IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

TWIN BRIDGES LIMITED PARTNERSHIP, KATHARINE DRAPER SCHUTT, KATHARINE DRAPER SCHUTT CUSTODIAN UGMA FOR ANNA DRAPER OSBORN, KATHARINE DRAPER SCHUTT CUSTODIAN UGMA FOR WILLIAM PRESTON OSBORN, ELIZA MARIAH OSBORN, GEORGE ARTHUR OSBORN, PRUDENCE DRAPER OSBORN, LOWELL REEVE DINNEEN, MATTHEW D. DINEEN, A. REEVE DRAPER, CHARLES PORTER SCHUTT, JR., CHARLES PORTER SCHUTT, III, JACOB FREDERICK SCHUTT, KATHARINE D. SCHUTT, II, AMANDA B. DRAPER, JOYCE HOGG DRAPER, JAMES AVERY DRAPER, IV, C.P. AND K.D. SCHUTT IRREVOCABLE TRUST DATED 12/31/92, ELLEN DRAPER CHADWICK and ROBERT ALLEN CHADWICK, Plaintiffs, v. FORD B. DRAPER, JR., Defendant.	)	Civil Action No. 2351-VCP
FORD B. DRAPER, JR., Counterclaim Plaintiff, and FORD B. DRAPER, III and AVERY L. DRAPER, Third-Party Plaintiffs,	)	

v.	)
	)
TWIN BRIDGES LIMITED PARTNERSHIP, KATHARINE DRAPER SCHUTT, KATHERINE DRAPER SCHUTT CUSTODIAN UGMA FOR ANNA DRAPER OSBORN, KATHARINE DRAPER SCHUTT CUSTODIAN UGMA FOR WILLIAM PRESTON OSBORN, ELIZA MARIAH OSBORN, GEORGE ARTHUR OSBORN, PRUDENCE DRAPER OSBORN, LOWELL REEVE DINNEEN, MATTHEW D. DINNEEN, A. REEVE DRAPER, CHARLES PORTER SCHUTT, JR., CHARLES PORTER SCHUTT, III, JACOB FREDERICK SCHUTT, KATHARINE D. SCHUTT, II, AMANDA B. DRAPER, JOYCE HOGG DRAPER, JAMES AVERY DRAPER, IV, C.P. AND K.D. SCHUTT IRREVOCABLE TRUST DATED 12/31/92, ELLEN DRAPER CHADWICK and ROBERT ALLEN CHADWICK,	)
	)
Counterclaim and Third-Party Defendants.	)

MEMORANDUM OPINION

Submitted: March 14, 2007
Decided: September 14, 2007

Matthew E. Fischer, Esquire, Timothy R. Dudderar, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, *Attorneys for Plaintiffs/Counterclaim and Third-Party Defendants*

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PARSONS, Vice Chancellor.

This case involves a dispute over the governance of a family-owned limited partnership, Twin Bridges, which owns a 250 acre parcel of real estate in Chadds Ford, Pennsylvania. The partners of Twin Bridges are the surviving children of the late Katharine Reeve Draper and their children and spouses. Mrs. Draper established the partnership in 1985 for estate planning purposes and named two of her seven children, Katherine Draper Schutt ("Schutt") and Ford B. Draper, Jr. ("Draper"), as general partners with authority to make all major decisions. The other siblings and Mrs. Draper had no management authority in Twin Bridges.

In recent years Schutt and Draper have disagreed on some important issues, thereby effectively creating gridlock within the partnership. To circumvent this problem, Schutt and most of the limited partners, who collectively hold 87% of the interests and voting power in Twin Bridges, decided to pursue a solution without involving Draper and his two sons. On August 16, 2006, the partners aligned with Schutt acted by written consents to amend the partnership agreement and then to merge the partnership into a newly-formed limited partnership with a different governance structure. The new partnership agreement provides for a third general partner, Plaintiff Prudence Draper Osborn ("Osborn"), who is a sister of Schutt and Draper. The parties agree that these actions did not change any partner's "economic interests" in the partnership.

The same day they effected the merger, Schutt and the limited partners aligned with her ("Plaintiffs") filed this action seeking a declaration of validity as to: the amendment to the partnership agreement, which authorizes the approval of a merger by partners holding two-thirds of the partnership interests; the merger of the partnership into

another Delaware limited partnership; and the merger agreement pursuant to which the merger was effected. Draper and his sons filed an Answer, Counterclaim and Third-Party Complaint,[1] asserting four claims for: (i) breach of contract against all Plaintiffs (Count I); (ii) a declaration of invalidity of the amendment and merger against all Plaintiffs under the Delaware Revised Uniform Limited Partnership Act ("DRULPA")[2] (Count II); (iii) breach of fiduciary duty against Plaintiff Schutt (Count III); and (iv) aiding and abetting a breach of fiduciary duty against all Plaintiffs other than Schutt (Count IV).

Currently before the Court are Plaintiffs' motion for summary judgment on their declaratory judgment claim and Defendants' cross motion for summary judgment on the first two counts of their Counterclaim, which relate to the same subject matter as Plaintiffs' claim. In addition, Plaintiffs have moved to dismiss all of Defendants' Counterclaims for failure to state a claim.

For the reasons stated, I conclude that the amendment and the merger effected by Plaintiffs, whether they are considered in combination as part of a single, integrated step transaction, or separately, are valid because they comply with Paragraph 31 of the partnership agreement, do not violate the implied covenant of good faith and fair dealing, and do not violate DRULPA. As to Plaintiffs' motion to dismiss, I grant it as to Counts I and II of the Counterclaim, which seek to declare the amendment and merger invalid for

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[1] The Counterclaim and Third-Party Complaint are referenced herein as the "Counterclaim."

[2] 6 *Del. C.* §§ 17-101 to 17-1111.

failure to comply with the partnership agreement and DRULPA. I deny the motion to dismiss, however, as to Counts III and IV to the extent they relate to aspects of the new partnership agreement beyond those that change the governance structure of Twin Bridges from having two to three general partners.

I. FACTS AND PROCEDURAL HISTORY

A. Beverly Farms and the Formation of Twin Bridges

Katharine Reeve Draper ("Mrs. Draper") owned Beverly Farms ("Beverly Farms" or the "Property"), a 250-acre estate located in Chadds Ford, Pennsylvania.[3] Mrs. Draper's house and the immediately surrounding area were and continue to be the only developed portion of the Property. Two areas of Beverly Farms located near Mrs. Draper's house, known as the "Play Yard" and "Shop" sites, are among the viable areas for development.

In December 1985, Draper suggested to his mother that creating a limited partnership to hold Beverly Farms for future development could provide tax benefits to her and future benefits for her children and grandchildren. With the help of counsel from the law firm of Richards, Layton & Finger, Draper then assisted Mrs. Draper in forming Twin Bridges Limited Partnership ("Twin Bridges" or the "Partnership") to enable

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[3] Compl. ¶ 8. As to the cross motions for summary judgment on the validity *vel non* of the amendment, merger, and merger agreement, the parties have agreed that there are no genuine issues of material fact. Unless otherwise noted, the facts recited herein are drawn from the pleadings, to the extent they reflect admissions, and the submissions of the parties in connection with the pending cross-motions for summary judgment. Citations to the record are intended to be illustrative, not exhaustive.

Mrs. Draper to remove Beverly Farms from her estate and establish a governance structure (the "Original Partnership Agreement" or "OPA")[4] that would govern collaboration on any future development or sale of the Property. Mrs. Draper contributed the title to Beverly Farms as the initial capital of Twin Bridges. She then gifted nearly 30% of the partnership interest in equal amounts to her seven children and retained the remaining interest. Over the remainder of her lifetime, Mrs. Draper gifted the interest she had retained in Twin Bridges to her children, their spouses, and her grandchildren.

At its inception, Twin Bridges had two general partners, Draper and Schutt. The OPA also named Mrs. Draper and five of her children, Osborn, Ellen Draper Mahalingham (now Ellen Chadwick), Elizabeth Avery Draper, Reeve Draper Dinneen (now Reeve Draper), and James Avery Draper, IV, as limited partners. Collectively, the two general partners and six limited partners owned all of the equity interests in the original Twin Bridges partnership.

Over time, the spouses and children of the original general and limited partners have been admitted as additional or substitute limited partners. Despite the division of shares among individuals, the overall interests of each branch of Mrs. Draper's family have remained the same with the exception of Elizabeth Avery Draper, who died in 1987, and Draper's branch, who currently own a slightly smaller interest.[5] As of August 16,

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[4] A copy of the Twin Bridges Limited Partnership Agreement dated December 27, 1985, or OPA, appears at Dudderar Aff. Ex. B.

[5] Draper and his family own a smaller percentage of Twin Bridges because they voluntarily redeemed part of their interest in 1996 in exchange for a plot of land subdivided from the Property.

2006, five family blocs each held approximately 17 percent of the outstanding interests in Twin Bridges, and Draper and his family held approximately 13 percent.

Under the OPA, Mrs. Draper named Draper as the initial managing partner of Twin Bridges and gave him authority to conduct the ordinary and usual activities and business of the Partnership.[6] Although the OPA named Draper as managing partner, it required both Draper and Schutt, as general partners, to consent "to all major decisions affecting the Partnership business."[7] The OPA also gave the general partners "equal voice in all decisions with respect to the overall management, control, and policies of the Partnership."[8] Thus, for at least all major decisions affecting Twin Bridges' business,

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[6] OPA ¶¶ 15(a)(1), (3), (4), (5).

[7] OPA ¶ 15(a)(6). Similarly, Draper's power as managing partner was "[s]ubject to the paramount right and authority of all general partners to manage and control the major decisions and actions of the Partnership." *Id.* ¶ 15(a)(3).

[8] OPA ¶ 15(a)(1). Further, Paragraph 15(a)(7) granted the general partners the power and authority to:

> sell, exchange, and convey all or any part of any assets owned from time to time by the Partnership, real or personal; to execute leases and to modify leases pertaining to any real property at any time owned by the Partnership; to borrow money and, as security therefor, to mortgage, pledge, or otherwise provide a security interest in all or any portion of the assets owned from time to time by the Partnership, real or personal; to prepay, in whole or in part, refinance, amend, modify, or extend any mortgage, pledge, security agreement, or bond with respect to any property owned at any time by the Partnership, real or personal; and to execute, on behalf of the Partnership, any and all instruments or documents that may be necessary, or, in the opinion of the general partners, desirable to carry out the intent and purposes of the Partnership.

Draper and Schutt, in their role as general partners, had to agree unanimously on a course of action.

The OPA also delineates some restrictions on the authority of general, as well as limited, partners over Twin Bridges. For example, the OPA expressly prohibits general partners from admitting "a person as a general partner or as a limited partner" without the written consent or ratification of all the limited partners.[9] In addition, the OPA expressly prohibits limited partners from participating "in the management of the Partnership business."[10]

Particularly relevant to the motions at hand, the OPA specifies the method by which it can be amended. The relevant section, Paragraph 31, states in pertinent part that:

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[9] OPA ¶ 15(a)(2)(v). The language of Paragraph 15(a) relevant to this subparagraph provides:

> (a) General Partners.
>
> (1) The business and affairs of the Partnership shall be under the exclusive management and control of the general partners. Except where expressly provided in this Agreement to the contrary, each general partner shall have an equal voice in all decisions with respect to the overall management, control, and policies of the Partnership.
>
> (2) Notwithstanding the foregoing provisions of this Subparagraph (a), the general partners shall have no authority, without the written consent or ratification of the specific act by all limited partners, to:
>
> . . . .
>
> (v) Admit a person as a general partner or as a limited partner (other than the admission and acceptance of the assignee of a limited partner's interest in the Partnership as a limited partner).

[10] OPA ¶ 15(b).

> (a) No amendment to this Agreement shall be effective or binding upon the parties hereto unless the same shall be in writing and shall have been agreed to by partners, general and limited, having, in the aggregate, two-thirds (2/3) of the interest in the capital of the Partnership of all the partners.

The ability to amend under Paragraph 31(a), however, is restricted by Paragraph 31(b):

> (b) Notwithstanding the foregoing provisions of Subparagraph (a) or any other provisions which may be contained in this Agreement, *no amendment to this Agreement shall* change this limited Partnership to a general partnership, change the liability of or reduce the interests of the general partners or the limited partners in Partnership capital, profits, or losses, or *allow the limited partners to take part in the control of the business of the Partnership, unless all partners, general and limited, consent to such amendment.*[11]

From the inception of the OPA until the actions in August 2006 that gave rise to this dispute, the Twin Bridges partners amended the OPA pursuant to Paragraph 31 three separate times without incident.[12]

B. The Fourth Amendment to the OPA

Before the death of Mrs. Draper in February 2005, the Partnership's decisions largely related to the maintenance of the Property. Although Draper and Schutt disagreed over the future development of Beverly Farms, Twin Bridges operated relatively smoothly. After Mrs. Draper died, however, the partners of Twin Bridges began to discuss potential options for developing the Property. These discussions reflected

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[11] OPA ¶ 31(b) (emphasis added).

[12] Largely, these amendments maintained family ownership of the estate by requiring forced sales of partnership units by a divorced spouse and an estranged family member. Dudderar Aff. Exs. C-E.

disagreements among the partners and, over time, grew more discordant as partners advanced divergent ideas. Disagreements arose, for example, over who might purchase the main house and where new development, if any, could be started on the Property.

In August 2005, the family met to discuss overall objectives and planning relating to development of the Property. Although the family disagreed on how the Property should be divided, they agreed to investigate development of a detailed land plan. Draper then collaborated with Brandywine Conservancy, Inc. to determine how the land might be divided equitably among those partners interested in building on the Property. The family met again in December 2005 to discuss development of the Play Yard site. According to Draper, Schutt did not want anyone to build there because it would obstruct the view from the main house, in which she was interested.[13] In March 2006, Schutt reiterated her desire to avoid development of the Play Yard site.

In April 2006, Brandywine Conservancy presented its development plan to Twin Bridges. Over the next month, the family debated how the Property should be divided. Both Schutt and Draper expressed interest in purchasing the main house. In addition, they disagreed on how the surrounding property should be developed and made available for division among the remaining partners. Emails began circulating among the partners to determine how to proceed with the development plan.

The general partners continued to disagree about the Property. Due to the structure of the OPA, however, no resolution could be reached unless both Draper and

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[13] *See* Countercl. ¶ 5.

Schutt unanimously consented to the development plan.[14] Schutt and the vast majority of the limited partners then determined that a new partnership structure was needed to avoid continuing deadlock. In July 2006, Schutt and the limited partners other than those in Draper's family began discussing how they could more effectively manage the Property. After considering alternatives, Plaintiffs determined that a management structure with three general partners would reduce the likelihood of deadlock and facilitate the decision-making process.[15] In particular, Plaintiffs resolved to merge Twin Bridges into a new limited partnership with a new partnership agreement providing for three general partners and dissolve the original Twin Bridges Partnership.

The OPA, however, did not include a merger provision. Therefore, Schutt and the limited partners (other than Draper and his family) first amended the OPA to include, among other things, a merger provision (the "Amendment"). The new provision enabled partners holding two-thirds of the interest in Twin Bridges to approve a merger and explicitly authorized a merger into another limited partnership that would have the effect of amending the OPA. They also created TB II, L.P. ("TB II"), a new partnership that provided for management by three general partners. Schutt and the limited partners planned to vote to approve the Amendment and then merge Twin Bridges into TB II at the next family meeting, scheduled for August 16, 2006.

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[14] One option available in the event of a deadlock was termination of the Partnership pursuant to Paragraph 5 of the OPA by the written consent of partners, general and limited, having two-thirds of the interests in the capital of Twin Bridges.

[15] Compl. ¶¶ 17-19. The record suggests that Draper previously had suggested the idea of adding a third general partner. *See* Draper Aff. Ex. 2 at 3.

At the August 16 meeting, Schutt announced to Draper and his sons that she and the limited partners aligned with her had decided to take action to prevent the possibility of a deadlock in any partnership decision regarding the Property.[16] Draper and his sons had no prior notice of Schutt's intended actions. Plaintiffs essentially presented them as a *fait accompli*. Because Schutt and the allied limited partners collectively owned more than the necessary two-thirds of the interest in the capital of Twin Bridges to amend the OPA, they executed written consents, under Paragraph 31(a), in favor of a fourth amendment to add a Paragraph 26.5. The new provision reads:

> 26.5 MERGER
>
> (a) Pursuant to an agreement of merger or consolidation, the Partnership may merge or consolidate with or into one or more limited partnerships or other business entities organized under the laws of the State of Delaware or any other state of the United States or any foreign country or jurisdiction, or any combination thereof, with the Partnership or other limited partnership or other entity as the agreement of merger or consolidation shall provide being the surviving or resulting limited partnership or other business entity.
>
> (b) Notwithstanding any provision of this Agreement to the contrary, a merger or consolidation, and the related agreement of merger or consolidation, described in Paragraph 26.5(a) shall be approved by the Partnership if it is approved in writing by partners, general and limited, having in the aggregate, two-thirds (2/3) of the interest in the capital of the Partnership of all the partners.
>
> (c) Upon the approval of a merger or consolidation, and the related agreement of merger or consolidation, to which the Partnership is a party in accordance with Paragraph 26.5(b), either general partner, acting alone, may execute the

[16] Draper Aff. Ex. 2.

> agreement of merger or consolidation with respect to such merger or consolidation on behalf of the Partnership . . . .
>
> (d) Notwithstanding any provision of this Agreement to the contrary, pursuant to Section 17-211(g) of the Delaware Revised Uniform Limited Partnership Act, an agreement of merger or consolidation approved in accordance with Paragraph 26.5(b) may effect any amendment to this Agreement.[17]

Thus, the Amendment purported to effect four changes relevant to this dispute: (1) it explicitly recognized the Partnership's ability to merge with or into another limited partnership or other business entity; (2) it authorized the approval of a merger by partners having, in the aggregate, two-thirds of the interest in the capital of the Partnership;[18] (3) it authorized either general partner, acting alone, to execute a merger agreement on behalf of the Partnership; and (4) pursuant to Section 17-211(g) of DRULPA, it authorized an agreement of merger that would effect an amendment of the OPA.

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[17] Dudderar Aff. Ex. F. The Amendment also purported to amend Paragraph 35 of the OPA to add a requirement that all disputes arising out of or relating to the OPA or the business "shall be brought in a Delaware state court." *Id.* ¶ 2.

[18] Interestingly, before the Amendment, the OPA did not mention mergers or consolidations. The original version of the DRULPA, which became effective in 1983, also did not have a section devoted to mergers or consolidations. MARTIN I. LUBAROFF & PAUL M. ALTMAN ON DELAWARE LIMITED PARTNERSHIPS ("LUBAROFF & ALTMAN"), at H-1 – H-32. The Legislature amended DRULPA effective August 1, 1985, however, to add a new § 17-211, entitled "Merger and Consolidation of Limited Partnerships." *Id.* at H-46 – H-47. The parties entered into the OPA in December 1985, just after the amendment to DRULPA, which explicitly provided, among other things, that: "Pursuant to an agreement, a domestic limited partnership may merge or consolidate with or into one or more limited partnerships formed under the laws of the State of Delaware or any other state, with such limited partnership as the agreement shall provide being the surviving or resulting limited partnership." 6 *Del. C.* § 17-211(a) (1985).

Within an hour of enacting the Amendment, Schutt and the limited partners aligned with her voted by written consent under the pertinent provisions of the OPA, as amended, to merge Twin Bridges into TB II (the "Merger").[19] Based upon Plaintiffs' consents, the Amendment and the Merger became effective in that order as of August 16, 2006.[20] Once Twin Bridges merged into TB II,[21] the OPA ceased to control and the new partnership agreement of TB II (the "New Partnership Agreement" or "NPA"), attached as Schedule I to the Agreement and Plan of Merger ("Merger Agreement"),[22] became controlling.

Many parts of the NPA are identical to the OPA, but there are some important differences. The NPA does not alter the percentage ownership interests of any of the partners under the OPA. Further, the NPA initially provides for two general partner positions and names Schutt as the initial and managing general partner and Osborn, a former limited partner of Twin Bridges, as the other initial general partner. Unlike the OPA, however, the NPA provides for a third general partner and a two-step procedure to determine which limited partner would fill that position. Under this language, Draper, a limited partner of TB II, was given an exclusive option to convert his limited partnership

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19 Compl. ¶ 20; Dudderar Aff. Ex. G.

20 Dudderar Aff. Ex. I. The Merger became effective on August 16, 2006, upon the filing of a certificate of merger with the Delaware Secretary of State.

21 At the effective time of the merger, the name of TB II, L.P., was changed to Twin Bridges Limited Partnership. *See* Draper Aff. Ex. 8 at 1. For clarity in this opinion, however, I will refer to the post-merger partnership as TB II.

22 *See* Dudderar Aff. Exs. H & I.

interest into that of a general partner upon written notice to Schutt and Osborn by September 15, 2006.[23] Absent timely exercise of this option, the general partners were authorized to name a third general partner. On September 12, 2006, Draper elected to become a general partner of TB II under a reservation of rights.[24]

On August 16, 2006, the same day Plaintiffs adopted the Amendment, effectuated the Merger, and signed the Merger Agreement, they also filed this action for a declaration that certain actions taken by them are valid under Delaware law. Specifically, Plaintiffs seek a declaration of validity as to the Amendment permitting a merger of the Partnership upon a two-thirds vote, the Merger of Twin Bridges into another Delaware limited partnership, and the Merger Agreement pursuant to which the Merger and the NPA were put into effect.

On September 7, 2006, Defendants filed an Answer, Counterclaim and Third-Party Complaint. The Counterclaim seeks a declaration that the Amendment and the Merger are invalid under the OPA and further asserts claims for breach of contract, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty against Plaintiffs. On September 22, 2006, Plaintiffs filed a Motion for Summary Judgment on

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[23] Dudderar Aff. Ex. H, Schedule I, ¶ 3(c). Other examples of actions the NPA allows that are different from the OPA include convening meetings or taking actions on behalf of the partnership with only a majority of the general partners (¶ 15(a)) and the general partners developing a plan for the transfer or distribution of real property and redemption of partner interests, pursuant to written approval of two-thirds of the interests (¶ 29(a, c)). In addition, the NPA purports to eliminate any duty to obtain the highest value for any portion of the Property that any partner or third party might be prepared to pay (¶ 29(e)).

[24] Dudderar Aff. Ex. A; Defs.' Opening Br. ("DOB") at 27.

their claim for a declaration of validity of the Amendment, Merger, and Merger Agreement. Plaintiffs also moved to dismiss Defendants' Counterclaim for failure to state a claim. Defendants then cross moved for partial summary judgment on Counts I and II of their Counterclaim on January 31, 2007.

This opinion first addresses the cross motions for summary judgment on the claims relating to the validity of the Amendment, Merger, and Merger Agreement. I then address Plaintiffs' Rule 12(b)(6) motion to dismiss the four counts of Defendants' Counterclaim.

C. Parties' Contentions on Cross Motions for Summary Judgment

In their motion for summary judgment, Plaintiffs seek a declaration that the Amendment and the Merger are valid. Plaintiffs first argue on contractual grounds that the OPA is unambiguous and that the Amendment was validly approved under the relevant section of the OPA governing amendments, Paragraph 31(a). Based on their contention that the Amendment is valid, Plaintiffs further assert that the Merger and Merger Agreement are valid because they were approved pursuant to the most recent Amendment to the OPA. The Fourth Amendment inserted Paragraph 26.5 entitled "Merger" into the OPA, and that section, according to Plaintiffs, governs any merger of Twin Bridges. Because Paragraph 26.5 requires a two-thirds vote of the interest in the capital of the Partnership to approve a merger, Plaintiffs contend that they validly approved the Merger and related NPA. In addition, Plaintiffs argue that the doctrine of independent legal significance supports the validity of the actions they took. Under this doctrine, Plaintiffs argue that they validly and separately approved the Amendment and

the Merger under the OPA, such that the outcome of that series of events, *i.e.*, the adoption of a new governance system including three general partners, also is legally valid.

Plaintiffs next contend that neither the Amendment nor the Merger violates DRULPA. Plaintiffs assert that Section 17-211(b) of DRULPA allows a partnership agreement to prescribe the limited partnership's procedures for a merger or consolidation. Although the OPA did not mention mergers, Plaintiffs assert that the Amendment established Twin Bridges' procedure for a merger with another limited partnership. In particular, the Amendment provides that the Partnership could merge into a new partnership with a new partnership agreement, if the merger "is approved in writing by partners, general and limited, having in the aggregate, two-thirds (2/3) of the interest in the capital of the Partnership of all the partners."[25] Plaintiffs contend that the Merger was approved in writing by the same 87% of limited and general partners as the Amendment, thereby fulfilling the requirements to merge into TB II.

Defendants, on the other hand, seek summary judgment invalidating the Amendment on several grounds. First, Defendants contend the Amendment does not comply with the unanimity requirement in the OPA. Defendants interpret Paragraph 31(b) as a prohibition of any amendment that allows a limited partner to take part in the control of the business unless all partners consent to such an amendment. Defendants contend that the Amendment allows approval of any merger agreement without

[25] Pls.' Opening Br. ("POB") at 15; Dudderar Aff. Ex. F.

limitation, and in doing so, encompasses amendments allowing limited partners to take part in the control of the business. The NPA, according to Defendants, does exactly that by making Osborn a general partner, and thereby allowing her to take part in the control of the business. Thus, Defendants argue that the Amendment is subject to the unanimity requirement of Paragraph 31(b); and because all partners did not approve the Amendment, it was not validly approved.

Defendants also contend that the combined Amendment and Merger violate the OPA's unanimity requirement by allowing a limited partner to take part in the control of Twin Bridges, in violation of Paragraph 31(b). Defendants assert that the intended effect of the Amendment and the Merger is to replace the OPA with the NPA, which makes Osborn (a limited partner under the OPA) a general partner. Defendants argue that this integrated transaction therefore directly contradicts Paragraph 31(b). In support of their analysis, Defendants apply a step-transaction approach that treats two contracts executed contemporaneously as one transaction for purposes of contract interpretation. Since the Amendment and the Merger became effective sequentially on the same day, August 16, 2006, Defendants conclude that both the Amendment and the Merger are part of one integrated "amendment" of the Partnership Agreement.

Finally, Defendants contend that the Amendment and Merger are invalid because they violate a default rule prescribed in Section 17-211(b) of the Delaware Revised Uniform Limited Partnership Act or DRULPA. That section requires that, in the absence of any contrary provision in the partnership agreement, (1) all general partners and (2) limited partners who own a majority of the interests in the partnership owned by the

limited partners must approve an agreement of merger or consolidation. Defendants allege that the Amendment is invalid under DRULPA because it was adopted after Section 17-211(b) and purports to supersede the default rule of that section, but was not approved by both general partners. Because Draper, as a general partner, did not agree to either the Amendment or the Merger pursuant to which Twin Bridges merged into a new entity, Defendants argue that the Amendment and Merger are invalid because they violate the DRULPA requirement of a vote of approval by "all general partners."

II. ANALYSIS

A. The Cross Motions for Summary Judgment on the Validity of the Amendment, the Merger and the New Partnership Agreement

Both parties seek summary judgment as to the validity of Plaintiffs' actions to approve the Amendment and, by means of the merger of Twin Bridges into TB II, adopt the NPA. Because Plaintiffs' 12(b)(6) motion to dismiss the Counterclaim rests, in part, on the resolution of the validity issues, I address the cross motions for summary judgment first.

1. The applicable standard

Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[26] When considering a motion for summary judgment, the evidence

[26] Ct. Ch. R. 56(c). *See AHS N.M. Holdings, Inc. v. Healthsource, Inc.*, 2007 Del. Ch. LEXIS 24, at *11 (Feb. 2, 2007). Under principles of contract law, interpretation of contractual language is purely a question of law. *Id.*

and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party.[27] Summary judgment will be denied when the legal question presented needs to be assessed in the "more highly textured factual setting of a trial."[28] The Court "maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application."[29]

The parties have agreed that, on the questions of the validity of the Amendment and Merger, no genuine issues of material fact exist and, pursuant to Court of Chancery Rule 56(h), the Court may render a decision on the merits based on the record submitted with their cross motions for summary judgment.[30] Therefore, the normal practice of drawing inferences in favor of the nonmoving party does not apply to the pending cross motions.

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27 *Estate of Carpenter v. Dinneen*, 2007 Del. Ch. LEXIS 45, at *14 (Apr. 11, 2007) (citing *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

28 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

29 *Tunnell v. Stokley*, 2006 Del. Ch. LEXIS 37, at *5 (Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 Del. Ch. LEXIS 89, at *37-38 (May 24, 2000)).

30 *See* Mar. 14, 2007 Argument Transcript ("Tr.") at 7; *Country Life Homes, Inc. v. Shaffer*, 2007 Del. Ch. LEXIS 23, at *11 n.15 (Jan. 31, 2007). Rule 56(h) states:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

Under Delaware limited partnership law, a limited partnership is a creature of both statute and contract.[31] The Delaware Revised Uniform Limited Partnership Act "embodies the policy of freedom of contract and maximum flexibility."[32] As the Delaware Supreme Court has recognized, parties to a Delaware limited partnership have the discretion to create a limited partnership "in an environment of private ordering" and operate that entity according to the provisions in the limited partnership agreement.[33] The provisions of the partnership agreement define the contractually bargained rights and responsibilities of those who are parties to the agreement and are afforded significant deference by the courts.[34] Limited partnerships, therefore, offer contractual flexibility with few statutory constraints.[35]

2. Are the Amendment and Merger, when considered as an integrated transaction, valid and enforceable?

On their cross motion for summary judgment, Defendants urge the Court to view the Amendment and the Merger as two steps of a single integrated transaction.

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31 *Cantor Fitzgerald, L.P. v. Cantor*, 2001 Del. Ch. LEXIS 137, at *16-17 (Nov. 5, 2001).

32 *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002) (citing *Elf Atochem N. Am., Inc. v. Jafari*, 727 A.2d 286, 290, 291 n.27 (Del. 1999)). *See also Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165, 172 (Del. Ch. 2002) ("Partnership Agreements are contracts to be construed like any other contract.").

33 *Gotham Partners*, 817 A.2d at 170.

34 *Cantor Fitzgerald*, 2001 Del. Ch. LEXIS 137, at *16-17.

35 *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 150 (Del. Ch. 2003).

Defendants contend that the Amendment and Merger, when considered in combination, are invalid for several reasons. According to Defendants, they first fail to comply with the unanimity requirement in the OPA for an amendment transferring power to limited partners, second violate the implied covenant of good faith and fair dealing, and third are invalid under DRULPA. Because Plaintiffs dispute each of Defendants' arguments, I will address them in turn. I must first address, however, the threshold question of whether it is appropriate to analyze the Amendment and Merger as two constituent parts of the same transaction.

a. The Amendment and the Merger can be viewed as parts of an integrated two-step transaction

Defendants argue that, in substance, the two actions (the Amendment and the Merger) are part of one integrated "amendment" of the OPA. Defendants rely primarily on *Noddings Investment Group, Inc. v. Capstar Communications, Inc.*[36] for the proposition that the Delaware courts have treated related contracts executed at the same time as one transaction for purposes of contract interpretation. In *Noddings*, a warrant agreement of a corporation made no reference to a "spin-off clause." The company later contemplated and effectuated a spin-off of certain assets into a separate company. Approximately one month after that, the original corporation merged with a third company. Both transactions were contemplated in a merger agreement between the companies who controlled the merging companies. The parties to the lawsuit contested whether the spin-off and subsequent merger of the original corporation triggered the

[36] 1999 Del. Ch. LEXIS 56 (Mar. 24, 1999).

stock adjustment provision of the warrant agreement. If they did, that would have the plaintiff nonexercising warrant holders entitled to merger payments including consideration related to the spin-off transaction.

Noting that the merger agreement expressly indicated that the parties contemplated spinning off certain assets before the close of the merger, Chancellor Chandler concluded that the spin-off and merger were integrally related.[37] The Chancellor also relied upon a fairness opinion from Lehman Brothers that treated the spin-off and the merger as one transaction. Thus, the Court held that the spin-off and merger were part and parcel of the same transaction, and "should be combined into one for purposes of determining the rights of the Plaintiffs."[38]

Recently, in *Gatz v. Ponsoldt*,[39] the Delaware Supreme Court reaffirmed that: "It is the very nature of equity to look beyond form to the substance of an arrangement. 'Equity will not permit one to evade the law by dressing what is prohibited in substance in the form of that which is permissible.'"[40] In that case, two transactions occurred simultaneously with the effect that majority control of a corporation passed through a

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37 Specifically, the merger agreement stated that "if SFX Entertainment is not spun off to the stockholders of SFX Broadcasting prior to the Hicks Muse Merger, or disposed of in an alternative transaction, the acquirer may proceed with the transaction by increasing the Merger consideration by a total of $ 42,500,000." *Id.* at *18.

38 *Id.* at *25.

39 2007 Del. LEXIS 167 (Dec. 13, 2006).

40 *Id.* at *43-44 (quoting *Kelley v. Mayor of Dover*, 300 A.2d 31, 38 (Del. Ch. 1972)).

controlling stockholder to a third party. Plaintiffs asserted a direct claim under the *In re Tri-Star/Gentile v. Rossette* line of cases,[41] arguing that the simultaneous transactions caused an expropriation of economic value and voting power by the controlling stockholder at the expense of the minority.[42] The Delaware Supreme Court looked behind the two simultaneous transactions that had the effect of making the third party, rather than the controller, the ultimate transferee and beneficiary of the expropriation. Ultimately, the court held that the fact that the fiduciary did not retain the direct benefit of the expropriation did not deprive the injured public shareholders of their right to seek redress in a direct action.[43] In further support of its holding, the Supreme Court cited various doctrines including the step transaction doctrine that "allow[s] the substantive realities of a transaction to determine the tax consequences."[44]

I see no reason as a matter of law or equity why the step transaction principle should not be applied here. Indeed, partnership agreements in Delaware are treated exactly as they are treated in tax law, as contracts between the parties.[45] The parties' intentions as expressed in, or reasonably inferred from, their agreement must be

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41 *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319 (Del. 1993); *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).

42 *Gatz*, 2007 Del. LEXIS 167, at *35-38.

43 *Id.* at *44-46.

44 *Id.* at *43 (citing *Brown v. United States*, 329 F.3d 664, 671 (9th Cir. 2003) and *Comm'r v. Court Holding Co.*, 324 U.S. 331, 334 (1945)).

45 *Gardner v. Comm'r*, 54 T.C.M. (CCH) 250, 1987 Tax Ct. Memo LEXIS 417, at *32-33 (1987).

controlling in the construction of a contract.[46] Although Plaintiffs attempt to discount *Noddings* because it applies New York law, the holding in that case is based on contract law, and Plaintiffs have not identified any distinction that would render it inapplicable to this case.[47] As the Delaware Supreme Court emphasized in *Gatz*, "transactional creativity [ ] should not affect how the law views the substance of what truly occurred."[48]

The facts of this case strongly support a finding that the Amendment, the Merger, and the resulting NPA all were part of one integrated transaction developed by Plaintiffs to avoid an ongoing stalemate between the general partners relating to the development of Twin Bridges. The primary provision of the Amendment was entitled "Merger," and Plaintiffs arranged the Amendment, the Merger, and the resulting NPA to become effective on the same day, August 16, 2006.[49] The transcript of the August 16, 2006 meeting of the Twin Bridges partners further reflects the background of Plaintiffs'

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46 *Id.*

47 Plaintiffs cite *Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962 (Del. Ch. 1989) for the doctrine of independent legal significance, and argue that, under that doctrine, the Amendment and Merger should be treated as separate and independent events. POB at 18-20. This doctrine, however, is fundamentally rooted in corporation law. *Orzek v. Englehart*, 195 A.2d 375, 378 (Del. 1963). As the Supreme Court instructs, independent legal significance applies when actions validly taken pursuant to one section of the Delaware General Corporation Law are legally independent from actions that might have been taken under another section. *In re Sunstates Corp. S'holder Litig*., 788 A.2d 530, 536 (Del. Ch. 2001). Whether the doctrine of independent legal significance applies in the context of a limited partnership dispute is an open question in this State. Because my resolution of the substantive issues in this case does not turn on that question, I need not address it further.

48 2007 Del. LEXIS 167, at *45.

49 Dudderar Aff. Exs. F, G & H.

coordinated plan to amend the OPA. Schutt's following comments at that meeting exemplify Plaintiffs' view:

> After our last round of meetings, we all realized that we had, umm, the possibility of a deadlock in making partnership decisions. . . . I believe that our common goals for the family, the property and the partnership is to figure out a plan that's fair to everyone. Umm, at this point, in order to move forward, it seems to me it's time to, umm, make a change to the partnership to prevent "the deadlock" and to change the agreement. So we did . . . over the summer.[50]

Plaintiffs indisputably adopted the Amendment as a part and parcel of their actions to accomplish the Merger through Paragraph 26.5(b) and substitute the New Partnership Agreement for the Original Partnership Agreement under Paragraph 26.5(d).

Thus, consistent with the holding in *Noddings*, I conclude that the Amendment and Merger are part and parcel of one integrated transaction. Accordingly, the Amendment and Merger may be treated as one combined action for purposes of evaluating their validity.

b. The integrated transaction must be viewed as an amendment to the OPA.

Paragraph 31 of the OPA only applies to amendments. Plaintiffs argue that the Merger cannot be deemed an amendment of the OPA within the meaning of Paragraph 31(b). Rather, Plaintiffs assert that, "the OPA was not amended through the Merger -- it was extinguished."[51] This argument exalts form over substance. A clear purpose of the Merger, and the related Amendment in this integrated transaction, was to effect an

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[50] Draper Aff. Ex. 2 at 3.

[51] POB at 17; *see also* Pls.' Reply Br. ("PRB") at 10 n.10.

amendment of the OPA in a fashion that would avoid the need for a unanimous vote under Paragraph 31(b). Plaintiffs themselves emphasize that the Merger did not change the interests of any of the partners in the Partnership in any way,[52] and they failed to articulate any other economic purpose for the Amendment and Merger.

The Delaware Supreme Court addressed a similar issue in the context of a certificate of designations for preferred stock in *Elliott Associates, L.P. v. Avatex Corp.*,[53] in which it described the nullification of the certificate in a merger as "the total (not partial) amendment or alteration" of the certificate.[54] The *Avatex* court further explained: "[T]he merger is the corporate act that renders the Avatex certificate a 'legal nullity,' in defendants' words. That elimination certainly fits within the ambit of one or more of the three terms in the certificate: *amendment* or *alteration* or *repeal*."[55] Although this case involves a limited partnership agreement, rather than a certificate of designations for preferred stock, I consider *Avatex* persuasive support for holding that the substitution of

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52 POB at 4, 10-11.

53 715 A.2d 843, 852 n.44 (Del. 1998).

54 The court in *Avatex* made this statement in the course of defining the word "repeal," and stated that the terms "amendment" and "alteration," which were also used in the certificate only "incompletely describe the effect of the proposed merger on the Avatex charter," which was to nullify it. *Id.*

55 *Id.* at 852.

the NPA for the OPA in this case by means of the integrated transaction constituted an amendment within the meaning of Paragraph 31.[56]

Plaintiffs did not respond to Defendants' reliance on *Avatex* in their briefing, although Defendants mentioned it in both their opening and reply briefs. At argument, Plaintiffs downplayed the significance of *Avatex*, contending that it merely reaffirms the rules and principles of *Warner Communications v. Chris-Craft*,[57] on which Plaintiffs rely.[58] Having reviewed the two cases carefully, I find *Avatex* more analogous to the case at bar.[59]

I also reject Plaintiffs argument that Section 17-211(g) of DRULPA is irrelevant here.[60] That Section provides that an agreement of merger may "(1) effect any amendment to the partnership agreement or (2) effect the adoption of a new partnership

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56 Like limited partnership agreements, certificates of designations reflecting the preferential rights of preferred stock are contractual in nature. *Avatex*, 715 A.2d at 853 n.46.

57 583 A.2d 962 (Del. 1989).

58 *See* Tr. at 99.

59 Important differences exist between the factual context in *Warner* compared to this case. In *Warner*, for example, even if the merger affected an amendment of the certificate, it did not adversely affect the preferred stock, as required to trigger the preferred's right to a class vote. 583 A.2d at 967-68. The alleged harm resulted from the conversion of the preferred stock into other securities, other property or cash, as a result of the merger. In contrast, the main purpose of the merger of Twin Bridges into TB II was to effect the changes in the partnership agreement, which became effective when the Merger did. There was no change in the economic interests of any of the partners.

60 *See* Tr. at 96-97.

agreement for a limited partnership . . . ."[61] Plaintiffs' argument is difficult to understand. Presumably, they contend that rather than amend the OPA, they adopted an entirely new partnership agreement by way of the Merger.[62] The applicable version of Section 17-211(g), however, provides that: "a partnership agreement containing a *specific reference* to this subsection may provide that an agreement of merger or consolidation . . . may (1) effect any amendment to the partnership agreement or (2) effect the adoption of a new partnership agreement . . . ."[63] While Paragraph 26.5(d) makes the required statutory reference to Section 17-211(g), it does *not specifically* provide for the adoption of a new partnership agreement by way of a merger; instead, Paragraph 26.5(d) merely states that "an agreement of merger . . . may effect any

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[61] 6 *Del. C.* § 17-211(g) was added to DRULPA in 1990, five years after the parties entered into the OPA.

[62] In terms of form and substance, Plaintiffs' action resembles an amendment as much as the adoption of an entirely new agreement. *See* Draper Aff. Ex. 8 (blacklined version of the NPA as compared to the OPA). Perhaps the most accurate characterization of the NPA would be as a restatement of the OPA incorporating a number of amendments. In fact, Plaintiffs admit the NPA was "largely identical to the OPA," with some of the key differences involving the changes in the governance structure now at issue. POB at 10.

[63] *See* LUBAROFF & ALTMAN at H-907 (emphasis added). Because the OPA was originally filed and effected before July 31, 2005, the OPA, insofar as Section 17-211(g) is concerned, is governed by the law "as in effect on July 31, 2005." 6 *Del. C.* § 17-211(g). At that time, Section 17-211(g) required any amendment providing for the ability to effect any amendment or adoption of a new partnership agreement by way of a merger to make a specific reference to § 17-211(g). *See* LUBAROFF & ALTMAN at H-907. The current version of Section 17-211(g) contains no such requirement.

amendment to this Agreement."[64] Therefore, Paragraph 26.5 makes the statutorily required reference to an amendment only, and not to the adoption of a new partnership agreement. Were I to accept Plaintiffs' argument that the NPA must be viewed solely as a new agreement, and not an amendment, their adoption of it would be subject to challenge as not authorized under DRULPA. Because I conclude that the integrated transaction, consisting of the Amendment and Merger, must be viewed as an amendment of the OPA within the meaning of Paragraphs 26.5 and 31, I hold that it is governed by Paragraph 31's procedures for amending the Agreement.

c. In combination, are the Amendment and Merger prohibited by Paragraph 31(b) of the OPA?

Under the OPA, amendments are governed by Paragraph 31. Paragraph 31(a) states that amendments to the OPA are effective provided that the amendment is in writing and approved by two-thirds of the interests in the capital of the Partnership. That general rule is then limited by Paragraph 31(b), which states that, notwithstanding 31(a), certain types of amendments require a unanimous vote of approval from all partners. Paragraph 31(b) applies to any amendment that (1) changes the limited Partnership to a general partnership, (2) changes the liability of or reduces the interests of the general partners or the limited partners in capital, profits, or losses, or (3) allows the limited partners to take part in the control of the business of the Partnership. Only the last form of amendment governed by Paragraph 31(b) is relevant here. The parties dispute, however, whether Paragraph 31(b) even applies to the Amendment at issue in this case.

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[64] Dudderar Aff. Ex. F (emphasis added).

Arguing that the Merger and the Amendment should be treated separately, Plaintiffs contend that the Amendment was validly added to the OPA pursuant to Paragraph 31(a). That section states that "[an amendment] shall be in writing and shall have been agreed to by partners, general and limited, having, in the aggregate, two-thirds (2/3) of the interests in the capital of the Partnership of all the partners." Plaintiffs assert that the Amendment is valid because it meets all the requirements of Section 31(a) -- *i.e.*, it is in writing and was approved by limited and general partners holding approximately 87% of the Partnership interest. Plaintiffs further contend that because the Amendment was validly approved under the OPA, the Merger effectuated pursuant to it is also valid.

Defendants assert that the Amendment and Merger, viewed as an integrated transaction, is invalid for failing Paragraph 31(b)'s unanimity requirement.[65] Defendants make two principal arguments that the integrated transaction did not meet Paragraph 31(b)'s requirement that any amendment "allow[ing] the limited partners to take part in the control of the business of the Partnership" be passed unanimously.[66] Because Draper

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[65] DOB at 35. *See also* Defs.' Reply Br. ("DRB") at 14. Defendants make similar arguments for why the Amendment and the Merger each, individually, failed to meet Paragraph 31(b)'s unanimous voting requirement. *See* DRB at 8 (arguing the Amendment was invalid) *and* 12 (arguing the Merger was invalid). To the extent necessary for purposes of the pending motions, I address these arguments in the context of discussing the merits of the integrated transaction.

[66] In addition to the two challenges under this exception in Paragraph 31(b), Defendants' Counterclaim hints at a third argument for invalidity based on another exception. Defendants allege that the loss of power by Draper, as one of two general partners, to veto unfair Partnership transactions proposed by the other general partner increases his liability for such transactions. *See* Countercl. ¶ 75. Taking this assertion one step further, which Defendants do not explicitly do, the Amendment and Merger could also implicate Paragraph 31(b)'s second form of

did not approve either the Amendment or the Merger, Defendants argue that the integrated transaction is invalid for failure to comply with Paragraph 31(b). Specifically, Defendants assert that Osborn's transformed status from a limited to a general partner and the limited partners' new voting authority to approve a development plan both represent instances of limited partners taking part in the control of the Partnership.[67]

Consistent with the underlying policy of freedom of contract espoused by the Delaware Legislature, limited partnership agreements are to be construed in accordance with their literal terms.[68] "The operative document is the limited partnership agreement and the statute merely provides the 'fall-back' or default provisions where the partnership agreement is silent."[69] Only "if the partners have not expressly made provisions in their partnership agreement or if the agreement is inconsistent with mandatory statutory

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amendment requiring unanimity (amendments "chang[ing] the liability of . . . the general partners"). Such an assertion would be overbroad, however, as nearly *any* amendment would have at least *some* indirect effect on the liability of the general partners. I do not believe such a construction would be consistent with the intent of the original parties.

67 DOB at 35 ("Ms. Osborn, a limited partner of Twin Bridges, is vested with the discretionary powers of a general partner," and "limited partners as a whole are granted the power to approve or reject any sale or transfer of real property as part of a Plan.").

68 *In re Nantucket Island Assocs. P'Ship Unitholders Litig.*, 810 A.2d 351, 361 (Del. Ch. 2002) ("The interpretative principles relevant to resolving [contract] disputes are familiar. . . . The terms of the agreement themselves: 'will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language'").

69 *Cantor Fitzgerald, L.P. v. Cantor* (*Cantor II*), 2001 Del. Ch. LEXIS 137, at *16-17 (Nov. 5, 2001) (quoting *Cantor Fitzgerald, L.P. v. Cantor* (*Cantor I*), 2000 Del. Ch. LEXIS 43, at *50 (Mar. 13, 2000)).

provisions, . . . will [a court] look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence."[70] In other words, unless the partnership agreement is silent or ambiguous, a court will not look for extrinsic guidance elsewhere,[71] so as to "give maximum effect to the principle of freedom of contract"[72] and maintain the preeminence of the intent of the parties to the contract.[73] Based on these overarching principles of limited partnership law, I now turn to the interpretation of Paragraph 31(b).

As stated earlier, Paragraph 31(b) requires the unanimous consent of all parties for any amendment that (1) transforms the limited Partnership to a general partnership, (2) changes the liability or interests of the partners, or (3) "allow[s] the limited partners to take part in the control of the business of the Partnership." Only the third form of amendment is relevant to our discussion.

Plaintiffs argue that the disputed language in Paragraph 31(b) comes directly from Section 17-303(a) of DRULPA, which limits a limited partner's liability to third parties

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70 *In re LJM2 Co-Inv., L.P.*, 866 A.2d 762, 777 (Del. Ch. 2004) (citing *Sonet v. Timber Co.*, 722 A.2d 319, 323 (Del. Ch. 1998)).

71 *Cantor I*, 2000 Del. Ch. LEXIS 43, at *72.

72 6 *Del. C.* § 17-1101(c).

73 *See* Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 Del. J. of Corp. L. 1 (2007); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) ("The basic approach of the Delaware Act is to provide members with broad discretion in drafting the Agreement and to furnish default provisions when the members' agreement is silent").

to, among other things, situations where "he or she participates in the control of the business."[74] Section 17-303 provides in pertinent part:

> A limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he *participates in the control* of the business.[75]

The relevant language of Paragraph 31(b) arguably also relates to the fact that a limited partnership structure can provide substantial benefits in other jurisdictions -- *e.g.*, limited liability and tax benefits -- that may be eviscerated if the limited partners could take part in the control of the Partnership.

In this case, Defendants described Twin Bridges as the "brainchild" of Draper.[76] In cooperation with Mrs. Draper, Draper conceived the primary purposes of Twin Bridges to include removing Mrs. Draper's most valuable asset from her estate in a tax-saving manner, while allowing Mrs. Draper to gift interests in the Partnership to her children, their spouses, and her grandchildren. When Twin Bridges was formed, Mrs. Draper retained over 71% of the interest in it, but was only a limited partner.

1. Osborn's status as a general partner under the NPA

Defendants assert that by transforming Osborn's status from that of a limited partner to a general partner under the NPA, the Amendment and Merger effected an amendment to the OPA that allows a limited partner to take part in the control of the

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74 Tr. at 17-18.

75 6 *Del. C.* § 17-303(a) (emphasis added).

76 DOB at 8.

business of the Partnership within the meaning of Paragraph 31(b). I find Defendants' argument unpersuasive because it fails to incorporate the original parties' intent, interpret properly the plain meaning of the Partnership Agreement, or consider Osborn's changed partnership status.

One factor the Court must focus upon in resolving the parties' dispute is the intent of the parties at the time they entered into the OPA. An analysis of the original parties' intent, as expressed in the OPA,[77] indicates that the parties wished to leave open the possibility of admitting a new general partner without unanimous assent of all partners. A limited partnership with two general partners of equal rank and no prescribed mechanism for breaking a tie vote has a cumbersome management structure. As Plaintiffs note, the obvious problem with this structure is that deadlock is inevitable whenever the general partners disagree. Mrs. Draper and the other original parties to the OPA contemplated only two general partners at the outset.[78] The language of the OPA, however, does not support a finding that Mrs. Draper and the other original parties

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77 "[A] court will . . . seek to determine contractual intent from the language of the . . . contract itself." *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 686 A.2d 152, 155-56 (Del. 1996) (interpreting an insurance contract).

78 The OPA provides, for example, for a managing partner "who shall be one of the general partners mutually agreed upon by both general partners." OPA ¶ 15(a)(3). By using the word "both," as opposed to "the" or "all," the OPA reflects an initial intent to limit the number of general partners to two. Similarly, Paragraph 15(a)(6) provides that for major decisions affecting partnership business, the Managing Partner must "obtain the consent of the other general partner."

intended to preclude the addition of a third general partner, or even to require a unanimous vote of the partners to effect such a change.[79]

Based on advice from sophisticated counsel,[80] the original partners left open the possibility in the OPA that a limited partner could become a general partner with only a two-thirds majority. Paragraph 15(a)(2)(v) requires that a general partner obtain a unanimous vote of all limited partners to "[a]dmit a person as a general partner . . . ." Paragraph 31, however, authorizes the amendment of Paragraph 15(a)(2)(v) with only a two-thirds vote because it does not fall within the scope of any of the three forms of amendments specified in Paragraph 31(b) as requiring a unanimous partner vote. Such an amendment would neither (1) change Twin Bridges to a general partnership, nor (2) change the liability or ownership interests of the general partners (as general partners) or the limited partners (as limited partners), nor (3) allow the limited partners (as limited partners) to take part in the control of the business of the Partnership. Therefore, under Paragraph 31(a), the holders of two-thirds of the interest in the Partnership could amend

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79 On the issue of the Partnership structure, before Plaintiffs brought this action, Draper himself "raised the possibility of certain of the grandchildren being named as additional general partners at some future date." Countercl. ¶ 39. Presumably, these grandchildren would come from the ranks of the then existing limited partners.

80 The OPA was drafted by attorneys at Richards Layton & Finger, who represented all of the parties to the Partnership Agreement, including Mrs. Draper and Schutt. *See* Countercl. ¶ 17; Tr. at 48-49.

Paragraph 15(a)(2)(v) to reduce the vote required to admit another person, including a former limited partner, as a third general partner.[81]

Defendants disagree with this conclusion. A critical premise of their argument appears to be that an amendment of the OPA that would make a former limited partner a general partner of Twin Bridges would allow that limited partner to take part in the control of the business of the Partnership and therefore come within the scope of Paragraph 31(b). That premise is incorrect. Paragraph 31(b) requires any amendment to the OPA that would "allow *the limited partners* to take part in the control of the business of the Partnership"[82] receive the unanimous consent of all partners. I conclude that the parties used the phrase "the limited partners" as opposed to, for example, "a limited partner," advisedly. The plain language of the third category mentioned in Paragraph 31(b) refers to an amendment giving the limited partners, as a group, powers akin to those of a general partner. Such an amendment could modify the structural nature of the partnership. In the case of Twin Bridges, it could change the nature of the Partnership to such an extent that it might lose some or all of the limited liability, tax, and other benefits the original partners sought to achieve under the laws of Delaware and other jurisdictions. The Amendment and Merger clearly did not effect such a structural change.

Further, even if the Court construes Paragraph 31(b) as applying to an amendment that allows only one limited partner of Twin Bridges to take part in the control of the

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[81] While the limited partners and Schutt did not choose to take this path, the evidence of record convince me that it was available to them.

[82] OPA ¶ 31(b) (emphasis added).

business, Defendants' still argument fails. The problem stems from Defendants' failure to consider Osborn's status when evaluating Paragraph 31(b)'s applicability to the Amendment and Merger making her a general partner. Defendants argue that Osborn is merely "*vested* with the discretionary powers of a general partner."[83] Osborn, however, acquired those powers only because she became a general partner. Her status changed; she no longer was a limited partner. That renders Paragraph 31(b) inapplicable because its unanimous voting requirement for amendments giving limited partners power to take part in the control of the Partnership only applies to *limited* partners. Thus, for example, Paragraph 31(b) arguably might require unanimous voting if the Amendment vested Osborn with the discretionary powers of a general partner while restricting her status to that of a limited partner.

2. Limited partners' new authority to vote to approve a development plan

Defendants base their second argument as to how the integrated transaction allows the limited partners to take part in the control of the Partnership on the NPA's giving "[t]he limited partners as a whole … the power to approve or reject any sale or transfer of real property as part of a Plan."[84] The "Plan" to which Defendants refer is a Development Plan for the Property developed by the general partners of TB II under the authority provided by NPA Paragraph 29, a new provision added as a result of the Merger

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83 DOB at 35 (emphasis added).

84 *Id.*

and not found in the OPA.[85] Paragraph 29 further requires that the general partners submit any Plan to the Partnership. A Development Plan can only be "approved by the partners if it is approved in writing by partners, general and limited, having, in the aggregate, two-thirds (2/3) of the interests in the capital of the Partnership of all partners."[86] The Amendment and Merger thereby give the limited partners, who collectively hold more than two-thirds of the interest in Twin Bridges, the power to approve or reject a Development Plan. Defendants argue that such power constitutes an "alteration of power at Twin Bridges [that] can only be effected by unanimous agreement under Section 31(b)."[87]

Defendants' argument presents the following issue: does the limited partners' power to approve a Plan under the NPA allow them to take part in the control of the business of the Partnership within the meaning of Paragraph 31(b) of the OPA. I conclude that it does not. As previously discussed, the relevant language in Paragraph

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[85] Paragraph 29 of the NPA, entitled "Development Plan," provides in part:

> Notwithstanding any provision of this Agreement to the contrary, the general partners may, in their discretion, develop a plan (the "Plan") for the development of the Property that includes, in one or a series of related transactions, the transfer or distribution to one or more partners of a portion of the Property as a distribution with respect to, or as consideration for the redemption of all or any portion of, such partners' interests in the Partnership.

See NPA ¶ 29(a).

[86] NPA ¶ 29(c).

[87] DOB at 35.

31(b) closely parallels Section 17-303(a) of DRULPA, which provides that a limited partner, who is not also a general partner, generally is not liable to third parties, unless "he or she participates in the control of the business."[88] DRULPA supplies further guidance on the meaning of that phrase in Section 17-303(b). That Section provides, for example, that a limited partner "does not participate in the control of the business within the meaning of subsection (a)" by virtue of possessing the right or power to vote on "[t]he sale, exchange, lease, mortgage, assignment, pledge or other transfer of, or granting of a security interest in, any asset or assets of the limited partnership."[89] Under this definition, the fact that the NPA gives the limited partners the power to vote on a Development Plan would not constitute "allow[ing] the limited partners to take part in the control of the business of the Partnership." Thus, this aspect of the Amendment and Merger does not implicate Paragraph 31(b).

This conclusion comports not only with DRULPA's definition of "participat[ing] in the control of the business," but also with the plain language of the OPA. Paragraph 31(b)'s requirement for a *unanimous* vote of the partners for any amendment that would allow the limited partners to take part in the control of the business logically would not include a situation where, as contemplated in the NPA, only the general partners could

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88 6 *Del. C.* § 17-303(a).

89 *See* 6 *Del. C.* § 17-303(b)(8)(b). Section 17-303 has not been substantively amended since the creation of the OPA. *See* LUBAROFF & ALTMAN (providing a history of the development of DRULPA).

develop a Development Plan for consideration by the other partners.[90] Nothing in the NPA indicates that the limited partners had the right to propose and adopt a Plan themselves.

Defendants argue that the construction the Court has adopted of Paragraph 31(b) is "fundamentally inconsistent with the structure and purpose of the [OPA]."[91] To demonstrate their point, Defendants contend that such a construction would have permitted Mrs. Draper, who initially owned approximately 71% of Twin Bridges, to amend the OPA to give herself the power to approve mergers, or to put herself in control of Twin Bridges. This allegedly would have jeopardized the original partners' objective of removing the Property from Mrs. Draper's estate in a tax-saving manner. Defendants' argument lacks merit for several reasons. First, it is highly speculative. Defendants presented no expert testimony or other convincing evidence that construing the OPA to allow the actions effected by the Amendment and Merger would have caused Twin Bridges to lose the tax-saving benefits the partners sought. Second, Defendants themselves alleged that Mrs. Draper intended from the outset to gift additional portions of

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90 The role of the limited partners in voting on a Development Plan under the NPA is consistent with their right to approve a transfer of Partnership property to a corporation by way of the written consent of the holders of 50% of total Partnership capital under Paragraph 23 of the OPA. Based on Paragraph 15(b) of the OPA, which states that, "[t]he limited partners shall not participate in the management of the Partnership business," I infer that the approval powers conferred on limited partners under Paragraph 23 would not violate that proscription.

91 DRB at 6; *see also id.* at 23-24.

her interest in the Partnership to the spouses of her children and her grandchildren.[92] Consequently, there is no reason to conclude that Mrs. Draper or the other original partners expected her to maintain more than two-thirds of the interest in Twin Bridges for very long. In addition, the record discloses no attempt by Mrs. Draper at any time to take part in the control of the Partnership. Based on these factors, Defendants' unsupported speculation about the possible loss of tax benefits provides no basis for altering the Court's conclusion about the meaning and scope of Paragraph 31(b) of the OPA.

For these reasons, I conclude that the Amendment and Merger, when considered as an integrated, two-step transaction, does not fall within the scope of Paragraph 31(b). Thus, Plaintiffs properly adopted the Amendment under Paragraph 31(a) of the OPA and the Merger under new Paragraph 26.5, and thereby effected the adoption of the New Partnership Agreement.

d. Do the combined Amendment and Merger violate the implied duty of good faith and fair dealing?

The implied covenant of good faith and fair dealing "attaches to every contract."[93] "Stated in its most general terms, the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of

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92 Countercl. ¶ 14 ("Twin Bridges is the brainchild of Mr. Draper. In cooperation with his mother, [Mrs. Draper], he conceived of Twin Bridges for two purposes: (1) to remove her most valuable asset out of her estate in a tax-saving manner, allowing her to gift interests in it to her children, their spouses and her young grandchildren . . . ."). At argument, Defendants elaborated that part of Mrs. Draper's tax-saving plan was to give units of Twin Bridges annually under the gift tax exclusion. Tr. at 49.

93 *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005).

preventing the other party to the contract from receiving the fruits of the bargain."[94] "The covenant is best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions."[95] Delaware courts, however, have cautioned:

> that implying contract terms is an occasional necessity to ensure that parties' reasonable expectations are fulfilled, but that this quasi-reformation . . . should be [a] rare and fact-intensive exercise, governed solely by issues of compelling fairness and that only when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter may a party invoke the covenant's protections. Thus, a claim for breach of an implied covenant generally cannot be based on conduct authorized by the terms of the agreement.[96]

Defendants appear to make their argument under the implied covenant in the alternative. They argue that because the OPA is silent on mergers, if the Court were to conclude that it could not resolve the dispute based on the language of the OPA, it should determine how the drafters would have addressed the approval needed for a "merger with an affiliated shell entity as an alternative means to amend the [OPA] and potentially circumvent the unanimity provision in Section 31(b)."[97] Not surprisingly, Plaintiffs

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94 *Id.* (citations omitted).

95 *Id.* at 441 (quotations and citations omitted).

96 *Cypress Assocs., LLC v. Sunnyside Cogeneration Assocs. Project*, 2006 Del. Ch. LEXIS 61, at *30 (Mar. 8, 2006) (internal citations and quotations omitted).

97 DRB at 20.

respond that the implied covenant of good faith and fair dealing has no application to this case, and, even if it did, does not support Defendants' position.

As a threshold matter the parties disagree as to whether the implied covenant even would apply in this case. Emphasizing that the Delaware Supreme Court's observation that implying obligations based on the covenant of good faith and fair dealing is "a cautious enterprise,"[98] Plaintiffs assert that the implied covenant applies only when parties to a contract "could not have foreseen the circumstance that gave rise to the dispute."[99] Defendants counter that they need only show that the parties, in fact, did not foresee that circumstance. According to Defendants, the covenant "requires a court to extrapolate the 'spirit' of the contract from its express terms, and 'determine the terms that the parties would have bargained for to govern the dispute had they foreseen the circumstances under which their dispute arose.'"[100] Defendants' position is at least plausible, while Plaintiffs' argument stretches the cases they cite to the limit, if not beyond.[101] For purposes of the pending motions, however, I need not resolve the parties'

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98 POB at 20 (quoting *Cincinnati SMSA L.P. v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998)).

99 PRB at 18 (citing *Chamison v. HealthTrust, Inc.*, 735 A.2d 912, 921 (Del. Ch. 1999)).

100 *PAMI-LEMB I Inc. v.* EMB-NHC, L.L.C., 857 A.2d 998, 1016 (Del. Ch. 2004) (quoting *Chamison v. HealthTrust*, 735 A.2d at 920).

101 Plaintiffs' reliance of *Chamison* and *E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436 (Del. 1996) appears misplaced. Although Plaintiffs argue that *Chamison* limited application of the covenant to circumstances the parties "could not have foreseen . . . ," the court's holding only said "had they foreseen . . . ." 735 A.2d at 921. In *Pressman*, the Delaware Supreme Court, which itself was

dispute over when the implied covenant applies. Instead, I accept for purposes of argument only Defendants' articulation of the standard.

Assuming that the original parties did not foresee that the OPA could be amended by way of a merger approved by only two-thirds of the interests to provide for the addition of a former limited partner as a third general partner, I still find that no violation of the implied covenant of good faith and fair dealing occurred. The covenant only would be applicable if the integrated transaction was clearly against the intent of the parties as expressed in the OPA. For reasons previously stated, the integrated transaction did not violate the expressed intent of the original parties. Thus, the Amendment and Merger did not contravene the implied covenant.

e. In combination, are the Amendment and Merger valid under DRULPA?

Defendants further contend that the Amendment and Merger are invalid under the 1988 amendment to DRULPA Section 17-211(b), which created a default rule that a merger must be approved by "all general partners" and by limited partners owning more than 50% of all of the interests owned by the limited partners, unless otherwise provided in the partnership agreement.[102] Defendants argue that the default rule requiring

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citing *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986), found the applicable standard to be what "the parties likely would have done if they had considered the issue involved." 679 A.2d at 443. Thus, Plaintiffs' position on this point is tenuous at best.

[102] 6 *Del. C.* § 17-211(b). Section 17-211(b) provides in pertinent part that:

> Unless otherwise provided in the partnership agreement, a merger or consolidation shall be approved by each domestic

unanimity among general partners comports with the OPA, which called for the mutual consent of both general partners for "all major decisions affecting the Partnership business," such as the sale of "any substantial portion" of the assets of Twin Bridges, or borrowing or lending more than $5,000.[103] In addition, Defendants rely on *Sellers v. Bancroft & Sons Co.*,[104] and, by analogy, Section 242(b)(4) of the DGCL for the general proposition that a supermajority provision in a charter cannot be reduced or eliminated by a lesser vote than the specified supermajority.

Plaintiffs respond that Defendants theory is unsupported and contrary to both the letter and spirit of Delaware limited partnership law. They contend that the "default rule" of Section 17-211(b) requiring unanimous approval of the general partners does not apply here, because the original partnership agreement, as amended, already provided the requirements for approving a merger. According to Plaintiffs, they validly adopted the Fourth Amendment of the OPA, which includes an explicit merger provision.

Plaintiffs point to Section 17-302(f) of DRULPA for the proposition that where a limited partnership provides for its amendment, "it may only be amended in that manner or as otherwise permitted by law." Because the challenged Amendment received more

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> limited partnership which is to merge or consolidate (1) by all general partners, and (2) . . . by limited partners who own more than 50 percent of the then current percentage or other interest in the profits of the domestic limited partnership owned by all of the limited partners or by the limited partners in each class or group, as appropriate.

[103] *See* OPA ¶ 15(a)(6).

[104] 2 A.2d 108 (Del. Ch. 1938).

than the two-thirds vote required for amendments under Paragraph 31(a), Plaintiffs contend that it is valid. The Amendment added Paragraph 26.5(b) to the OPA, which provided for the approval of mergers by partners having two-thirds of the interest in the capital of the Partnership. Plaintiffs also argue that it is irrelevant that the OPA entered into in 1985 did not mention mergers, and that the Legislature did not adopt the default rule for voting on mergers and the provision authorizing mergers that had the effect of amending a partnership agreement until 1988 and 1990, respectively. Citing 6 *Del. C.* § 17-1108,[105] Plaintiffs assert that the clear terms of DRULPA itself dictate that all amendments are retroactive.

Under Section 17-211(b) of DRULPA, the Legislature has granted Delaware limited partnerships the power to merge or consolidate with or into other limited partnerships or business entities. According to the leading commentators on limited partnerships, DRULPA "grants the parties tremendous flexibility in structuring a merger or consolidation pursuant to the terms of the parties' business understanding."[106]

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[105] Section 17-1108 of DRULPA, entitled "Reserved power of State of Delaware to alter or repeal chapter," provides:

> All provisions of this chapter may be altered from time to time or repealed and all rights of partners are subject to this reservation. Unless expressly stated to the contrary in this chapter, all amendments of this chapter shall apply to limited partnerships and partners whether or not existing as such at the time of the enactment of any such amendment.

[106] LUBAROFF & ALTMAN at § 7.2

As the Delaware Supreme Court in *Gotham Partners* instructs, the Legislature's basic approach in limited partnerships is to maintain the policy of freedom of contract and maximum flexibility.[107] A court will superimpose statutory default rules onto a written agreement "only in situations where the partners have not expressly made provisions in their partnership agreement," or where the agreement is inconsistent with mandatory statutory provisions.[108] Hence, a court must tread lightly when determining whether to apply default statutory provisions to an agreement of limited partnership.[109] With these principles in mind, I turn to the issues raised by the parties.

The gravamen of this dispute is whether the Amendment, as part of an integrated two-step transaction, had to be adopted by a unanimous vote of the general partners, which it was not. I conclude that the answer is no. Section 17-211(b)'s default requirement of a unanimous vote of the general partners to approve any merger does not apply to the challenged Merger. That requirement applies only if the partnership agreement does not otherwise provide.[110] The validly adopted Amendment expanded the OPA to include explicit requirements in Paragraph 26.5 for the approval of a merger. The existence of this new provision rendered the default rule of Section 17-211(b) inapplicable.

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107 *Gotham Partners v. Hallwood Realty Partners, L.P.*, 817 A.3d 160, 170 (Del. 2002).

108 *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999).

109 *In re LJM2 Co-Inv., L.P.*, 866 A.2d 762, 779 (Del. Ch. 2004).

110 *See* 6 *Del. C.* § 17-211(b).

Citing cases rooted in the Delaware corporation law, Defendants object that a supermajority provision may not be eliminated by a lesser vote. They acknowledge, however, that DRULPA Section 17-302(f)[111] dictates that, if a partnership agreement contains a provision governing amendments, an amendment may only be made pursuant to that provision or as otherwise permitted by law. While it is true, as Defendants contend, that Section 17-302(f) was enacted in 1998, long after the OPA was executed, that fact is irrelevant. Under Section 17-1108, all amendments to DRULPA are retroactive unless stated otherwise.

I also find unpersuasive Defendants' reliance on Section 242(b)(4) of the DGCL[112] to support requiring a unanimous vote of the general partners for any amendment of the

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[111] 6 *Del. C.* § 17-302(f). Section 17-302(f) states in pertinent part that:

> If a partnership agreement provides for the manner in which it may be amended, . . . it may be amended only in that manner or as otherwise permitted by law . . . . If a partnership agreement does not provide for the manner in which it may be amended, the partnership agreement may be amended with the approval of all the partners or as otherwise permitted by law.

[112] 8 *Del. C.* § 242(b)(4). This section provides:

> Whenever the certificate of incorporation shall require for action by the board of directors, by the holders of any class or series of shares or by the holders of any other securities having voting power the vote of a greater number or proportion than is required by any section of this title, the provision of the certificate of incorporation requiring such greater vote shall not be altered, amended or repealed except by such greater vote.

Section 242(b)(4) codified the holding of *Sellers v. Bancroft & Sons*. *See Frankino v. Gleason*, 1999 Del. Ch. LEXIS 219, at *16 (Nov. 15, 1999).

OPA that would allow approval of a merger by a lesser vote. Because the conceptual underpinnings of the corporation law and Delaware's limited partnership law are different, courts should be wary of uncritically importing requirements from the DGCL into the limited partnership context.[113] Further, Section 242(b)(4) differs significantly from Section 17-211(b) of DRULPA. The latter constitutes a default rule meant to be applied only if the partnership agreement is silent on the vote needed to approve a merger. In contrast, Section 242(b)(4) positively requires that any alteration, amendment, or repeal of a supermajority vote requirement in a certificate of incorporation be accomplished with the approval of the same supermajority. No comparable, affirmative requirement appears in DRULPA, and I do not perceive any basis for implying such a requirement.

3. Are the Amendment and Merger, when viewed independently, valid under Paragraph 31(b) of the OPA?

For the reasons stated above, the Court concludes that neither the passage of the Amendment nor the implementation of the Merger pursuant to the Amendment violated Paragraph 31(b)'s unanimity requirement. If the integrated transaction as a whole did not implicate Paragraph 31(b) of the OPA, then the Amendment, when considered separately,

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[113] *See* Steele, *supra* note 73, at 10-13, 19 (describing the evolution of DRULPA § 17-1101(d), which allows a limited partnership to contract away partners' fiduciary duties, and how the Legislature enacted it in response to the Delaware Supreme Court's willingness in *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 167 (Del. 2002) to incorporate fiduciary duties from the common law of Delaware corporations into the partnership context).

could not have implicated 31(b).[114] Instead, I conclude that Plaintiffs validly passed the Amendment pursuant to Paragraph 31(a), and the Merger was validly executed pursuant to Paragraph 26.5 of the amended OPA.

B. Plaintiffs' Motion to Dismiss Defendants' Counterclaim

Plaintiffs moved to dismiss each of the four counts of Defendants' Counterclaim for failure to state a claim. On a motion to dismiss for failure to state a claim, a court must assume the truth of all well-pleaded allegations and construe all reasonable inferences in a light most favorable to the nonmoving party.[115] The court need not consider conclusory allegations.[116] Dismissal is appropriate only when it appears with reasonable certainty that the plaintiff would not be entitled to relief under any reasonable set of facts properly supported by the complaint or incorporated documents.[117]

1. Counts I and II related to the validity of the Amendment and Merger

Count I of the Counterclaim seeks a declaration that the Amendment and Merger constitute a breach of contract, because they violate Paragraph 31(b) of the OPA and the

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[114] In finding the Amendment to be valid, I recognize that it conceivably could be construed to cover a hypothetical transaction that would fall within Paragraph 31(b) of the OPA. None of the parties argued the possibility that an amendment which actually came within the scope of Paragraph 31(b) could be accomplished by means of a two-thirds vote of the interests in the Partnership. For purposes of the pending motions, therefore, I do not need to reach that issue. Rather, I assume for purposes of this opinion that the Amendment does not extend to any merger that would, in fact, be subject to Paragraph 31(b).

[115] *Quereguan v. New Castle County*, 2006 Del. Ch. LEXIS 83, at *9 (Apr. 24, 2006).

[116] *See, e.g.*, *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996).

[117] *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006).

implied covenant of good faith and fair dealing. Defendants do not seek damages based on this, or any of the other counts of their Counterclaim, except for a request for attorneys' fees. Having concluded that the Amendment and Merger do not violate either Paragraph 31(b) or the implied covenant, I grant Plaintiffs' motion to dismiss Count I.

Count II of the Counterclaim seeks a declaration that the Amendment and Merger are invalid under DRULPA, because they failed to comply with the statutory default rule requiring the approval of any merger by all general partners (plus more than 50% of the limited partner interests). Having found no DRULPA violation, I grant Plaintiffs' motion to dismiss Count II.

2. Count III for Schutt's breach of fiduciary duty

Plaintiffs seek dismissal of Count III under Rule 12(b)(6) for failure to state a claim against general partner Schutt for breach of fiduciary duty. They assert that the facts alleged in the Counterclaim relate only to the approval of the Amendment and the Merger and that Defendants have not identified any actions undertaken by Plaintiffs involving the use of the disputed NPA provisions, other than making Osborn a general partner. Plaintiffs argue that because Defendants' claim of self-interested transactions by Schutt is only "hypothetical," it is not ripe for decision.[118] In other words, Plaintiffs argue that Count III of the Counterclaim fails to allege any wrongful actions pursuant to the NPA that could support a finding of a breach of fiduciary duty.[119]

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[118] POB at 30.

[119] Plaintiffs also argue that since Defendants do not seek monetary relief, Count III should be dismissed because a "party cannot maintain a claim that seeks no relief."

Defendants allege that the governance changes between the OPA and the NPA are breaches of Schutt's fiduciary duty to the Partnership as a general partner.[120] They assert that the verified facts of the Counterclaim evince Schutt's intent to avoid fiduciary duties implied under the law in her role as general partner. Defendants first allege that Plaintiffs merged Twin Bridges into TB II to facilitate self-dealing and obtain portions of the Property for prices lower than fair market value. In particular, Defendants contend that Schutt (along with the other non-Draper limited partners) breached (or aided in the breach of) her fiduciary duties so as "to use some pricing discretion . . . discounts" in the sale of Partnership property.[121]

The issue before this Court is whether Schutt's involvement in passing the Amendment and approving the Merger, which together constituted an integrated transaction, could constitute a breach of her fiduciary duty of loyalty to the Partnership. Under Delaware law, a general partner in a limited partnership has a duty to "exercise the utmost good faith, fairness and loyalty," and such duty is often compared to that of corporate directors.[122] Unless the partnership agreement preempts fundamental fiduciary

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PRB at 29. This argument has no merit. The Counterclaim asks the Court to set aside and rescind the Amendment and Merger and to declare the two transactions void. *See* Countercl. at 36.

120 Countercl. ¶ 89.

121 Draper Aff. Exs. 2 & 3.

122 *Boxer v. Husky Oil Co.*, 429 A.2d 995, 997 (Del. Ch. 1981).

duties,[123] "a general partner is obligated to act fairly and prove fairness when making self-interested decisions."[124]

There is no question that, before the integrated transaction, Schutt, as a general partner, owed a fiduciary duty of loyalty to the Partnership. Plaintiffs' prime contention for dismissal is that because no self-dealing transactions have taken place, Defendants' claim is not yet ripe. Furthermore, Plaintiffs argue that because the Amendment and Merger were valid transactions under the OPA and DRULPA, Schutt's voting of her interest was not restricted by her fiduciary obligation as a general partner. Defendants

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[123] In the past, there has been some disagreement among the Delaware cases on the ability of parties in alternative business entities contractually to eliminate fiduciary duties. As a result, there has been some uncertainty as to whether fiduciary duties within the context of limited partnerships can be eliminated from the partnership contractually. *See, e.g.*, Steele, *supra* note 73, at 5, 9-13, 29-32 (providing an overview of Delaware case law relating to the application of traditional fiduciary duties in the context of limited partnerships and concluding that the limited partnership, as a creature of contract, should govern, allowing parties to freely adopt or eliminate the traditional fiduciary duties present in corporate law).

In the 2004 amendments to DRULPA, however, the Legislature made clear that absent contractual modification of fiduciary duties, a limited partnership formed under Delaware law is presumed to incorporate those duties in its governance structure. Specifically, the Legislature, consistent with the underlying policy of giving maximum effect to the principle of freedom of contract, stated that to the extent that "a partner or other person has duties (including fiduciary duties) to a limited partnership," the duties may be expanded or restricted in the partnership agreement, provided that it does not eliminate the implied contractual covenant of good faith and fair dealing. *See* 6 *Del. C.* § 17-1101(d) (as amended by 74 Del. Laws 265 (2004)).

[124] *McGovern v. General Holding, Inc.*, 2006 Del. Ch. LEXIS 93, at *57 (May 18, 2006).

dispute that contention based on *Schnell v. Chris-Craft Industries, Inc.*,[125] and other Delaware corporation law cases that have held technically legal action to be a violation of a fiduciary's duty of loyalty because the action was inequitable.

Upon completion of the integrated transaction, NPA Paragraph 29(e) eliminated all fiduciary duties relating to the development and implementation of a Development Plan.[126] Schutt and her allied general partner Osborn, constituting a quorum of the general partners pursuant to NPA Paragraph 15(a)(2),[127] could propose a Development Plan to be presented to the limited partners for their approval.[128] Under Paragraph 29(e) Schutt and her majority allies (Osborn as a general partner plus the limited partners not in Draper's family) could then approve a Development Plan whereby the Partnership could

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125 285 A.2d 437, 439-40 (Del. 1971).

126 In pertinent part, ¶ 29(e) states:

> No partner shall have any duty (including any fiduciary duty) to any other partner or to the Partnership . . . that would restrict or impair in any respect the development . . . [and] implementation of a Plan. . . . Without limiting the generality of the foregoing and solely by way of example, in developing a Plan, no general partner shall have any duty to obtain the highest value for any portion of the Property that any partner or any third party may be prepared to pay.

127 Under ¶ 15(a)(2), "[a] majority of the general partners shall constitute a quorum for the transaction of business by the general partners." As there would be only three general partners, Schutt and Osborn would constitute a majority.

128 A Development Plan must be presented by the general partners to the Partnership for approval. *See* NPA ¶ 29(c) ("The general partners shall submit any Plan . . . to the partners for their approval . . . . A Plan shall be approved by the partners if it is approved . . . by partners, general and limited, having, in the aggregate, two-thirds (2/3) of the interests in the capital of the Partnership of all partners.").

sell some its assets to an individual partner at a below-market price. Under DRULPA Section 1101(d), the elimination of the partners' fiduciary duties (including the duty of loyalty) in Paragraph 29(e) of the NPA is permissible. Draper and his sons effectively would be shut out. In fact, Draper alleges that the provisions of the NPA coerced him to become a general partner and assume the concomitant risk of liability, even though he no longer has the power to veto decisions he considers unwise. The question then is whether this Court must wait for such a transaction to take place, or whether Schutt's actions in relation to the integrated transaction that created Paragraph 29(e) are sufficient to support a ripe claim for a breach of fiduciary duty.

First, I address Plaintiffs' contention that because Schutt approved the integrated transaction in keeping with the OPA and DRULPA, she "was not restricted by any fiduciary obligation from voting her interest as she saw fit."[129] Under *Schnell v. Chris-Craft Industries, Inc.*, strict compliance with the Delaware Corporation Law in changing the by-law date was insufficient to insulate management from a breach of fiduciary duty claim -- "inequitable action does not become permissible simply because it is legally possible."[130] As the fiduciary duty of loyalty of a general partner may be similar to that of a corporate director, *Schnell* has been extended to the limited partnership context on

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129 *See* POB at 31.

130 285 A.2d at 439.

multiple occasions.[131] Thus, while the integrated transaction may be valid under the OPA and DRULPA, that does not necessarily immunize Schutt from a claim that she breached her fiduciary duty of loyalty to the Partnership in spearheading that transaction.

Secondly, Plaintiffs argue that Defendants' breach of fiduciary duty claim is not ripe because no self-dealing transactions have occurred to date, and Defendants have not alleged any such act. Thus, Plaintiffs contend that Defendants' claim rests on speculation.

Citing *Hollinger International, Inc. v. Black*,[132] Defendants counter that "[g]overnance changes motivated by a desire to impose unfair self-dealing transactions over Mr. Draper's objection are plainly actionable."[133] In *Hollinger*, this Court struck down a set of bylaw amendments, adopted under the direction of Hollinger's controlling shareholder Conrad Black, whose "plain purpose" was to disable Hollinger's board and prevent it from completing a review of alternative strategic transactions that Black was contractually required to further.[134] By striking the bylaws, the Court enabled "the board [to] take good faith action, within its domain, without being subject to a veto by Black or other directors subject to his control."[135]

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131 *See, e.g., Alpine Inv. Partners v. LJM2 Capital Mgmt., L.P.*, 794 A.2d 1276, 1284 n.13 (Del. Ch. 2002); *Juran v. Bron*, 2000 WL 1521478, at *19-20 (Del. Ch., Oct. 6, 2000).

132 844 A.2d 1022 (Del. Ch. 2004).

133 DOB at 46.

134 *Hollinger Int'l*, 844 A.2d at 1081.

135 *Id.* at 1082.

Under Delaware law, to be ripe a claim "must allege that present harms will flow from the threat of future action."[136] Here, Defendants allege that Schutt has engaged in a scheme to impose unfair self-dealing transactions on the Partnership. In *Hollinger*, Black caused the adoption of a governance change to restructure the power of the board. In this case, Defendants accuse Schutt of using the Amendment and Merger to facilitate self-dealing transactions that potentially will benefit Schutt and her allied partners.

Furthermore, in Delaware, "[a] court may find a case [ripe] where the interest in postponing review until the question arises in a more concrete and final form is outweighed by the immediate and practical impact on the party seeking relief."[137] Certain aspects of the challenged actions of Plaintiffs implicate this proposition, as well. Having found nothing inconsistent with the OPA or DRULPA in the aspects of the Amendment and Merger that effectively amend the OPA to provide for three, rather than two, general partners and elevate Osborn to the status of a general partner, I conclude that the implementation of those changes would not be inequitable. The situation is more murky, however, as to Paragraph 29(e) of the NPA, which purports to eliminate fiduciary duties in connection with the development and implementation of a Development Plan. Plaintiffs effected that change to the OPA without any prior notice to, or consultation

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136 *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 Del. Ch. LEXIS 182, at *27 (Oct. 11, 2006).

137 *Id.* at *26-27.

with, Defendants. Rather, they presented Defendants with a *fait accompli*.[138] Because Paragraph 29(e) of the NPA purports to eliminate all fiduciary duties with respect to Development Plans, if this Court were to grant Plaintiffs' motion to dismiss, any future review of a self-dealing transaction by Schutt as part of such a Plan would be subject only to a lesser standard of the implied covenant of good faith and fair dealing.[139] Limiting Defendants' rights to challenge future Partnership actions on a Development Plan in that way would have an immediate and practical impact on Defendants. It would make it more difficult, for example, for Defendants to challenge a Partnership decision based on the use of some form of discretionary or family pricing. I view Defendants' claimed need to challenge Plaintiffs' effort to eliminate any fiduciary duties regarding Development Plans as outweighing any interest Plaintiffs or the Court might have in postponing that issue until it arises in a more concrete context. Accordingly, I hold that Defendants' challenge to Paragraph 29 of the NPA as a breach of Schutt's fiduciary duties is ripe for adjudication.

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138 The same is true as to Plaintiffs' actions to implement a three general partner governance structure. Because Plaintiffs took that action to overcome Draper's claimed veto power over the actions of the Partnership, however, I do not consider the lack of notice material. In the circumstances, giving Defendants notice probably would have precipitated some form of defensive action and, ultimately, litigation involving essentially the same issues presented by the pending motions for summary judgment. The amendments purporting to eliminate fiduciary duties raise different issues, and did not have to be combined with the changes to the Partnership structure, other than to suit Plaintiffs' convenience.

139 Under DRULPA Section 17-1001(d), the implied covenant cannot be eliminated even if a partnership agreement purports to eliminate all fiduciary duties. 6 *Del. C.* § 17-1001(d).

In addition, the allegations in Count III of Defendants' Counterclaim are such that I cannot conclude with reasonable certainty at this preliminary stage that Defendants would not be entitled to relief under any reasonable set of facts supported by Count III, at least as it relates to Paragraph 29 of the NPA. Schutt's actions in bringing about the implementation of the NPA and especially Paragraph 29 are clearly self-interested. Schutt personally can expect to benefit from the changes made in terms of, for example, obtaining ownership of the main house at what may be a below-market price. One also reasonably could infer from the facts alleged in the Counterclaim that Schutt orchestrated the adoption of Paragraph 29 without any prior notice to, or opportunity for input from, Draper and his sons. Based on the complexities of dealing with an undivided asset like the Twin Bridges Property and at least nineteen interested parties, the Court cannot rule out the possibility that depriving Draper of notice and an opportunity to address such an important issue as eliminating fiduciary duties constituted a breach of fiduciary duty. In addition, I am convinced that Defendants would be harmed if they were precluded from litigating that issue and relegated solely to relying on the implied covenant of good faith and fair dealing to protect the rights they seek to assert in this litigation. Thus, I hold that Defendants have pled sufficient facts to state a claim against Schutt for breach of her fiduciary duty of loyalty to the Partnership in terms of the adoption of at least Paragraph 29 of the NPA. To that extent, therefore, I deny Plaintiffs' Rule 12(b)(6) motion to dismiss Count III.

3. Count IV for aiding and abetting Schutt's breach of fiduciary duty

Plaintiffs also seek dismissal under Rule 12(b)(6) for failure to state a claim against the individual Plaintiffs, excluding Schutt, for aiding and abetting Schutt's breach of her fiduciary duty of loyalty to the Partnership. Under Delaware law, a valid claim for aiding and abetting a breach of fiduciary duty requires: (1) the existence of a fiduciary relationship; (2) the fiduciary breached its duty; (3) a defendant, who is not a fiduciary, knowingly participated in a breach; and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the nonfiduciary.[140]

Plaintiffs argue that Defendants have neither (1) pled sufficient facts, as a predicate, to support a claim for breach of Schutt's fiduciary duty, nor (2) pled sufficient facts to support a claim that the other Plaintiffs knowingly participated in Schutt's breach. For the reasons stated as to Count III, I reject the first prong of Defendants' argument, at least as it relates to Paragraph 29 of the NPA. I turn therefore to the second prong.

Defendants rely on email correspondence between the parties and the transcript of the August 16, 2006 meeting to support their allegations that Plaintiffs intended to use the NPA to breach Partnership fiduciary duties and that Schutt, with Osborn's assistance, breached her obligation to act fairly in making self-interested decisions.[141] Defendants contend that a comparison of the OPA with the NPA shows a recognition by Plaintiffs

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[140] *In re General Motors (Hughes) S'holder Litig*., 2005 WL 1089021, at *23 (Del. Ch. May 4, 2005) (citing *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 386 (Del. Ch. 1999)).

[141] *See* Countercl. ¶¶ 88-94; *see also* Draper Aff. Exs. 2, 3 & 6.

themselves that their actions, in pursuing the Amendment and Merger provisions, breached their fiduciary obligations to Twin Bridges.[142] Based on these allegations, Defendants contend that they have alleged sufficient facts to warrant denial of Plaintiffs' motion at this early stage of case development.

I find unpersuasive Plaintiffs' challenge to the sufficiency of Defendants' allegations that the Plaintiffs who were limited partners in Twin Bridges knowingly participated in Schutt's breach. Defendants have pled sufficient facts in their Counterclaim to support a reasonable inference that Plaintiffs knowingly participated in Schutt's alleged breach. Thus, I also deny Plaintiffs' motion to dismiss Count IV of Defendants' Counterclaim, at least as it relates to Paragraph 29 of the NPA.

III. CONCLUSION

For the reasons stated, I grant Plaintiffs' motion for summary judgment on their claims and deny Defendants' cross motion for summary judgment on Counts I and II of their Counterclaim and will enter an appropriate judgment declaring that the Amendment and the Merger are valid and effective. I also grant Plaintiffs' motion to dismiss Defendants' Counterclaim for failure to state a claim as to Counts I and II. With respect to Counts III and IV of the Counterclaim, I grant Plaintiffs' motion to dismiss those Counts to the extent they challenge the aspects of the Amendment and Merger that enabled and implemented a change in the governance structure of Twin Bridges from two

[142] Draper Aff. Exs. 2 and 3.

to three general partners, with Schutt and Osborn among the general partners. In all other respects, Plaintiffs' motion to dismiss Counts III and IV is denied.

Plaintiffs' counsel shall prepare a proposed form of judgment implementing these rulings and provide it to Defendants' counsel for review. The parties shall file a proposed form of judgment within ten days of the date of this opinion, and if agreement is not reached as to the form, a brief explanation of their respective positions on the points of disagreement.