ORIGINAL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RUTH ELLEN MILLER, CHARLES and LYDIA HOFFMAN, and JOY LAZARUS on the behalf of Themselves and all others similarly situated,

Plaintiff,

v.

AMERICAN REAL ESTATE PARTNERS, L.P., HIGH COAST LIMITED PARTNERSHIP, AMERICAN PROPERTY INVESTORS, INC., CARL ICAHN, ALFRED D. KINGSLEY, MARK H. RACHESKY, WILLIAM A. LEIDESDORF, JACK G. WASSERMAN, and JOHN P. SALDARELLI,

Defendants.

Civil Action No. 16788

01 SEP -6 PM 04
REGISTER IN CHANCERY
DIANNE H. KENNY

MEMORANDUM OPINION

Date Submitted: August 6, 2001
Date Decided: September 6, 2001

Pamela S. Tikellis and Robert J. Kriner, Jr., Esquires, of CHIMICLES & TIKELLIS, Wilmington, Delaware; Of Counsel: Lynda J. Grant, Esquire of GOODKIND LABATON RUDOFF, New York, New York, Attorneys for Plaintiffs.

R. Franklin Balotti, J. Travis Laster, and Catherine G. Dearlove, Esquires, of RICHARDS LAYTON & FINGER, Wilmington, Delaware; Of Counsel: Theodore Altman, Marilla Ochis, and Joshua Sohn, Esquires, of PIPER MARBURY RUDNICK & WOLF, New York, New York, Attorneys for Defendants Carl C. Icahn and High Coast Limited Partnership.

Josy W. Ingersoll and Danielle B. Gibbs, Esquires, of YOUNG CONAWAY STARGATT & TAYLOR, Wilmington, Delaware, Attorneys for Defendants American Property Investors, Inc., Alfred D. Kingsley, Mark H. Rachesky, William A. Leidesdorf, and Jack G. Wasserman.

STRINE, Vice Chancellor

This is yet another case in which a general partner of a limited partnership contends that the partnership agreement eliminates the applicability of default principles of fiduciary duty, and in which this court finds that the drafters of the agreement did not make their intent to eliminate such duties sufficiently clear to bar a fiduciary duty claim. Here, the drafters of the American Real Estate Partners, L.P. partnership agreement did not clearly restrict the fiduciary duties owed to the partnership by its general partner, a defendant entity wholly owned by defendant Carl Icahn. Indeed, the agreement seems to contemplate that the general partner and its directors could be liable for breach of fiduciary duty to the partnership if they acted in bad faith to advantage themselves at the expense of the partnership.

The fact that the general partner and other defendants owe fiduciary duties does not, however, mean that the plaintiffs have pled a viable claim. In this opinion addressing the defendants' motion to dismiss, I reject the defendants' argument that they did not owe fiduciary duties, but find that the plaintiffs have failed to make non-conclusory allegations of fact that, if true, support an inference that the defendants breached their fiduciary duty of loyalty. Because the plaintiffs have averred enough to lead the court to suspect that a viable complaint can be pled, however, the complaint is dismissed without prejudice. As to those aspects of the plaintiffs' complaint

that are barred by the doctrine of laches, the dismissal shall be with prejudice.

I. Factual Background

Overview Of The Plaintiffs' Allegations

The plaintiffs are holders of limited partnership units in defendant American Real Estate Partners, L.P. ("American Real Estate" or the "Partnership"). They seek various forms of relief against the entities and persons who control American Real Estate: American Real Estate's general partner, defendant American Property Investors, Inc. ("the General Partner"); the General Partner's directors, including defendant Carl Icahn, the General Partner's owner and chairman of the board; and American Real Estate's majority unitholder, defendant High Coast Limited Partnership ("High Coast"), which is also controlled by Icahn and has American Property Investors as its general partner.

Distilled to its essence, the amended complaint alleges that Icahn (i) acquired the General Partner interest; (ii) used the General Partner to make a rights offering that would enable High Coast to acquire a majority of American Real Estate's units and insulate the General Partner from removal; (iii) cut off all distributions so that Icahn could devote available cash to investments in which other Icahn entities were interested and place pressure

on other unitholders to sell out; (iv) amended the Partnership Agreement through a written consent executed by High Coast to broaden the purposes of the Partnership and allow American Real Estate to invest in any securities, thus furthering Icahn's plan to use American Real Estate as a financing agency for the investment goals of his other entities; and (v) bought out additional unitholders at an allegedly unfair price through a tender offer. According to plaintiffs, the sum total of these actions have left the public unitholders of American Real Estate as unitholders in a profitable Partnership that pays no distributions so that it can instead serve as a pool of available capital that Icahn can use for his own personal purposes. Because Icahn has total control over American Real Estate and its cash flow, and has made no secret of his intent to continue to use the Partnership in this self-interested manner, the capital markets have placed a correspondingly low value on Partnership units, to the detriment of the public unitholders.

I will now set forth the elements of this supposed scheme, as such elements are pled in the amended complaint.

A. High Coast Obtains Voting Control

American Real Estate was formed in early 1987. Its purpose was to invest and manage real estate, and to engage in other activities related to

those purposes. As of the mid-1990s, American Real Estate owned a large portfolio of diverse real estate properties.

By 1995, the Icahn-controlled General Partner was in place at American Real Estate. In February 1995, Icahn's affiliate High Coast controlled 9.89% of American Real Estate's units.

That month, the General Partner caused American Real Estate to make a "Rights Offering." Each limited partner was issued one freely tradeable and transferable subscription right for each seven units held. The subscription right entitled the right holder to obtain six partnership units and one preferred unit for $55, with $45 of the price being allocated to the six units and $10 to the preferred unit. The price per regular unit was a slight discount to the then-prevailing market price.

All limited partners were also offered the opportunity to participate in an oversubscription privilege. This privilege enabled limited partners to purchase, on a *pro rata* basis, any rights not exercised by other holders. In connection with the Offering, High Coast guaranteed that it would purchase all units it would receive rights to purchase, and any units and preferred units that were not subscribed for by other limited partners.

The unitholders were informed that the Partnership wanted to raise cash to take advantage of "what the General Partner perceived as significant

investment opportunities to acquire undervalued properties, such as development properties and non-performing loans, which the General Partner believes have the potential to diversify and enhance the long-term value of the Partnership's investment portfolio."[1]

Nearly two million rights were issued, of which only 418,307 were exercised. High Coast was therefore able to use the unexercised rights to acquire an additional 10,324,128 units ('plus 1.7 million preferred units). This raised its ownership stake from 9.89% to 50.6%.

Because the Partnership Agreement states that the General Partner can be removed only by the affirmative votes of 75% of the unitholders, High Coast had achieved a level of ownership that rendered Icahn's control of American Real Estate unshakeable.

B. The General Partner Eliminates Cash Distributions

In 1993, the General Partner had halved quarterly distributions from a quarter to twelve and a half cents per unit. In December 1995 -- after High Coast obtained a majority of units — the General Partner ceased all distributions.

According to the plaintiffs, this decision adversely affected the public unitholders. Although the units trade on the New York Stock Exchange,

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[1] Am. Comp. ¶ 35 (quoting prospectus)

allegedly the trading volume in Partnership units is thin, and the price at which units trade relates principally to the amount of distributions it makes. Because Icahn had locked up control and had ceased to distribute any of the Partnership's cash flow to unitholders, the units' trading price allegedly was depressed.

C. Icahn Uses His Control To Amend The Partnershiu Agreement

In July 1996, the General Partner disseminated an "Information Statement" to unitholders, informing them that the Partnership Agreement had been amended solely by the votes of High Coast upon recommendation of the General Partner.

The "Amendment" altered § 3.01 of the Partnership Agreement, which defined American Real Estate's business and purpose. The Amendment ended the Partnership's exclusive focus on real estate to enable American Real Estate to invest in securities of any kind, whether or not related to real estate. As the information statement indicated:

> The equity securities in which the Partnership may invest may include common stocks, preferred stocks and securities convertible into common stocks, as well as warrants to purchase such securities. The debt securities in which the Partnership may invest may include bonds, debentures, notes, mortgage-related securities and municipal obligations. Certain of such securities may include lower rated securities which may provide the potential for higher yield and therefore may entail higher risk. In addition, the Partnership may

> engage in . . . options and futures transactions, foreign currency transactions and leveraging for either hedging or other purposes.'

The information statement also indicated that the broadening of American Real Estate's investments could endanger the tax status of the Partnership.

The purpose of the Amendment was articulated as follows:

> The Partnership intends to continue to invest its assets available for investment in undervalued assets in the real estate market. . . [However,] *while the Partnership believes opportunistic real estate investments continue to remain available, such investments have become more competitive to source and the increased competition may have an adverse impact on the spreads and the ability to find quality assets that provide returns sought by the Partnership.* In addition. . . the Partnership Agreement only permits the Partnership to invest in assets related to real estate unless such investments are of a short-term nature pending investment in real estate assets, such as deposit accounts and money market funds. The General Partner believes that it is in the best interests of the Partnership and the Unitholders for the Partnership to be permitted to invest a portion of the Partnership's funds in assets outside the real estate market that may provide returns on its funds in excess of those available to the Partnership in the current real estate market or those currently received on investments in government securities.[3]

The public unitholders were also informed, however, that High Coast's reasons for voting their units to consent to the Amendment to the Partnership Agreement were not entirely related to furthering the interests of American Real Estate as a partnership. Rather,

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[2] Am. Comp. ¶ 53 (quoting information statement).

[3] Information Statement at 4 (emphasis added).

> Icahn's approval of the Amendment to the Partnership Agreement through High Coast and the General Partner's selection of non-real estate investments may be influenced by factors other than the best interests of the Partnership and maximization of Unitholder value. Such factors may include whether the General Partner and its affiliates, including Icahn, have independent investments in such assets which may benefit from investments by the Partnership.[4]

The unitholders were also told that the Partnership "anticipate[d] that Mr. Icahn, as Chairman, and personnel of the General Partner and the Partnership will be responsible for selecting non-real estate investments by the Partnership as they have with respect to real estate related investments.“' The Information Statement further warned that "the General Partner's selection of non-real estate investments may be subject to conflicts of interest, including those relating to whether the General Partner or its affiliates have independent investments in such assets which may benefit from investments by the Partnership."[6]

The unitholders were also told that the Audit Committee of the General Partner had approved the Amendment, acting independently of the General Partner's management. The Audit Committee was comprised of defendants Alfred D. Kingsley, William A. Leidesdorf , and Jack G. Wasserman. According to the Information Statement, the Audit Committee,

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[4] Information Statement at 5.

[5] Information Statement at 2.

[6] *Id.*

upon advice from Coopers & Lybrand, concluded that the expansion of American Real Estate's permissible investments was in the best interests of the Partnership because of the limited opportunities available in the real estate market; the benefits of a more diversified investment portfolio; and the potential gains that could come from non-real estate investments. After Audit Committee approval, the full board of the General Partner, including Icahn, approved the Amendment and submitted it to High Coast for the necessary votes to adopt it.

D. High Coast Makes A Tender Offer

In November 1998, High Coast made a tender offer for 10,000,000 — or nearly 40% of all — American Real Estate units at $10.50 per unit. That offer was successful and resulted in High Coast upping its holdings to 89.7% of all units.

According to the plaintiffs — *who did not sell in the offer* — the $10.50 per-unit price was well below the $18.00 per-unit net asset value of American Real Estate. They say that High Coast was able to buy at this allegedly unfair price because Icahn had left unitholders with no option. Because Icahn controlled American Real Estate, had cut all distributions, had announced that he would invest the Partnership's cash in non-real estate ventures for reasons that were self-interested, and had begun to make such

investments, plaintiffs contend that the unitholders had no real choice but to accept what they were being offered.

E. Icahn's Investments On Behalf Of American Real Estate

The plaintiffs argue that Icahn and the General Partner have "intentionally and willfully" caused American Real Estate "to make investments which: ([1]) are high risk; (2) have no financial benefit to the Partnership; and (3) have depressed the value of the Units."[7] In particular, the plaintiffs contend that American Real Estate has been used as a financing tool to aid Icahn in his efforts to obtain a control position in a number of companies, including RJR Nabisco and Phillips Services Corp. Icahn also caused the Partnership to purchase the bonds of several bankrupt Atlantic City casinos, with the hopes of obtaining control. The complaint further asserts that Icahn caused American Real Estate to purchase an Icahn-owned land development company for over $84 million.

The plaintiffs argue that these investments were risky (e.g., Phillips Services Corp. was bankrupt), and were an imprudent use of cash. Despite impressive cash flow from Partnership operations, Icahn continues to refrain from making distributions, eschewing that choice in favor of using

[7] Am. Comp. ¶ 73.

Partnership cash as a source of capital in furtherance of the interests of other entities he controls.

The plaintiffs also allege the Icahn and the General Partner have intentionally disseminated — *unidentified* — negative news about the Partnership in order to depress the market value of units. They further claim that Icahn took advantage of this depression by having High Coast purchase another 400,000 units at less than $8 per unit in early 2000.

F. <u>The Plaintiffs' Claims And The Defendants' Motion</u>

The complaint pleads the story recited above with broad strokes. Most of the allegations are cursory, and unsupported by pled facts. The relief sought by the plaintiffs is pled in a like manner.

The plaintiffs contend that the defendants have violated the Partnership Agreement and their fiduciary duties by effecting the scheme outlined above. As relief, the plaintiffs seek:

- unspecified damages;
- a permanent injunction disabling the General Partner from acting as such;
- dissolution of American Real Estate;
- a mandatory injunction requiring the General Partner to make distributions or to undertake unspecified measures to increase unit value; and/or

- their attorneys fees and costs.

The amended complaint was not served on the defendants until September 22, 2000. The original complaint in this action had been filed on November 18, 1998, but was never served on any of the defendants. The impetus for tiling and serving an amended complaint appears to have come mostly from the court, which had inquired as to the status of this matter. The court's inquiry coincided with attempts by the plaintiffs and the defendants to settle this action, efforts which ultimately failed some time after the filing of the original complaint.

After the service of the amended complaint, the defendants filed and briefed a motion to dismiss. In their brief, the defendants have understandably tried to address the plaintiffs' rather unfocussed claims on a transaction-by-transaction basis. The defendants argue that each of the transactions challenged was authorized by the Partnership Agreement, and that the provisions of the Partnership Agreement set forth specific standards of conduct that supplant traditional fiduciary duties. Because the General Partner and the other defendants acted in conformity with the contractually specified standards of conduct, the defendants argue that the amended complaint fails to state a claim upon which relief can be granted. In the alternative, the defendants argue that the complaint does not state a claim

even if the defendants owed fiduciary duties to the unitholders. Additionally, the defendants argue that some aspects of plaintiffs' claims are time-barred, because the plaintiffs did not serve their complaint until three years after the events in question.

II. Procedural Standards

On a motion to dismiss, this court must assume the truth of all well-pled allegations of fact.[8] The court, however, need not give weight to conclusory allegations that are unsupported by specific allegations of fact.[9] After examining the complaint in this pro-plaintiff manner, the court may dismiss the complaint only if it is reasonably certain that the facts pled in the complaint would not support any claim for relief.[10]

III. Legal Analysis

A. The Plaintiffs' Claims Related To The Rights Offering Are Time-Barred

The complaint pleads that the Rights Offering occurred in February 1995. The original, un-served complaint was not filed until November 1998, more than three years after the consummation of the Rights Offering.

There can be no excuse for such late filing. The plaintiffs have failed to allege that the applicable legal limitations period of three years — to

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[8] *Rabkin v. Philip A. Hunt Chemical Corp.,* Del. Supr., 498 A.2d 1099, 1104 (1985).

[9] *In re Tri-Star Pictures, Inc. Litig.*, Del. Supr., 634 A.2d 319, 326 (1991).

[10] *Rabkin, 498* A.2d at 1104.

which this court ordinarily looks in order to apply the doctrine of laches — was equitably tolled." This failure is understandable given the fact that there was litigation filed in this court that contributed to an alteration of the Rights Offering in favor of the limited partners.[12] Not only that, the plaintiffs have stood by while High Coast and other investors have conducted transactions pursuant to the Rights Offering and accepted the market risk that came with exercising the Rights. There being no just reason for plaintiffs to attack the Rights Offering in an untimely manner, the plaintiffs challenge to that Offering is dismissed.[13]

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[11] *United States Cellular v. Bell Atl. Mobile Sys., Inc.,* Del. Supr., 677 A.2d 497, 502 (1996).

[12] *See In re American Real Estate Partners, L.P. Litig.,* Del. Ch., Cons. C.A. No. 13687, mem. op., 1997 WL 770718, Chandler, C. (Dec. 3, 1997).

[13] The defendants also argued in their opening brief that all claims addressing actions taken by the defendants more than three years before the *service* of the complaint in September 2000 are barred by laches. That argument has force because the mere filing of a complaint is ordinarily insufficient to toll a statute of limitations, even if service is withheld because of some belief that the defendants would be benefited by a delay. *See Robertson v. Gest,* Del. Supr., 1991 WL 316950, Order, Walsh, J. (Dec. 11, 1991); *Russell v. Olmedo,* Del. Supr., 275 A.2d 249 (1971). The plaintiffs have suggested, however, that the defendants did not wish for the complaint to be served and that plaintiffs held off from effecting service based on an agreement with defendants' counsel and in deference to the parties' settlement discussions. At oral argument, defendants' counsel acknowledged that this issue is not ripe for disposition at this time because the precise nature of the discussions between plaintiffs and defendants about service is unclear. Some factual record might be necessary to determine whether some tolling accord had been reached, and additional briefing would be helpful on whether the approach taken in *Robertson v. Gest* and *Russell v. Olmedo* applies in the equitable context of a laches argument.

B. Does The Complaint State A Claim?

1. Does The Partnershin Ameement Eliminate The General Partner’s Fiduciarv Dutv Of Lovaltv?

The defendants’ contention that the plaintiffs have failed to plead a cognizable claim depends heavily on their argument that the Partnership Agreement eliminated any default fiduciary duty of loyalty owed by the General Partner, Icahn, and the other defendant directors to the limited partners of American Real Estate. The defendants base their argument on § 6.13 of the Agreement, and in particular subsection (d). The subsection reads as follows:

> *Whenever in this Agreement the General Partner is permitted or required to make a decision (i) in its “‘sole discretion ” or “discretion ”, with “absolute discretion ”* or under a grant of similar 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 Operating Partnership or the Record Holders,* 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.*[14]

According to the defendants, § 6.13(d) sweeps away all default principles of fiduciary duty when the sole and complete discretion standard

[14] Partnership Agreement, § 6.13(d) (emphasis added).

governs the General Partner's actions. The sole and complete discretion standard, they contend, is utterly inconsistent with the default duty of loyalty, which would require that the General Partner treat the limited partners fairly in any conflict situation. How can one square that duty of fairness with § 6.13(d)'s statement that the General Partner need not consider any particular factor in making decisions subject to the sole and complete discretion standard?

The defendants' focus on this question is logical. As they note, several of the acts the plaintiffs complain of fall under the "sole and complete discretion" standard. For example, under the Agreement, the General Partner has sole and complete discretion to make or withhold distributions.[15] Therefore, § 6.13(d) is implicated by the plaintiffs' challenge to the General Partner's decision to cease distributions.

Likewise, the Agreement contains the following broad provision stating:

> 6.01 Management and Control of Partnership. Except as otherwise expressly provided or limited by the provisions of this Agreement (including, without limitation, the provisions of Article VII), the General Partner shall have full, exclusive and complete discretion to manage and control the business and affairs of the Partnership, to make all decisions affecting the business and affairs of the Partnership, and to take all such actions as it deems necessary or appropriate to accomplish the purposes of the Partnership as set forth

[15] Partnership Agreement, § 6.05.

> herein. The General Partner shall use reasonable efforts to carry out the purposes of the Partnership as set forth herein. The General Partner shall use reasonable efforts to carry out the purposes of the Partnership and shall devote to the management of the business and affairs of the Partnership such time as the General Partner, in its sole and absolute discretion, shall deem to be reasonably required for the operation thereof. No Limited Partner, Record Holder, Non-Consenting Investor or Subsequent Transferee shall have any authority, right or power to bind the Partnership, or to manage or control, or to participate in the management or control of, the business and affairs of the Partnership in any manner whatsoever.[16]

The defendants argue that this section applies to the General Partner's investment decisions. Because the core purpose of the Partnership is to make investments in real estate and (under the contested Amendment, non-real estate) investments, the defendants argue that § 6.13(d) applies to the plaintiffs' challenges to specific investment decisions made by the General Partner.

Once again, therefore, this court faces a situation where an agreement which does not expressly preclude the application of default principles of fiduciary is argued to do so by implication. Indeed, this case presents the court with an opportunity to address a contractual provision similar to the one it interpreted on two occasions in *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*,[17] and contemporaneously with this case in *Gelfman v.*

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[16] Partnership Agreement, § 6.01.

[17] Del. Ch., C.A. No. 15754, mem. op., 2001 WL 846054, Strine, V.C. (July 18, 2001 corr. Aug. 1, 2001); Del. Ch., C.A. No. 15754, mem. op., 2000 WL 1521371 Strine, V.C., (Sept. 27, 2000).

Weeden Investors, L.P.[18] In each of those cases, this court held that the traditional fiduciary entire fairness standard could not be applied because it was inconsistent with a contractual provision providing a general partner with sole and complete discretion to effect certain actions subject solely to a contract-specific liability standard. The court's decision was based on two factors. First, the court noted the difference between the sole and complete discretion standard articulated in the agreements, which explicitly stated that the general partner had no duty to consider the interests of the partnership or the limited partner in making its decisions, and the traditional notion that a fiduciary acting in a conflict situation has a duty to prove that it acted in a procedurally and substantively fair manner.[19] Second, and even more critically, however, each of the agreements indicated that when the sole and complete discretion standard applied, any other conflicting standards in the agreements, other contracts, or under law (including the DRULPA) were to give way if it would interfere with the general partners' freedom of action under the sole and complete discretion standard." That is, in each case, the agreement expressly stated that default principles of fiduciary duty would be

[18] Del. Ch., C.A. No. 18519, mem. op., Shine, V.C. (Aug. 23, 2001).

[19] *Gotham,* 2001 WL 846054 at *24; *Gelfman,* mem. op. at 15-16.

[20] *Gotham,* 2001 WL 846054 at *26; *Gelfman,* mem. op. at 18.

supplanted if they conflicted with the operation of the sole and complete discretion standard."

This case presents a twist on *Gotham Partners* and *Gelfman*. Like the provisions in *Gotham Partners* and *Gelfman*, § *6.13(d)* sets forth a sole discretion standard that appears to be quite different from the duty of a fiduciary to act with procedural and substantive fairness in a conflict situation. What is different about § 6.13(d), however, is that it does not expressly state that default provisions of law must give way if they hinder the General Partner's ability to act under the sole discretion standard. Rather, § 6.13(d) merely states that other standards in the Agreement or agreements contemplated by the agreement give way to the sole discretion standard. By its own terms, § 6.13(d) says nothing about default principles of law being subordinated when the sole discretion standard applies.

This omission is of legal significance. In prior cases, this court has held that default principles of fiduciary duty will apply unless a partnership

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[21] *Gotham,* 2001 WL 846054 at *3 (quoting agreement provision stating that each limited partner agreed that "any standard of care or duty under the Delaware RULPA or any other applicable law shall be modified, waived or limited as required to permit the General Partner to act" under the sole and complete discretion standard so long as the General Partner's action "does not constitute willful misconduct and is reasonably believed to be consistent with the overall purposes of the Partnership"); *Gelfman*, mem. op. at 14 (quoting agreement language that is essentially identical to that in *Gotham*, but which also subjects the general partner to liability for gross negligence).

agreement plainly provides otherwise.[22] As the defendants would have it, when the Partnership Agreement says that the General Partner has sole discretion, it means that the General Partner has unreviewable power to act in any manner whatsoever, however advantageous to the General Partner and however disadvantageous to the Partnership. According to the defendants, the General Partner could choose to invest Partnership funds in a failing venture solely to ensure that the General Partner's own investment in that venture is not lost, and turn its back on a less risky and more profitable opportunity for the Partnership.

This court has made clear that it will not tempted by the piteous pleas of limited partners who are seeking to escape the consequences of their own decisions to become investors in a partnership whose general partner has clearly exempted itself from traditional fiduciary duties.[23] The DRULPA puts investors on notice that fiduciary duties may be altered by partnership agreements, and therefore that investors should be careful to read partnership

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[22] *See, e.g., Sonet v. Timber Company, L.P.,* Del. Ch., 722 A.2d 319, 322 (1998).

[23] *Sonet*, 722 A.2d at 327; *see also In re Cencom Cable Income Partners, L.P. Litig., Del.* Ch., C.A. No. 14634, mem. op. at 12-13, 1997 WL 666970 at *4, Steele, V.C. (Oct. 15, 1997) (In rejecting argument that the entire fairness standard applied to a sale covered by specific contractual provision, the court stated that"[p]laintiffs have failed to show why the written terms of the sale process should be subject to some court-approved, after-the-fact, moralistic 'entirely fair' standard, when the parties defined the desired process in the Partnership Agreement and could have, but did not, require the General Partner to include the specific provisions that Garber testified would be desirable in a purchase agreement negotiated at arms-length.")

agreements before buying units.[24] In large measure, the DRULPA reflects the doctrine of *caveat emptor,* as is fitting given that investors in limited partnerships have countless other investment opportunities available to them that involve less risk and/or more legal protection. For example, any investor who wishes to retain the protection of traditional fiduciary duties can always invest in corporate stock.

But just as investors must use due care, so must the drafter of a partnership agreement who wishes to supplant the operation of traditional fiduciary duties. In view of the great freedom afforded to such drafters and the reality that most publicly traded limited partnerships are governed by agreements drafted exclusively by the original general partner, it is fair to expect that restrictions on fiduciary duties be set forth clearly and unambiguously.[25] A topic as important as this should not be addressed coyly.

Here, I conclude that the Partnership Agreement fails to preclude the operation of the fiduciary duty of loyalty with sufficient clarity, even in

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[24] That is, if the investors wish to protect themselves through legal means. Many investors protect themselves by diversifying their portfolios. One suspects that investment funds and other sophisticated investors also protect themselves by refusing to invest their money in entities controlled by persons who have burned them in the past, and that reputational factors might therefore play some role in deterring opportunistic behavior.

[25] *Sonet*, 722 A.2d at 322 ("[P]rinciples of contract preempt fiduciary principles where the parties to a limited partnership have made their intentions to do so plain.").

situations when the General Partner has the contractual power to act in its sole discretion. The reasons I reach this conclusion are several. First, I again note the absence of any express indication that default principles of law must give way when the sole discretion standard applies. This absence is striking given the prevalence of such express provisions, and their use in concert with contractual language markedly similar to § 6.1 3(d).[26] The drafter's decision to preempt conflicting provisions of the Agreement and of other contracts, but not those of default law can thus be viewed as intentional.

Second, other provisions of the Agreement imply that concepts of fiduciary duty will apply except when the Agreement clearly modifies them. For example, the Agreement contains an exculpatory provision -- § 6.14 — that exempts the General Partner and its directors and officers from liability

> except for liability (i) for any breach of such Person's duty of loyalty to the Partnership, as such duty may be set forth in or modified by this Agreement, (ii) for acts or omissions not in good faith or which involve intentional misconduct or knowing violation of law or (iii) for

[26] Aside from *Gotham Partners* and *Gelfman*, I note that the leading treatise on the DRULPA includes a section of forms. That section advocates the use of contractual provisions like § 6.13(c), which state that when a sole discretion standard applies, other standards are to give way. Unlike § 6.13(c), however, the treatise form expressly states that the sole discretion standard applies to the exclusion of "any other or different standards imposed by this Agreement *or any other agreement contemplated herein or by relevant provisions of law or equity or otherwise.*" Martin I. Lubaroff & Paul Altman, *Lubaroff & Altman on Delaware Limited Partnerships,* at F-38 (2000 Supp.) (emphasis added); see also *id.* at F-99 (essentially the same except using the term "applicable law" rather than "relevant provisions of law or equity").

> any transaction from which such Person derived an improper benefit.[27]

While to some extent my reference to § 6.14 may be seen as begging the question since the application of § 6.14 itself raises the question of whether the Agreement has "modified" the duty of loyalty, the section seems to me to undercut the notion that § 6.13(d) provides the General Partner with the limitless scope of action for which the defendants contend. Given the breadth of actions to which the sole discretion standard applies, § 6.14 would have little scope if the defendants are correct about what § 6.13(d) means. Its presence in the contract and its preservation of liability for situations when the General Partner has breached its duty of loyalty or acted in bad faith is, on balance, more consistent with a reading of § 6.13(d) that leaves room for the application of the fiduciary duty of loyalty, at least as to its substantive aspects.

Finally, this interpretation is consistent with the Registration Statement provided to investors when the Partnership was first formed. That Statement contains a section stating:

> 6.12. Transactions with General Partner or Affiliates. In addition to transactions specifically contemplated by the terms and provisions of this Agreement, the Partnership is expressly permitted to enter into other transactions with the General Partner or any of its Affiliates, including, without limitation, buying and selling properties from or to

[27] Partnership Agreement, § 6.14.

> the General Partner or any of its Affiliates, subject to the Limitations contained in this Agreement, the Delaware Act and in the Registration Statement.[28]

By its own terms, the Partnership Agreement indicates that the Registration Statement is contractually relevant:

> The General Partner is accountable to the Partnership and the Unitholders as a fiduciary and, consequently, must exercise good faith and integrity in handling Partnership affairs. This is a rapidly developing and changing area of the law and API Investors who have questions concerning the duties of the General Partner should consult with their counsel. Under appropriate circumstances, a Unitholder may file a class action on behalf of all Unitholders for alleged violations by a General Partner of its fiduciary responsibility or of Federal or state securities laws.
>
> The Partnership Agreement provides that the General Partner and its affiliates and all of their officers, directors, employees and agents will not be liable to the Partnership or to any Unitholder for any losses sustained or liabilities incurred as a result of any action that does not constitute (i) a breach of that person's duty of loyalty to the Partnership, as that duty of loyalty may be specified in or modified by the Partnership Agreement, (ii) an act or omission in bad faith which involves intentional misconduct or a knowing violation of law or (iii) a transaction from which an improper personal benefit is derived.[29]

These provisions indicate that the drafters of the Partnership Agreement did not eliminate fiduciary duties in the sweeping manner contended for by the defendants. Because the Partnership Agreement must be read in accordance with the reasonable expectations of the investors, and because the

[28] Registration Statement at B-18.

[29] Registration Statement at 75-76.

Agreement does not clearly eliminate the application of the fiduciary duty of loyalty, I conclude that the General Partner owed certain loyalty-based duties to the limited partners.

The question is, exactly what elements of the traditional duty of loyalty apply? The parties have not shed much light on this topic, having confronted the basic question in starker terms. Therefore, I speak tentatively.

At first blush, however, it appears that the Agreement does have some effect on the traditional duty of loyalty. For one thing, the Agreement seems to preclude the application of any "fair process" test to a decision made by the General Partner that is subject to the sole discretion standard, even if such decision is conflicted. Typically, the fairness of a procedure would turn largely on the extent to which the interests of the minority (or in this case, the limited partners) were given due consideration in the decision-making machinery.[30] Because the sole discretion standard in the Agreement authorizes the General Partner to make decisions without giving any consideration to particular interests, including those of the limited partners,

[30] *E.g., Weinberger v. UOP, Inc.,* Del. Supr., 457 A.2d 701, 711 (1983).

the application of a procedural fairness test conflicts directly with the contract.[31]

Less certain is whether the sole discretion standard obviates the duty of the General Partner to act with substantive fairness in a transaction between the General Partner (or an affiliate) and the Partnership. The parties have shed little light on this question, and I hesitate to answer it without additional help. Without prejudice to the defendants' ability to renew their argument at a later time if the need arises, I believe it prudent not to foreclose the possibility that something akin to a fairness standard applies in an interested transaction. The fact that § 6.14 does not exculpate the General Partner "for any transaction from which [it] derived an improper personal benefit" buttresses my hesitance to conclude that the General Partner may effect a self-dealing transaction on terms unduly favorable to itself.

Likewise, I conclude that the Partnership Agreement preserves that core aspect of the duty of loyalty which prohibits a fiduciary from taking bad faith action to injure the Partnership for his own personal advantage. Again, the specific indication in § 6.14 that the Agreement does not generally exculpate acts of bad faith supports this conclusion. So does a less case-

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[31] *R.S.M., Inc. v. Alliance Capital Management Holdings L.P.,* Del. Ch., C.A. No. 17449, mem. op. at 39, Shine, V.C. (Apr. 10, 2001).

specific, normative proposition. To the extent that an Agreement purports to insulate a General Partner from liability even for acts of bad faith towards the Partnership, it should do so in the most painstakingly clear terms. Whether an Agreement that permits a General Partner-by its unmistakable terms — to exercise its discretion in bad faith is consistent with Delaware public policy is in itself an important question. But no court need reach that question until a Partnership Agreement plainly provides the General Partner with authority to act in bad faith with impunity. The Partnership Agreement at issue in this case does not do so.

2. Does The Comnlaint State A Claim For Breach Of The Fiduciary Duty Of Lovaltv?

Having concluded that the plaintiffs may state a cognizable claim if they allege facts that support a breach of the more substantive aspects of the traditional fiduciary duty of loyalty, I now turn to the task of analyzing the plaintiffs' claims. This task is complicated by the cursory nature of the complaint, which is redolent with accusations of bad faith schemes but short on the pleading of specific facts that support the inference that these alleged schemes may indeed exist.

In evaluating the plaintiffs' claims, I start with the fact that they do not allege that any of the General Partner's actions were beyond the contractual power of the General Partner, assuming that those actions were

properly motivated and did not confer an improper benefit on the General Partner. Rather, the plaintiffs' ability to plead claims is based entirely on their ability to set forth facts supporting an inference that the General Partner breached its duty of loyalty. Indeed, the complaint alleges a breach of the Partnership Agreement in only two respects. The first is odd, in sense that the complaint alleges that the General Partner breached the Agreement by acting in a manner not exculpated by § 6.14. The second is more general, and consists in the proposition that the implied covenant of good faith and fair dealing precludes all of the actions challenged by the plaintiffs.[32] Taken together, I have difficulty distinguishing these two "contractual claims" from the plaintiffs' claim that the General Partner and the other defendants breached their fiduciary duty of loyalty. For this reason, the rest of this opinion focuses on the question of whether the complaint pleads facts that support a breach of the substantive aspects of the duty of loyalty.

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[32] The complaint does not use the implied covenant of good faith and fair dealing in any precise manner. That is, the complaint does not explain why a particular act of the General Partner could be seen, in view of the particular express provisions of the Agreement, as so repugnant to the reasonable expectations of the contracting parties as to be precluded by the implied covenant. Rather, the complaint pleads the implied covenant as a substitute for fiduciary duties, which at the very least precludes the General Partner from exercising its contractual powers in bad faith so as to advantage itself at the expense of the Partnership and the limited partners. As so used by the plaintiffs, the implied covenant becomes indistinguishable from a core aspect of the fiduciary duty of loyalty.

a. The General Partner's Termination Of Distributions

The plaintiffs allege that the General Partner initially halved distributions in 1993 and then terminated them altogether in December 1995. The General Partner's alleged motives for these reductions were: (i) to free up cash to invest in projects in which Icahn was investing through other entities he controlled; and (ii) to put downward pressure on the unit price of the Partnership's units and thus enable High Coast to conduct a tender offer for units at a bargain price.

As pernicious as this alleged conduct sounds in the abstract, the complaint does not plead a cognizable claim that the General Partner's decision to reduce and then terminate distributions was a breach of the duty of loyalty. Although the complaint's allegations are undoubtedly inflammatory, they are not backed up with pled facts.

Many businesses decide to eliminate dividends or distributions in order to use free cash for growth. Their shares or units then trade on the premise that the entity is a growth-oriented vehicle. In this case, American Real Estate units are publicly traded on a major stock market.

The complaint contains no facts that suggest that there were not potentially lucrative uses for the Partnership's cash. Under § 6.05 of the Agreement, the General Partner has "the sole and absolute discretion" to

retain Partnership cash as "may be required to satisfy the anticipated present and future cash needs of the Partnership, whether for operations, expansion, improvements, acquisitions or otherwise."

What the plaintiffs at best allege is that they have a difference of opinion with the General Partner about the mission of the Partnership. The plaintiffs contend that the Partnership should be managed in a more balanced fashion, in which the Partnership makes regular cash distributions and pursues more modest growth. Instead of doing as the plaintiffs wish, the General Partner has decided to take a long-term approach that focuses on capital growth. Without more, pleading that the General Partner of a limited partnership adopted such a strategy does not suffice to state a claim.

Certainly, however, such a strategy could be deemed a breach of the duty of loyalty, if well-pled facts indicated that the strategy was designed to provide benefits to the General Partner, to the detriment of other unitholders. Such facts are not pled here, however.

As will be noted later, the plaintiffs have failed to plead facts that indicate that Partnership cash has been invested in projects solely so as to bail out or enrich Icahn, or with any intent to otherwise injure the Partnership. Likewise, even under the pro-plaintiff standards of Rule 12(b)(6), I cannot draw the inference that the General Partner's decision to

eliminate distributions *in* 1995 was designed to enable High Coast to make a low-ball tender offer *in 1998.*

Nor have the plaintiffs alleged any other more specific form of harm flowing from the termination of distributions. For example, they have not claimed that the General Partner retained the cash and attempted to grow the Partnership because that would result in an increase of management fees to the General Partner, which would more than offset any costs to High Coast from the termination of distributions. Nor have the plaintiffs alleged that the termination of distributions has caused limited partners adverse tax consequences.

b. The Amendment To The Partnershin Agreement

The plaintiffs claim that the General Partner had a bad faith reason to amend the Partnership Agreement to permit the Partnership to invest in non-real estate projects: the amendment was necessary if Icahn was to be able to use the Partnership as a source of funding for his various efforts to acquire control of entities in diverse business fields. The Partnership itself, plaintiffs insist, had no reason to look beyond real estate for places to invest its cash. Indeed, the plaintiffs allege that Icahn admitted that the General Partner's proposal of the Amendment was a breach of fiduciary duty, because the Information Statement expressly indicated that High Coast's consent to the

Amendment was influenced by factors other than "the best interests of the Partnership and maximization of Unitholder value."[33] These factors included "whether the General Partner and its affiliates, including Icahn, have independent [non-real estate] assets which may benefit from investments by the Partnership."[34] Based on little more than these statements, the plaintiffs allege that the General Partner breached its duty of loyalty by proposing the Amendment in the first place.

There is no doubt that Icahn admitted that his own reasons for approving the Amendment in his capacity as High Coast's owner were self-interested and not in perfect alignment with the Partnership's other unitholders.[35] But the plaintiffs ask me to infer from this the fact that the General Partner qua General Partner proposed the Amendment so as to advantage Icahn and disadvantage the Partnership. This I cannot do.

The Information Statement that the complaint cites many times identifies a perfectly legitimate rationale for the Amendment: the Partnership could obtain better results if it could also invest its cash in potentially higher-yielding non-real estate investments. The complaint does

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[33] Information Statement at 5.

[34] *Id.*.

[35] Under Delaware corporation law, to which the plaintiffs look for support in sustaining their claims, a stockholder is entitled to vote its shares in its own self-interest. See, e.g., *Stroud v.* Grace, Del. Ch., 606 A.2d 75, 84 (1992).

not plead any facts that support an inference that this was not the motive of the General Partner. Tellingly, the complaint does not allege any facts about the process that was undertaken by the General Partner in deciding to propose the Amendment. This omission is interesting because the Information Statement upon which the plaintiffs place so much reliance does describe the process.

According to the Information Statement, the General Partner's Audit Committee, acting with advice from independent financial advisors, studied the advisability of the Amendment and decided that it was a favorable initiative from the perspective of the Partnership.[36] The Audit Committee was comprised of directors of the General Partner who, according to the complaint, had no affiliation with any Icahn-controlled entities other than the General Partner as of the time they made their decision. It is also noteworthy that the Amendment did not diminish any of the protections that the Agreement provided to unitholders against self-dealing by the General Partner. Rather, it simply had the effect of increasing the universe of investments that the Partnership could make.

Absent well-pled allegations that the purpose of the Amendment was to broaden the purposes of the Partnership so that it could make investments

[36] Information Statement at 14.

that were not beneficial to it, but were beneficial to Icahn and his affiliates, I believe that the plaintiffs have failed to state a claim. The mere fact that the Amendment permitted the Partnership to invest in a wider array of opportunities, and that those opportunities could include those which with other Icahn affiliates were involved, does not suffice. In this regard, my conclusion is closely linked to my later finding that the plaintiffs have failed to plead facts from which an inference can be drawn that the General Partner invested Partnership funds in Icahn-recommended investments on terms that were unfair to the Partnership and advantageous to Icahn.

Finally, I note another troubling aspect of this part of plaintiffs' claim, which must be addressed if this claim is later resurrected. That possibility exists because my dismissal order will be made without prejudice. The plaintiffs' complaint was filed some two years after the 1996 Amendment was enacted and was not served until four years thereafter. In that time, the Partnership has made investments in reliance on the Amendment. Public investors have bought units in the Partnership based on the expectation that the Partnership's purposes extended beyond real estate.

The defendants have not focussed their laches claim specifically on the Amendment. In the future, they may renew that motion (if plaintiffs replead) with this issue in mind. I have difficulty conceiving of how this

court can practicably rescind an Amendment that has been in effect for five years. Certainly, any relief that would be available would be prospective in nature only. When unitholders wish to challenge a partnership agreement amendment they should do so promptly and with vigor, not with the torpor that has characterized this litigation.

c. The 1998 High Coast Tender Offer

In the most cursory of terms, the plaintiffs challenge the November 1998 tender offer by High Coast as coercive and undervalued. They assert that the unitholders felt that they had no other choice than to tender because the General Partner had cut off distributions and was investing in Icahn-directed investments. The plaintiffs also allege that the offer did not fairly reflect the net asset value ("NAV") of the Partnership, but do not allege that limited partnership units generally trade at a price equaling or even approaching NAV. The plaintiffs also do not identify whether the offer included a premium to the unaffected trading price.[37]

I do not believe that these allegations state a claim. For one thing, the tender offer was made by High Coast. The plaintiffs ask me to draw the inference that the General Partner's termination of distributions in 1995 was

[37] The defendants insist that the $10.50-per-unit offer represented a significant premium over the previously traded unit price of $7.25. Mem. in Supp. of Defs.' Mot. to Dismiss Am. Class Action Compl. at 6.

designed to set the stage for a tender offer by High Coast in 1998. Even under liberal pleading standards, that inference is not a reasonable one. Nor have the plaintiffs identified public disclosures of the Partnership that were coercive in nature; at most, the plaintiffs have pointed to the 1996 Information Statement as involving disclosures that coerced investors in the 1998 tender offer. But the fact that the Partnership had disclosed two years earlier that High Coast's motives for approving the 1996 Amendment were not in total alignment with other unitholders does not rise to the level sufficient to constitute actionable coercion in connection with a 199% tender offer by High Coast. Put bluntly, the complaint does not allege facts that support the inference that the General Partner took wrongful coercive actions in connection with High Coast's 1998 tender offer.

Even more fundamentally, the plaintiffs before the court do not allege that they tendered into the offer or otherwise suffered any injury on account of it. According to the plaintiffs, High Coast already owned a majority of the Partnership's units before the tender offer. As a result, it is difficult to conceive of how non-tendering unitholders were injured by the tender offer.

d. The Partnershin's Investments

As a final matter, I reach the plaintiffs? claim that particular investments made by the General Partner resulted from breaches of fiduciary

duty. This is a critical aspect of the plaintiffs' complaint. In large measure, my decision about the Amendment is influenced by the failure of the plaintiffs to plead facts that support an inference that the General Partner's investments were wrongful.

The best way to illustrate this is to set forth the most relevant paragraphs of the plaintiffs' complaint verbatim:

> 73. Since 1997, consistent with its admonition in the Information Statement, Icahn and the General Partner have intentionally and willfully caused the Partnership to make investments which: [1]are high risk; (2) have no financial benefit to the Partnership; and (3) have depressed the value of the Units.
>
> 74. As a result, the trading price of the Partnership's Units have [sic] been depressed, and the market for the Units has been highly illiquid.
>
> 75. For instance, the Partnership has earned sufficient net cash flow beyond its daily needs to make substantial distributions and/or dividends which would have resulted in a significant increase in the trading value of the Units.
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> 76. According to the Partnership's Form 10-K for the year ended December 31, 1999, (the "1999 10-K"), filed with the U.S. Securities and Exchange Commission on March 30, 2000, in 1999, AREP generated net cash flow after payment of maturing debt obligation and capital expenditures of approximately $35,400,000.
>
> 77. According to the 1999 10-K, during 1998, AREP had a net cash flow of $30,000,000. Some of this cash flow was generated by way of sale of the Partnership's properties, and some of the cash flow was generated interest earned from the proceeds of the Rights Offering.
>
> 78. Notwithstanding these substantial net cash flows, the General Partner refused to make distributions or declare a divided, or take other steps which would have lead to a rise in the Units' trading price and maximization of value.
>
> 79. Rather, as the General Partner, Icahn and. the Individual Defendants admit in the 1999 10-K, the net cash flow was added to AREP's operating cash reserve, which was over $lOO,OOO,OOO by December 31, 1999.

80. These cash reserves have not been used for the financial well being of AREP or its Unitholders, but rather to further Icahn's takeover schemes.

81. For instance, in 1998 and 1999, AREP invested approximately $175,300,000 in the stock of RJR Nabisco in order to aid Icahn in his efforts to take control of that company, financing this purchase at least in part with its cash reserves or cash flow.

82. During the period of 1997 through 1998, Icahn and the General Partner further caused AREP to invest over $100,000,00 of AREP's cash in bonds of certain bankrupt Atlantic City casinos, with the goal of obtaining control of these casinos, including the Sands, the Claridge and Stratosphere.

83. With regard to these Gaming Investments, Icahn has diverted and misappropriated AREP's cash reserves and thus monies which could be distributed to Unitholders to enable himself to cheaply gain control of these entities.

84. Similarly, Icahn cause AREP to make a significant investment in a bankrupt Canadian corporation, Philips Services, Corp. ("Philips") and intends to use AREP to help him gain control of Philips.

85. Icahn has further cause AREP to invest in capital intensive real estate companies, which do not generate current income.

86. For instance, during the first quarter of 2000, Icahn cause AREP to purchase Bayswater Realty & Capital Corp. ("Bayswater") a land development company which he owned, for $84,500,000.

87. Such investment in undeveloped land involve more risk than land upon which developments have been completed, and do not generate operating revenue, while incurring costs to develop the properties.

88. Such investment do not result in the maximization of value for the Unitholders, and do not and have not resulted in higher Unit prices or liquidity for Unitholders.

89. At the same time, the General Partner and Icahn have caused AREP to make these investments, Icahn and the General Partner have failed to take any steps which would increase liquidity for AREP's Unitholders or increase the market price or trading value of the Units.[38]

What is striking about these paragraphs is how conclusory and non-specific they are. Given the nature of the plaintiffs' conspiracy theory, one

[38] Am. Comp. ¶¶ 73-89.

would have expected them to have identified particular Partnership investments of the following kinds:

- An investment in which Partnership money was substituted in for the funds of another Icahn affiliate, so that the Icahn affiliate could gain cash flow while Icahn retained control of the entity in which the investment was made;

- An investment in which the Partnership infused capital in an Icahn-controlled entity that needed capital to avoid a restructuring or a loss of control by Icahn;

- The purchase by the Partnership of an entity that was already owned by another Icahn-controlled entity at an unfair price; or

- A scenario in which a group of Icahn affiliates purchased control of an entity, and in which the Partnership's portion of the investment had the least attractive features. That is, a situation where the Partnership assumed a great deal of risk or a low return, in order to allow other Icahn-controlled entities to receive better terms and for Icahn to obtain control.

Instead, what the complaint gives the court is cursory allegations that the Partnership invested in risky projects along with other Icahn-controlled entities, when it could have been paying out cash distributions *(the bulk of which would have gone to High Coast).* Even when the complaint alleges that the Partnership purchased an entity from another Icahn affiliate, the Bayswater Realty & Capital Corp., the complaint fails to allege that the purchase price was unfair.

It is unclear to me what is wrong with the Partnership co-investing with other Icahn-controlled entities in situations that are potentially

advantageous to all concerned. For example, the complaint alleges that the Partnership invested over $175 million in the stock of RJR Nabisco as part of Icahn's effort to obtain control of that entity.[39] But the complaint does not allege that the investment turned out poorly for the Partnership.

In their briefs, the plaintiffs go a bit further and point in an unclear, but troubling way, to potential facts about one Partnership investment that might suggest that the General Partner used Partnership funds to make an investment that was principally motivated by a desire to aid Icahn, without providing any benefit to the Partnership itself. The words of the brief insinuate that this investment involved the Partnership assuming an equity or creditor position towards a troubled entity that Icahn already controlled, thus preserving Icahn's control and providing him with cash flow at great risk and little upside to the Partnership. But these allegations are not in the complaint and are, to be frank, confusingly stated in the brief.

As of now, the complaint simply alleges that the General Partner is co-investing with other Icahn affiliates in risky projects and that these investments have not yet produced an increase in unit prices. I am not unaware that Icahn had personal reasons which could have motivated him to have caused the General Partner to make investments that were not in the

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[39] Complaint, § 8 1

best interests of the Partnership. Investments of the nature I outlined above are illustrative of my understanding of the core concerns raised by the plaintiffs.

That said, it remains the fact that Icahn, through High Coast, has a strong interest in the success of the Partnership, since he owns 90% of its units. The plaintiffs are resourceful enough to have identified and pled facts that support an inference that the General Partner has breached its duty of loyalty by making investments to advantage Icahn at the expense of the Partnership. They could have sought books and records to aid them in this effort.

Given the slow speed of this litigation, it is tempting to dismiss with prejudice. The pace of this case, however, is not solely the fault of the plaintiffs; they and the defendants were engaged in negotiations for two years which did not break down until last fall. The plaintiffs have also sketched the outlines of a factual scenario that involved the potential for serious abuse of the unitholders by the defendants. Given this factor, there is the prospect that the plaintiffs might be able to plead a cognizable claim

using guidance from this opinion. Therefore, I will dismiss this action without prejudice.[40]

IV. Conclusion

For the foregoing reasons, the defendants' motion to dismiss the complaint is GRANTED. The defendants' motion to dismiss is granted with prejudice as to any actions of the defendants arising on or before three years before the tiling of the complaint on November 18, 1998. The defendants' motion to dismiss is otherwise granted without prejudice to the plaintiffs' right to tile an amended complaint. IT IS SO ORDERED.

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[40] I urge the plaintiffs to give careful thought to who they name as defendants in any new complaint. In the existing complaint, the plaintiffs have pled claims against non-employee directors of the General Partner, and have not alleged any motive for purposeful wrongdoing on their part. Although these directors face a structural conflict, they had no personal interest in advantaging Icahn or High Coast. *Gelfman*, mem. op. at 28, n.24; *Gotham*, 2001 WL 846054 at *30. As a result, they are likely protected from liability by § 6.14 of the Agreement, since any complaint against them would implicate only the duty of care.

As to any directors of the General Partner named in the amended complaint, the plaintiffs should also give thought to whether it is necessary to plead a redundant "aiding and abetting claim" against them. One would think that the directors either owed fiduciary duties to the unitholders or that they did not. If only the General Partner was owed such duties directly, its directors would simply be the means through which the General Partner acted.

Finally, I dismiss without farther discussion the plaintiffs' dissolution claim, which lacks merit. The plaintiffs should give careful thought before reasserting that claim.