IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JEFFREY E. SCHUSS, JACK E. SCHUSS, A/T/F THE BETTY JANE SCHUSS TRUST, JACK E. SCHUSS TRUST, KAREN SCHUSS TRUST, DEBORAH S. DOOLITTLE TRUST and JONATHAN SCHUSS TRUST, CHARLES LEA, JR. and WILLIAM J. REIK JR., INDIVIDUALLY AND IN THEIR CAPACITIES A/T/F ADW #2; MORTON N. RICHTER, SOLELY IN HIS CAPACITY A/T/F MORTON N. RICHTER IRA TRANSFER 10/01/04 and MORTON N. RICHTER REVOCABLE TRUST, SARA RICHTER SOLELY IN HER CAPACITY A/T/F SARA RICHTER IRA and SARA RICHTER REVOCABLE LIVING TRUST, ANNETTE DICKLER, SOLELY IN HER CAPACITY A/T/F ANNETTE DICKLER TRUST THOMAS A. HUNTER IV, INDIVIDUALLY AND IN HIS CAPACTIY A/T/F THOMAS A. HUNTER IV IRA; WALTER G. MCNEILL, DAVID RICHTER, MATTHEW RICHTER, MW SMALL CAP, L.P., CHRISTIAN B.A. SLAVIN, GEORGE O. WITWER REVOCABLE TRUST; THERESA KENNY, DAVID N. PEARL, CAREN J. SIEHL FAMILY TRUST, ANTHONY SCHULTE, RICHARD ENGLANDER, RICHARD R. HAYES IRA, HAYES FOUNDATION, SCOTT KILNER, SOLELY IN HIS CAPACITY A/T/F KILNER REVOCABLE TRUST, and TOM A. JAVITS,

Plaintiffs,

v.

PENFIELD PARTNERS, L.P., PINE CREEK ADVISERS LIMITED PARTNERSHIP, WILLIAM D. WITTER, INC.,

Defendants.

Civil Action No. 3132-VCP

**MEMORANDUM OPINION**

Submitted: January 10, 2008
Decided: June 13, 2008

David J. Margules, Esquire, Evan O. Williford, Esquire, BOUCHARD MARGULES & FRIEDLANDER, P.A., Wilmington, Delaware; Andrew T. Solomon, Esquire, Michael T. Sullivan, Esquire, SULLIVAN & WORCESTER LLP, New York, New York; Harvey E. Bines, Esquire, SULLIVAN & WORCESTER LLP, Boston, Massachusetts; *Attorneys for Plaintiffs*

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**PARSONS, Vice Chancellor.**

This is an action for breach of contract, breach of fiduciary duty, and an accounting. Plaintiffs are limited partners in a hedge fund who withdrew from membership in the limited partnership and expected to receive a distribution equal to their liquidating share at the time they withdrew. Upon withdrawal, Plaintiffs requested that their distributions be in kind and ratable. Defendants made distributions that were in kind but not ratable and, due to a decline in value of the designated securities by the time of distribution, had a value significantly below that of the limited partners' capital accounts.

Plaintiffs' complaint asserts claims against the hedge fund, its general partner, and the general partner of the general partner. Defendants moved to dismiss all the counts in the complaint for failure to state a claim. The parties' dispute boils down to two main issues: (1) was the general partner required to make any in kind distributions on a pro rata basis; and (2) were the withdrawing partners entitled to the securities the general partner specified at the time of retirement, even if they had declined in value at the time of distribution, or to assets whose aggregated value equaled the withdrawing partners' share of the fund as of the date of their retirement? For the reasons stated, I conclude the partnership agreement did not require ratable in kind distributions; rather, the general partner could make in kind distributions in his sole discretion. Further, I conclude the withdrawing limited partners conceivably could prove they were entitled to assets whose aggregated value equaled their share of the fund at the time of retirement. In the context of Plaintiffs' other allegations, Defendants' alleged failure to comply with that

requirement is sufficient to support each of the three counts of the complaint. Accordingly, I grant in part and deny in part Defendants' motion to dismiss.

# I. FACTS[1]

## A. The Parties

Defendant Penfield Partners, L.P. ("Penfield") is a Delaware limited partnership which operates a hedge fund. It was formed in November 1988 pursuant to an Amended and Restated Agreement of Limited Partnership of Penfield Partners, L.P. (the "LPA" or "Partnership Agreement").[2]

Defendant Pine Creek Advisers Limited Partnership ("Pine Creek"), a Delaware limited partnership, is Penfield's general partner (the "General Partner").

Defendant William D. Witter, Inc. ("Witter") is a New York corporation which serves as the general partner of the General Partner, Pine Creek. Witter is also the investment adviser to Penfield.

Plaintiff Jeffrey E. Schuss is a former limited partner of Penfield and Pine Creek, who withdrew from Pine Creek on or before December 31, 2006. Until Schuss resigned effective November 21, 2006, he was an employee of Witter and acted as Penfield's chief portfolio manager. Following his resignation, Schuss formed a new investment fund initially named Emerald Partners, L.P. ("Emerald"), which he later renamed JES Partners, L.P. ("JES").

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[1] Unless otherwise indicated, the facts recited in this Memorandum Opinion are drawn from the allegations in the Verified Amended Complaint (the "Complaint"), filed on August 17, 2007.

[2] The LPA was subsequently amended. The most recent amendment was in 2004.

The other plaintiffs are individuals, trusts, IRA accounts, and entities that are former limited partners of Penfield and who, along with Schuss, withdrew from Penfield on or before December 31, 2006, and directed Penfield to transfer all or a substantial portion of their investments in Penfield to Emerald (together with Schuss, "Plaintiffs"). Each withdrawing limited partner, including Schuss, requested that the withdrawal and transfer be in kind and ratable.

### B. The LPA

Article VIII of the LPA governs the withdrawal of a limited partner. Sections 8.01 and 8.02 provide, *inter alia*, that on fifteen days prior written notice a limited partner may withdraw all or any part of its capital account as of each June 30 or December 31. The withdrawing limited partner is entitled to a distribution. Section 8.05 addresses whether the distribution is in cash or in kind, providing:

> All distributions to a Partner by reason of the Partner's partial or complete withdrawal or retirement from the Partnership shall be made in cash or, in the sole discretion of the General Partner, in securities selected by the General Partner or partly in cash and partly in securities selected by the General Partner.[3]

Additionally, if a limited partner withdraws all of its account, the withdrawal is treated as a "retirement" and is governed by Article X of the Partnership Agreement.[4]

Under § 10.01 of the LPA, within thirty days of retirement, the Partnership is obligated to pay or distribute to a retiring partner:

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[3] Compl. Ex. A, the LPA, § 8.05.

[4] LPA § 8.02(c) ("A Partner withdrawing his entire Capital Account pursuant to this Section 8.02 shall be deemed to have retired as of the date of such withdrawal.").

> [A]n amount in cash or, as determined by the General Partner, in securities selected by the General Partner or in cash and securities selected by the General Partner, equal in value to not less than 90% of the estimated amount of the Liquidating Share [*i.e.*, Capital Account, as defined in the LPA, as of the retirement date] . . . of such Partner.

Promptly after the General Partner determines the actual amount of the retiring partner's Liquidating Share, the LPA requires Penfield to pay in cash, securities, or both, as determined by the General Partner, the balance due to the retiring partner with interest at the then-existing federal funds rate.

Plaintiffs' Complaint asserts claims against the General Partner, Pine Creek, and its general partner, Witter, as well as Penfield. The Partnership Agreement contains a provision limiting the liability of the General Partner, including liability for breaches of fiduciary duty. Specifically, LPA § 3.03 provides:

> The General Partner, each member, officer, employee or affiliate of the General Partner, and any person or persons designated pursuant to Section 9.02 of this Agreement shall not be liable for any loss or cost arising out of, or in connection with, any act or activity undertaken (or omitted to be undertaken) in fulfillment of any obligation or responsibility under this Agreement, including any such loss sustained by reason of any investment or the sale or retention of any security or other asset of the Partnership, except that any person exculpated from liability under this Section shall not be exculpated from any liability arising from losses caused by his, her or its gross negligence, willful misconduct or violation of applicable laws.[5]

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[5] LPA § 3.03(a).

### C. Plaintiffs Withdraw from Penfield

Schuss, who was a limited partner of Penfield and Pine Creek and an employee of Witter, acted as chief portfolio manager for Penfield's investments. Starting in 2003, upon the death of Witter's founder and CEO, William D. Witter, Schuss faced internal fighting and mismanagement that decreased Witter's fortunes. These event motivated Schuss's decision to resign from Witter and withdraw from Pine Creek. By letter dated November 15, 2006, Witter informed Penfield's investors that Schuss would withdraw as a limited partner of Pine Creek effective January 3, 2007, but was expected to continue to manage Penfield through the end of 2006. Further, Witter advised the limited partners that they could elect to withdraw some or all of their investment as of December 31, 2006 upon fifteen days notice.

Effective December 31, 2006, Schuss and the other Plaintiffs withdrew from Penfield, instructing the hedge fund to transfer all or a substantial portion of their distribution proceeds to Emerald. Plaintiffs asked that the distribution be in kind and ratable. As of December 31, 2006, the aggregate ending capital of the Plaintiff withdrawing limited partners was $71,103,538. Of that $71,103,538, the limited partners directed Penfield to transfer $63,610,725 to Emerald.[6] In addition, other Penfield partners, holding $32,753,986 in capital, also withdrew. Thus, as of December 31, 2006, 93.9% of Penfield's capital withdrew.

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[6] This amount represented 57.6008% of Penfield's total year-end capital.

The first day the equity markets were open in the United States in 2007 was January 3, 2007. On January 17, 2007, Penfield transferred securities to Emerald on behalf of withdrawing limited partners with an aggregate market value of $58,631,876, or 92.173% of the $63,610,725 aggregate Liquidating Shares of those withdrawing limited partners who requested that their distribution be transferred to Emerald. Therefore, the balance due to these limited partners was $4,978,848.

The January 17, 2007 distribution to Plaintiffs was in kind but not ratable. In addition, Plaintiffs received no portion of Penfield's cash balance, which at year end totaled approximately $35 million. A few months later, Witter contacted Schuss concerning the final distribution to the limited partners who withdrew and invested in Emerald, now JES. Witter took the position that it was entitled to make in kind, but not ratable distributions to Plaintiffs and that any in kind distribution would be valued at 2006 year-end prices. On that basis, Witter offered cash and securities with an approximate value of $1.3 million. Schuss rejected Witter's proposal and commenced this lawsuit. After the rejection, Penfield made a partial cash distribution to Plaintiffs.

While the Complaint is not a model of clarity, Plaintiffs ultimately seek the remaining principal obligation, plus interest, less the value of subsequent distributions.

## II. PROCEDURAL HISTORY

On July 31, 2007, Plaintiffs filed a verified complaint in this action, which they amended on August 17, 2007 (the "Complaint"). The Complaint asserts three causes of action. Count one is against Penfield and seeks damages for breach of the Partnership Agreement. It alleges Penfield breached the LPA by failing to make a full and timely

final distribution to Plaintiffs and by failing to make ratable, in kind distributions to Plaintiffs. Count two is against Pine Creek and Witter and seeks damages for breach of fiduciary duty. It alleges that Pine Creek, at the direction of Witter, breached its fiduciary duties to Plaintiffs and acted in bad faith, or at a minimum was grossly negligent in causing Penfield to: (a) distribute securities to Plaintiffs on a non-ratable basis in violation of Delaware law; (b) attempt to distribute depreciated securities at inflated year-end prices to satisfy Penfield's distribution obligation to Plaintiffs; and (c) unreasonably delay the final distribution to Plaintiffs in order to leverage them to accept less than their full Liquidating Shares. Count three seeks an order for an accounting against Penfield. The Complaint also seeks costs, interest, and attorneys' fees.

On October 8, 2007, Defendants moved to dismiss the Complaint pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Court heard argument on Defendants' motion on January 10, 2008. This is the Court's ruling on that motion.

## III. ANALYSIS

### A. Standard for Dismissal under Rule 12(b)(6)

The standard for dismissal pursuant to Rule 12(b)(6) for failure to state a claim is well settled. A court will grant the motion only if it concludes, after accepting all well-pled factual allegations of the complaint and drawing all reasonable inferences in favor of the nonmoving party, that the "plaintiff would not be entitled to recover under any

reasonably conceived set of circumstances susceptible of proof."[7] A court need not accept every interpretation of the allegations proposed by the plaintiff; instead, a court will accept those "reasonable inferences that logically flow from the face of the complaint."[8]

While the court may not consider matters outside the pleadings when assessing a motion to dismiss for failure to state a claim, the court may consider documents that are integral to a plaintiff's claim and incorporated into the complaint as well as facts subject to judicial notice.[9] Here, I have considered the LPA because the agreement is integral to Plaintiffs' claims, referred to throughout the Complaint, and attached to the Complaint as an exhibit.

### B. Did Penfield Breach the LPA?

The first claim in the Complaint is for breach of the Partnership Agreement against Penfield. Specifically, Plaintiffs allege Penfield breached the LPA by failing to make a full and timely final distribution to Plaintiffs and by failing to make ratable, in kind distributions to Plaintiffs. As a preliminary matter, Defendants argue that because Penfield is not a party to the LPA and is not alleged to have caused a breach of the LPA, it cannot be liable for breach of that contract. Delaware law, however, dictates otherwise.

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7 *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

8 *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

9 *See In re Gen. Motors*, 897 A.2d at 170.

In particular, 6 *Del. C.* § 17-606(a) of the Delaware Revised Uniform Partnership Act ("DRULPA" or the "Limited Partnership Act")[10] provides:

> Subject to §§ 17-607 and 17-804 of this title, and unless otherwise provided in the partnership agreement, at the time a partner becomes entitled to receive a distribution, he or she has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

Under the statute, once a partner withdraws, the partner becomes "simply a contract claimant holding fixed rights," and can sue in contract for failure to pay the value of its share as of the withdrawal date.[11] As Plaintiffs note, logically and consistent with the plain meaning of DRULPA § 17-606(a), it is the partnership that owes the distribution to the creditor (*i.e.*, the withdrawn limited partner). Therefore, Penfield is a proper defendant.

Defendants also argue Penfield could not have breached the LPA because it vests the General Partner with discretion regarding distributions to withdrawing limited partners. The parties' dispute concerns two main issues: (1) was the General Partner required to make ratable, in kind distributions; and (2) are the withdrawing partners entitled to receive distribution of specific securities selected by the General Partner at or around the time of retirement or of assets whose aggregated value equals the value of their Liquidating Shares at the time of retirement?

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[10] 6 *Del. C.* §§ 17-101 – 17-1111.

[11] *Hillman v. Hillman*, 910 A.2d 262, 278 (Del. Ch. 2006).

### 1. Was the General Partner required to make ratable, in kind distributions?

Defendants assert that under §§ 8.05 and 10.01 of the LPA the General Partner has the sole discretion to return capital of a withdrawing partner in cash, in securities selected by the General Partner, or partly in cash and partly in securities selected by the General Partner. Thus, according to Defendants, the LPA overrides any statutory default limiting the scope of in kind distributions. Additionally, Defendants challenge as incorrect Plaintiffs' position that withdrawing partners can only be forced to accept their pro rata share of any security. Defendants aver that if a distribution is solely in kind, which the LPA authorizes, a withdrawing partner necessarily will receive more than her pro rata share of some security if the partnership holds at least one dollar of cash, as Penfield did. Therefore, say Defendants, the General Partner in the exercise of its sole discretion was entitled to make payment to a withdrawing partner in selected securities in excess of the withdrawing partner's pro rata share of such securities.

Plaintiffs, citing § 17-605 of the Limited Partnership Act, assert Penfield could not compel them, as withdrawing partners, to accept securities in an amount exceeding their pro rata share in the capital of the partnership. Plaintiffs concede the statutory limitation on in kind distributions may be overridden by a partnership agreement, but contend that the LPA does not contain explicit language trumping the statute. Plaintiffs also challenge Defendants' assertion that if a distribution is solely in kind and the partnership holds any cash a withdrawing partner necessarily will receive more than her pro rata share of some security. Although Plaintiffs acknowledge the validity of Defendants' argument if the

value of each and every security held by the partnership remains static between the retirement date and the date of payment, Plaintiffs contend it breaks down otherwise. Logically, they argue, certain securities will increase in value and the General Partner, acting in his discretion, could allocate units of the more valuable security to fully satisfy the credit balance without the need to make a comprehensive pro rata distribution of all the shares in the partnership's portfolio. Plaintiffs therefore urge the Court to reject Defendants' argument as an unworkable syllogism.[12]

Section 17-605 of DRULPA provides that a partnership may compel a partner to accept an in kind asset distribution, but as to each asset, not in an amount exceeding the partner's pro rata share in the capital of the partnership.[13] Section 17-605, however, is a default rule that applies where the partnership agreement does not provide otherwise. Here, under Article VIII of the LPA, a limited partner who withdraws part or all of its capital account or who retires is entitled to a distribution. Section 8.05 governs whether the distribution can be in cash or in kind:

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[12] Plaintiffs' argument necessarily relies on the assumption that the value of the withdrawing partner's credit balance becomes fixed on the retirement date and that the withdrawing partner is entitled to a percentage of that fixed value, not of the securities selected by the General Partner, on the initial distribution date. I address this dispute *infra* Part III.B.2, and conclude Plaintiffs conceivably could prove their point in this regard.

[13] 6 *Del. C.* § 17-605 ("Except as provided in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed exceeds a percentage of that asset which is equal to the percentage in which the partner shares in distributions from the limited partnership.").

> All distributions to a Partner by reason of the Partner's partial or complete withdrawal or retirement from the Partnership shall be made in cash or in the sole discretion of the General Partner, in securities selected by the General Partner or partly in cash and partly in securities selected by the General Partner.

Further, LPA § 10.01 prescribes terms and conditions for a distribution upon a withdrawing partner's retirement:

> Within 30 days after the date of retirement of a Partner . . . there shall be paid or distributed to such Partner or to the legal representative of such Partner, an amount in cash or, as determined by the General Partner, in securities selected by the General Partner or in cash and securities selected by the General Partner, equal in value to not less than 90% of the estimated amount of the Liquidating Share (as hereinafter defined) of such Partner . . . .

Statutory Section 17-605 provides a default rule, but defers to the parties' limited partnership agreement when the agreement specifies how in kind distributions are to be made and that procedure conflicts with the default rule. Penfield's LPA expressly authorizes the General Partner to make in kind distributions upon retirement of each withdrawing limited partner. Defendants contend the LPA authorizes non-ratable, in kind distributions and, therefore, overrides § 17-605. Plaintiffs argue the default rule controls, suggesting the LPA, in fact, does not authorize non-ratable, in kind distributions. To resolve this dispute, I must determine the meaning of the relevant provisions of the Partnership Agreement.

Under Delaware law, the interpretation of a contract is a question of law, and a motion to dismiss is a proper vehicle to determine the meaning of contract language.[14] Limited partnership agreements are contracts the courts construe like any other contract.[15] When interpreting a contact, the court strives to determine the parties' shared intent, "looking first at the relevant document, read as a whole, in order to divine that intent."[16] As part of that review, the court interprets the words "using their common or ordinary meaning, unless the contract clearly shows that the parties' intent was otherwise."[17] If the contractual language is plain and unambiguous, the Court should give binding effect to its evident meaning.[18] Additionally, when interpreting a contractual provision, a court

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14 *OSI Sys., Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

15 *See Arbor Place*, 2002 WL 205681, at *3. The court in *Arbor Place* cited *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 290-91 (Del. 1999), for the proposition that: "'The policy of freedom to contract underlies both the [LLC] Act and the LP Act. . . . The basic approach of the [LLC] Act is to provide members with broad discretion in drafting the Agreement and to furnish default provisions when the members' agreement is silent.'" *Id.*

16 *Matulich v. Aegis Comm'ns Group, Inc.*, 2007 WL 1662667, at *4 (Del. Ch. May 31, 2007) (citing *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996)); *Brandywine River Prop., Inc. v. Maffet*, 2007 WL 4327780, at *3 (Del. Ch. Dec. 5, 2007).

17 *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2005 WL 1252399, at *1 (Del. Ch. May 19, 2005) (quoting *Paxson Commc'ns Corp. v. NBC Universal, Inc.*, 2005 WL 1038997, at *9 (Del. Ch. Apr. 29, 2005)).

18 *Rhone-Poulenc Basic Chems. Co. v. Amer. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992). A contract is ambiguous, however, when the language "in controversy [is] reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Id.* at 1196. Ambiguity does not exist simply because the parties do not agree on a contract's proper construction. *United Rentals, Inc. v. Ram Holdings, Inc.*, 2007 WL 4496338, at *15 (Del. Ch. Dec. 21, 2007).

attempts to reconcile all of the agreement's provisions when read as a whole, giving effect to each and every term.[19] In doing so, courts apply the well settled principle that "contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless.'"[20]

Here, the LPA expressly gives the General Partner discretionary rights and authority in making payments to withdrawing limited partners. LPA § 8.05 provides that the General Partner shall exercise its sole discretion and make a distribution in cash, securities, or a combination, as determined and selected by the General Partner. It thus authorized Pine Creek, the General Partner of Penfield, to make the type of in kind distributions challenged by Plaintiffs. The LPA does not require such distributions to be ratable. To the contrary, the LPA specifically vests the General Partner with the discretion to determine which, if any, securities to distribute in kind, and whether to make a distribution entirely in kind, even if the partnership also has cash assets. Plaintiffs' interpretation of the LPA as requiring the General Partner to make only ratable, in kind distributions would render meaningless the language in §§ 8.05 and 10.01.[21] Therefore, I

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[19] *See, e.g.*, *Council of the Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *11 (Del. Ch. Nov. 2, 2007) ("Delaware courts do prefer to interpret contracts to give effect to each term rather than to construe them in a way that renders some terms repetitive or mere surplusage.").

[20] *Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006).

[21] Because the language of the LPA is clear, I need not address the parties' alternative arguments in resolving this issue.

conclude as a matter of law that the General Partner was not required to make the in kind distributions to Plaintiffs ratably. Thus, Plaintiffs could not conceivably succeed in proving that Penfield or Pine Creek breached the LPA because it made non-ratable in kind distributions, and their claims to that effect will be dismissed.

**2. The manner in which Defendants made the in kind distributions to Plaintiffs**

Defendants argue the withdrawing partners are entitled to the securities the General Partner specified for distribution at the time of retirement, which should have an aggregate value equal to the withdrawing partners' Liquidating Shares at that time. Defendants explain that under the LPA, the General Partner has a thirty-day window for making a distribution to a withdrawing partner, the purpose of which is to allow the hedge fund to assemble the selected assets for distribution. They assert that hedge funds cannot distribute assets immediately because, for example, they invest in illiquid securities or hold short positions. According to Defendants, the withdrawing partners bear the risk that the selected assets could decline in value between the date of withdrawal and the date of the distribution, a risk those partners could hedge if they deem it advisable.

Plaintiffs, citing Article X of the LPA, assert they were entitled to assets whose "value" on the initial distribution date equaled at least 90% of their estimated pro rata share of the total value of the fund as of December 31, 2006, the date of withdrawal.[22]

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[22] As additional support, Plaintiffs cite to DRULPA § 17-606, discussed earlier, for the proposition that statutorily, as a withdrawing partner, they gained the status of a creditor as of the date of withdrawal.

According to Plaintiffs, the purpose of the LPA's termination provisions is to permit a limited partner to terminate her involvement with the limited partnership. As of the withdrawal date, the limited partner is no longer part of the partnership, and is entitled to receive distribution of its share of the partnership as of that date - a value that is constant and no longer subject to the vagaries of the markets. In contrast to Defendants' position, Plaintiffs assert that the partnership, not the withdrawing partners, bears the market risk, and could engage in allocation of risk strategies such as converting positions to cash or hedging. Plaintiffs concede the LPA permits Penfield to arrange its affairs, but argue the partnership must redeem the obligation owed the limited partner as a creditor.

Plaintiffs further acknowledge that under the LPA, the General Partner is free to distribute cash, securities, or a combination, but contend the amount due the withdrawing limited partner must be determined as of the withdrawal date. Each limited partner had a Capital Account as of December 31, 2006 measured in dollars, not an account containing specified securities. As of the withdrawal date, the limited partner became a creditor for that same amount of money. The LPA distinguishes between the date of withdrawal and the date of payment. Here, the withdrawal date was December 31, 2006; the LPA provides for determining a withdrawing partner's Liquidating Share by reference to its Capital Account as of that date. According to Plaintiffs, the calculation of the Liquidating Share is formulaic and a withdrawing partner is entitled to that fixed, economic value.

As additional contractual support for their position, Plaintiffs note an obligation exists to pay interest on any unpaid balance for the period from the withdrawal date to the

date of payment. Plaintiffs assert the principal amount to be used in the interest calculation is fixed, and is determined with reference to the Liquidating Share. In the case of a limited partner withdrawing at least 90% of her Capital Account, the LPA defines her Liquidating Share as the Capital Account of such partner on the date of her withdrawal.[23] Defendants' interpretation would look to the specific assets the General Partner selected for transfer to the withdrawing partners' accounts on or around the withdrawal date. Plaintiffs assert Defendants' view would lead to the conclusion that the principal is always in flux, a nonsensical result.[24]

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[23] *See* LPA § 10.01.

[24] The latter aspect of Plaintiffs' argument regarding the handling of interest calculations does not withstand scrutiny. In terms of the initial distribution required to be made within thirty days of the date of withdrawal, the parties appear to agree on the interest calculation. There is no dispute the Liquidating Shares of the Plaintiffs, the withdrawing limited partners who directed Penfield to transfer all or a substantial portion of their investment to Emerald, was $71,103,538, and that Plaintiffs directed that $63,610,725 of those distributions be transferred to Emerald. Compl. ¶¶ 9, 25; Tr. at 52. All parties agree that from December 31, 2006 until the initial distribution on January 17, 2007, interest accrued on that principal amount. Tr. at 53-54. According to Plaintiffs, the in kind distribution of 90% or more of the $63,610,725 principal amount they received on January 17 should have been valued as of that date, and they would be entitled to interest on the remainder from that date until the date Penfield distributed the unpaid balance. The only respect in which Defendants disagree is that they valued the securities distributed on January 17 as of December 31, 2006. The Complaint alleges this caused Defendants to claim an inflated payment: Defendants apparently claim they distributed securities worth $58,631,876 on January 17, 2006, while Plaintiffs contend the amount was only $58,445,309. *See* Compl. ¶¶ 27, 37. Defendants methodology would reduce the amount of the unpaid balance and thereby also lower the amount of interest, as well. Whichever interpretation of the LPA prevails, however, the principal amount subject to interest would not fluctuate, as Plaintiffs posited.

On Defendants' motion to dismiss, the issue is whether Plaintiffs conceivably could succeed in proving their construction of the LPA is correct.[25] Plaintiffs assert the distribution procedure involves calculating an estimated Liquidating Share on December 31, 2006 for purposes of the initial distribution within thirty days and the remaining actual amount due at a later date, after any adjustments based on the audit of the partnership, plus interest. Although the parties agree that Plaintiffs were entitled to receive securities having a value of $63,610,725 as of the date of withdrawal,[26] Defendants construe their obligations under the LPA differently. They contend that after calculating the amount of the Liquidating Shares, the General Partner could, in its sole discretion, determine to distribute that entire amount in kind and effectively segregate for the Plaintiffs' individual accounts on December 31, 2006 or as soon thereafter as reasonably practicable specifically selected securities having a value equal to the Liquidating Share. Then within thirty days, the General Partner would be obligated, according to Defendants, to distribute to the withdrawing limited partners at least 90% of those securities without regard to their value on the date of distribution. In fact, Pine Creek allegedly proceeded in that manner. The issue before me on the motion to dismiss as to count one is whether Plaintiffs conceivably could prove their claim that Defendants' construction of the LPA is wrong and their implementation of that erroneous construction

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[25] Plaintiffs did not cross move for summary judgment or judgment on the pleadings on this issue.

[26] Tr. at 53.

subjects Penfield to liability for breach of contract. I answer that question in the affirmative.

Under the LPA § 8.02(c), a partner who withdraws at least 90% of its capital account shall be deemed to have retired as of the withdrawal date. Section 8.02(a) provides that a limited partner may withdraw all or any of its capital account as of June 30 or December 31 upon giving at least fifteen days prior notice of their intent to withdraw. Here, Schuss and the other Plaintiffs provided the requisite notice and withdrew all of their capital accounts from Penfield as of December 31, 2006. Thus, they are deemed to have retired.

After such a constructive retirement, the General Partner's contractual obligation shifts to Article X. Under LPA § 10.01, the General Partner is to cause payments to be made to the fully withdrawing limited partner. Section 10.01 provides: "Within 30 days after the date of retirement of a Partner . . . there shall be paid or distributed to such Partner . . . an amount in cash or, . . . in securities . . ." or in some combination "equal in value to not less than 90% of the estimated amount of the Liquidating Share . . . ."

In construing the LPA, Plaintiffs have at least a colorable argument that the plain language of the LPA supports their interpretation of the Partnership Agreement. The LPA arguably draws a distinction between the date of withdrawal or retirement and the date of distribution. The amount of the Liquidating Share is determined as of the date of withdrawal; the General Partner must make an initial distribution of at least 90% of some reference value within thirty days of the date of withdrawal. Plaintiffs argue that reference value is the Liquidating Share of the limited partnership. Defendants

apparently contend the reference value could be based on the number of shares of various securities the General Partner allocated to the withdrawing limited partners as of the date of withdrawal. At this preliminary stage, I cannot rule out the possibility that Plaintiffs' construction is correct. Indeed, it seems quite reasonable. Thus, the Court denies this aspect of Defendants' motion to dismiss count one.[27]

### C. Breach of Fiduciary Duty Against Pine Creek and Witter

Plaintiffs' second cause of action is for breach of fiduciary duty against Pine Creek and Witter. The Complaint avers that Pine Creek and Witter breached their fiduciary duties by: (a) violating Delaware law by distributing in kind assets to Plaintiffs in excess of their pro rata share; (b) shifting losses to Plaintiffs by distributing depreciated securities and valuing them based on inflated year-end prices; and (c) unreasonably delaying the final distribution to Plaintiffs in order to leverage them to accept less than their full Liquidating Shares. Further, the Complaint states that Witter, as general partner of Pine Creek, caused Penfield to breach its fiduciary duty, violate Delaware law, and commit acts of bad faith and gross negligence against Plaintiffs. Based on my conclusion as to Plaintiffs' first count that Defendants were not required to make any in kind distribution ratably, the portion of their second count premised solely on Defendants' failure to make a ratable in kind distribution lacks merit.

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[27] Plaintiffs' breach of contract claim based on the untimeliness of Penfield's performance obligations regarding distribution is closely tied to its complaint about the manner in which Defendants effected the distributions. I therefore deny that aspect of the motion to dismiss count one for the same reasons.

Defendants argue Pine Creek, as General Partner, could not have breached its fiduciary duty to the withdrawing limited partners, and Witter could not have aided and abetted such a breach, because Pine Creek and Witter complied with the LPA in making the distribution. Defendants further contend that, in any event, they are exculpated from liability under § 3.03 of the Partnership Agreement. Lastly, Defendants urge the Court to dismiss the breach of fiduciary duty claim as merely duplicative of Plaintiffs' breach of contract claim.

The analysis of those defenses necessarily begins with an evaluation of the reasonableness of Defendants' interpretation of the LPA as it relates to the required distribution. Defendants assert that because they made the distributions in compliance with the LPA, Pine Creek and Witter could not have breached their fiduciary duties. Unlike Plaintiffs' interpretation of the Partnership Agreement as it relates to distributions discussed previously, however, Defendants' interpretation is not closely tied to the language of the LPA. Defendants contend the LPA vests the General Partner with the discretion to select securities at the time of retirement, value those securities as of that date, and subsequently distribute them to the withdrawing limited partners, without regard to whether those securities had increased or decreased in value as of the date of the distribution.

While the LPA expressly provides the General Partner with discretion to select which, if any, securities to include in a distribution, the LPA does not explicitly support the remainder of Defendants' position. Rather, the LPA requires the General Partner to cause the partnership to make a distribution in two phases, with the first phase being at

least 90% of the withdrawing partner's estimated Liquidating Share. Although the Court is not required to decide this issue for purposes of the pending motion to dismiss, Defendants' interpretation of the LPA to permit them to use the securities they selected and valued at the time of retirement as a proxy for the Liquidating Share appears strained. When the surrounding facts are developed, the Court may reach a different conclusion. On the preliminary record now before me, however, I cannot rule out the possibility that Plaintiffs might succeed in proving Defendants' interpretation is incorrect and, perhaps, even glaringly so.

Defendants also seek dismissal of the second count based on the LPA's exculpation clause. Under Delaware law, a partnership agreement may limit or eliminate any and all liabilities of a partner or other person to a limited partnership or to another partner for breach of contract and breach of duties, provided the agreement does not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.[28] Here, LPA § 3.03 exculpates the General Partner for losses arising out of "any act or activity undertaken . . . in fulfillment of any obligation or responsibility under this Agreement." Although this is

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[28] 6 *Del. C.* § 17-1101(f) ("A partnership agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to an other person that is a party to or is otherwise bound by a partnership agreement; provided that a partnership agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.").

a broad exculpation clause, the limitation of liability, by its terms, does not cover gross negligence, willful misconduct, or violation of applicable laws.[29]

In this case, because the method Defendants used to determine the amounts due to be distributed to Plaintiffs arguably violates the LPA, reflects an unreasonable interpretation of the partnership agreement, and has caused significant damage to Plaintiffs to the benefit of Defendants and those affiliated with them, among others, Plaintiffs conceivably could prove Defendants adopted their interpretation in bad faith or as a result of gross negligence or willful misconduct. Thus, at least those exceptions to Defendants' potential grounds for exculpation might apply here. Thus, Defendants' exculpation defense is not sufficient to support dismissing Plaintiffs' claim for breach of fiduciary duty as a matter of law.

As an independent basis for dismissing count two, Defendants point to cases in which this court has dismissed breach of fiduciary duty claims that arise out of the same facts as claims for breach of contract.[30] Here, Plaintiffs' breach of fiduciary duty claim derives from the allegation that the General Partner violated the LPA when it made distributions of depreciated securities at inflated year-end prices, and then unreasonably delayed the final portion of such distributions to Plaintiffs, while providing more favorable treatment to persons or entities related to Defendants. Although these fiduciary duty claims share a common nucleus of operative facts with Plaintiffs' breach of contract

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[29] LPA § 3.03(a).

[30] *See, e.g.*, *Blue Chip Capital Fund II L.P. v. Tubergen*, 906 A.2d 827, 833-34 (Del. Ch. 2006); *Gale v. Bershad*, 1998 WL 118022, at *5 (Del. Ch. Mar. 31, 1998).

claim, they depend on additional facts as well, are broader in scope, and involve different considerations in terms of a potential remedy. For example, in the breach of contract claim Plaintiffs allege Penfield breached the LPA by not distributing to Plaintiffs the full amount due. By contrast, in the breach of fiduciary duty claims Plaintiffs allege Pine Creek, at the direction of Witter, engaged in intentional misconduct, such as dumping 2007 losses on Plaintiffs, to enrich Penfield's remaining investors, consisting mainly of Pine Creek, Witter, and members of the Witter family, at the expense of Plaintiffs. Hence, this case is distinguishable from those Defendants rely on, which dismissed breach of fiduciary duty claims as duplicative of breach of contract claims that either were substantially identical, such that the fiduciary duty claim would have been "superfluous,"[31] or involved remedies that were likely to be equivalent, based in part on the company's reassurance that it had sufficient resources to allow for a full remedy.[32] The latter consideration is relevant in this case, because approximately 94% of the funds invested in Penfield were withdrawn and the amounts at issue are significant.

For all of these reasons, I deny Defendants' motion to dismiss the Complaint's second cause of action against Pine Creek and Witter for breach of fiduciary duties.

### D. Accounting Against Penfield

Plaintiffs' third cause of action is for an equitable accounting. Plaintiffs allege that an accounting is necessary to achieve a complete settlement of Penfield's affairs.

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31 *Gale*, 1998 WL 118022, at *5.

32 *Blue Chip*, 906 A.2d at 834.

An action for an accounting is not available when there exists an adequate remedy at law.[33] Although Defendants contend an adequate legal remedy exists here in the form of money damages, I believe the situation is likely to be more complicated than that. Approximately 94% of Penfield's limited partners withdrew as of December 31, 2006, causing the distribution of the vast majority of its assets. The Complaint alleges that Penfield and the other Defendants distributed cash and other partnership assets to relatives of the principals of Defendant Witter under questionable circumstances both at the time of the withdrawals and more recently. Thus, while Plaintiffs ultimately may show that are entitled to receive the difference between their full actual Liquidating Share value and what they, in fact, received, plus interest, determining how that amount equitably might be satisfied from Penfield's current assets or otherwise may be complicated. Therefore, there may not be an adequate remedy available at law.

Further, courts historically have viewed a number of factors when considering a demand for an accounting. Those factors include whether: (1) the partner was wrongfully excluded from the partnership; (2) there is a breach of fiduciary duty; and (3) other circumstances render an accounting just and reasonable.[34] Here, Plaintiffs voluntarily withdrew from Penfield, but the Complaint alleges Defendants violated Plaintiffs' rights as withdrawing limited partners. Additionally, as previously discussed, Plaintiffs have asserted colorable claims for breach of fiduciary duty against Penfield's

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33 *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962).

34 *Nero v. Littleton*, 1998 WL 229526, at *4 (Del. Ch. Apr. 30, 1998).

General Partner and its general partner. Based on the complexity of the allegations regarding improper distributions and the nature of the wrongs alleged, I cannot at this preliminary stage exclude the possibility that an accounting will provide an appropriate form of relief. Accordingly, Defendants' motion to dismiss count three is denied.

## IV. CONCLUSION

For the reasons stated, Defendants' motion to dismiss is granted in part and denied in part.

**IT IS SO ORDERED.**