS, LTD. v. UNIHOLDING CORP.

No. 17,612

Court of Chancery of the State of Delaware, New Castle

July 12, 2000

Richard S. Cobb, Esquire, of Klett, Rooney, Lieber & Schorling, Wilmington, Delaware; and Michael B. Fisco, Esquire, Jerome A. Miranowski, Esquire, and James M. Jorissen, Esquire, of Oppenheimer Wolff & Donnelly, Minneapolis, Minnesota, of counsel, for plaintiffs.


STRINE, Vice Chancellor

Plaintiffs Grace Brothers, Ltd. and Banc of America Securities, LLC are institutional investors who own stock in UniHolding Corporation ("UniHolding"). They have filed suit against, among others, the directors of UniHolding (the "defendant-directors") and UniHolding's largest stockholder, Unilabs Holdings, SA ("Unilabs"). The plaintiffs allege that the defendants breached their fiduciary duties to UniHolding's non-controlling stockholders (the "Minority Stockholders") by allowing UniHolding's wholly-owned subsidiary, Unilabs Group Limited ("UGL"), to assume control over UniHolding's primary asset, its 54% stake in
Unilabs, SA ("ULSA"), which is a clinical laboratory services company operating in Europe.

The defendants are alleged to have effected this scheme by causing UGL to issue to Unilabs and other Unilabs affiliates a controlling block of UGL stock in exchange for their UniHolding shares. This swap transformed UGL's parent, UniHolding, into its powerless child and, together with other transactions, left UniHolding with no assets other than its now-minority interest in UGL.

By virtue of these actions, the plaintiffs allege, the defendant-directors have served Unilabs' and their own personal interests in controlling ULSA through UGL, a British Virgin Islands ("BVI") corporation whose shares are not listed on any stock exchange. Because UGL would afford the Minority Stockholders with no liquidity and substantially reduced informational rights, the defendants allegedly knew that the Minority Stockholders would have little interest in holding UGL shares. Not only that, after the swap the defendant-directors allowed UniHolding to default on its federal securities law disclosures, leading to the company's delisting. These actions, the plaintiffs say, caused UniHolding stockholders to find themselves with delisted stock that is valued at one-sixth of its worth in 1997, even though its former controlled subsidiary, ULSA, is prospering.

The defendant-directors' have moved to dismiss the complaint for, among other reasons, failure to make a demand on the UniHolding board and for failure to state a claim for breach of fiduciary duty.

In this opinion, I conclude that: (1) demand is excused because a majority of the UniHolding board was either interested in the transactions challenged in the complaint or beholden to other directors who were; and (2) the complaint states a claim that the UniHolding directors purposely effected transactions to benefit Unilabs and its affiliate stockholders at the expense of UniHolding's Minority Stockholders. In the latter respect, I conclude that the complaint states a claim for breach of fiduciary duty irrespective of whether the UniHolding board decided to implement the challenged transactions in major part through actions by its wholly-owned subsidiary, UGL. Directors of a parent board can breach their duty of loyalty if they purposely cause — or knowingly fail to make efforts to stop — action by a wholly-owned subsidiary that is adverse to the interests of the parent corporation and its stockholders. As a result, I deny the defendants' motion to dismiss, except as to plaintiffs' duty of care claims,

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1Throughout this opinion I refer at times to the moving defendant-directors simply as "defendants" where their status as directors is irrelevant.