ORIGINAL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BIGELOW/DIVERSIFIED SECONDARY PARTNERSHIP FUND 1990,

Plaintiff,

v. **C.A. No. 16630-NC**

DAMSON/BIRTCHER PARTNERS, BIRTCHER INVESTORS, BIRTCHER/ LIQUIDITY PROPERTIES, BIRTCHER PARTNERS, BIRTCHER PROPERTIES, BIRTCHER LTD., BIRTCHER INVESTMENTS, BREICORP, L.F. SPECIAL FUND II, L.P., L.F. SPECIAL FUND I, L.P., LIQUITY FUND ASSET MANAGEMENT, INC., ARTHUR BIRTCHER, RONALD BIRTCHER, ROBERT ANDERSON, RICHARD G. WOLLACK and BRENT R. DONALDSON,

Defendants,

and

DAMSON/BIRTCHER REALTY INCOME FUND I, DAMSON BIRTCHER REALTY INCOME FUND II, and REAL ESTATE INCOME PARTNERS III,

Nominal Defendants.

MEMORANDUM OPINION

Date Submitted: July 12, 2001
Date Decided: December 4, 2001

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Grover C. Brown, Esquire of Gordon, Fournatis & Mammarella, P.A., Wilmington, Delaware, Attorney for Nominal Defendants Damson/Birtcher Realty Income Fund I, Damson Birtcher Realty Income Fund II, and Real Estate Income Partners III.

NOBLE, Vice Chancellor

I. INTRODUCTION

The plaintiff in this action has brought class and derivative claims for breach of fiduciary duty and breach of contract against the general partners (and affiliated entities and individuals) of three limited partnerships in which it is a limited partner. Certain defendants have moved to dismiss the claims against them. For the reasons discussed below, I dismiss the breach of contract claim, but, otherwise, deny the motions.

II. BACKGROUND

A. The Parties

Nominal Defendants. The nominal defendants are three limited partnerships: Damson/Birtcher Realty Income Fund I ("Partnership I") is a Pennsylvania limited partnership; Damson/Birtcher Realty Income Fund II ("Partnership 11") is a Delaware limited partnership; and Real Estate Income Partners III ("Partnership III") is a Delaware limited partnership.[1] The Partnerships were established in the mid-1980s for the purposes of acquiring, operating, and eventually selling commercial and industrial real estate.

The Plaintiff. Plaintiff Bigelow/Diversified Secondary Partnership Fund 1990 ("Bigelow" or "plaintiff') is a limited partner in the Partnerships.

[1] Collectively, these three limited partnerships will be referred to as the "Partnerships."

The Defendants. The defendants' "family tree" is complex. In general, the defendants can be grouped into two categories. First are the general partners of Partnerships I, II, and III. The second general group includes the entities and persons who form the "upstream" flow from the general partners in the first group. As an additional complication, this second general group of defendants has two distinct families. With this general overview as a background, I now turn to the specific defendants and their relationships with both the plaintiff and one another.

As noted above, the first group of defendants is comprised of the general partners of the Partnerships. Two entities form this group. Damson/Birtcher Partners ("DBP") is the general partner of Partnership I, and Birtcher/Liquidity Properties ("BLP") is the general partner of both Partnerships II and III. Both DBP and BLP are California general partnerships and each maintains its principal place of business at the same address in California. Throughout this memorandum opinion, DBP and BLP will be collectively referred to as the "primary defendants" or the "General Partners" in recognition of their position as the defendants directly connected to (as general partners of) the Partnerships. Thus, at its core, this litigation pits Bigelow, a limited partner of the Partnerships, against DBP and BLP, the general partners of those three partnerships.

The remaining defendants, comprising the second group noted above, are the "upstream" entities and individuals affiliated with the general partners DBP and BLP.

DBP's Family Tree. DBP has two general partners: L.F. Special Fund I, L.P. (a California limited partnership) and Birtcher Partners (a California general partnership). Continuing up the L.F. Special Fund I branch are its general partner Liquidity Fund Asset Management, Inc. (a California corporation) and the corporation's Chairman Richard Wollack and President Brent Donaldson. DBP's second branch includes the affiliates of Birtcher Partners. Included on this branch are: Birtcher Partners' general partner Birtcher Investments (a California general partnership), Birtcher Investments' general partner, Birtcher Ltd. (a California limited partnership), Birtcher Ltd.'s general partner, BRIECORP, Inc. (a California corporation), and BRIECORP officers Arthur Birtcher (Co-chairman), Ronald Birtcher (Co-chairman), and Robert Anderson (Executive Director).[2]

BLP's Family Tree. In most respects, the upstream defendants related to BLP are the same as those for DBP. The difference lies at the first level above BLP. BLP, like DBP, has two general partners. BLP's general

[2] These two branches will be referred to as the "Liquidity defendants" and the "Birtcher defendants" respectively. These parties are sometimes collectively referred to as the "Moving Defendants."

partners, however, are L.F. Special Fund II, L.P. (a California limited partnership) and Birtcher Investors (a California limited partnership).[3] Otherwise, the chain of defendants is exactly the same as above. Thus, BLP initially has two separate and independent branches that eventually merge with, and overlap, related branches of DBP.

Finally, the last defendant is an affiliate of Birtcher Partners, Birtcher Properties, which performs management services for the Partnerships.

B. Plaintiff's Allegations of Fact[4]

The Partnerships were formed between May 1984 and December 1985 through separate Amended and Restated Partnership Agreements, which varied only slightly from one another. At all relevant times, the Partnerships have been engaged in the business of acquiring and operating office buildings, research and development facilities, shopping centers, and other commercial and industrial properties, The Partnerships' objectives, set forth in the original prospectuses for the Partnerships and restated in monthly and annual public tilings, were: (i) to make regular quarterly cash

[3] The First Amended Class Action and Derivative Complaint ("Amended Complaint") shows Birtcher Partners as a General Partner of BLP. Amended Complaint ¶13. Materials provided by the defendants, however, show Birtcher Investors as a General Partner of BLP. For purposes of this motion, I have assumed that the defendants' version is correct. This assumption has no bearing on my decision.

[4] Because this is decision on a motion to dismiss, the narration of facts will come primarily from the Amended Complaint. *See infra* note 41.

distributions to the Limited Partners; (ii) to achieve capital appreciation over a holding period of at least five years; and (iii) to preserve and protect the Partnerships' capital.

In May 1993, the General Partners of the Partnerships distributed to the Limited Partners "Consent Solicitations" seeking their consent for certain amendments to the Partnership Agreements ("1993 Consent Solicitations"). The 1993 Consent Solicitations contained two key components. One was a mandate that the General Partners seek approval for liquidation from the Limited Partners no later than December 31, 1996, if individual properties worth 50% of the total appraised values for all properties held were not sold or under contract for sale by the end of 1996. A second key provision charged the General Partners with the responsibility of "seek[ing] to sell the Partnership's properties and liquidate the Partnership at the earliest practicable time consistent with achieving reasonable value for the Limited Partners' investment."[5] In substance, the Consent Solicitations allowed for a continuation of the Partnerships' holding of their real estate investments instead of their liquidation by 1993, as originally contemplated.

[5] Amended Complaint ¶ 37.

Bigelow alleges that the 1993 Consent Solicitations were designed not only to allow the Partnerships to ride out a weak real estate market before mandatory liquidation, but also to coerce the Limited Partners into approving new provisions that would provide a more favorable stream of fee income to the General Partners.[6] Ultimately, a majority of the Limited Partners consented to these modifications.

In the original Partnership Agreements, the General Partners were compensated at a rate of 10% of the total of all distributions. This compensation, however, was subordinated to certain preferred distributions to the Limited Partners. Because the Limited Partners received few of these distributions, the General Partners' subordinated distributions were likewise never paid. The 1993 Consent Solicitations changed this situation. The new compensation structure, approved as part of the 1993 Consent Solicitations, gave the General Partners an annual asset management fee calculated as a percentage of the appraised value of the properties. The fee was guaranteed so long as the Partnerships owned the properties. In addition, Birtcher Properties, an affiliate of DBP was to receive both "property management

[6] The change in the fee structure is discussed more fully below

fees" and "leasing fees" totaling 6% of the gross revenues of the Partnerships.'

Despite the new mandate and shift in focus, the General Partners failed to liquidate the Partnerships' properties by the end of 1996. Because only one property had been sold by the end of 1996, the 1993 amendments required the General Partners to present a plan of prompt liquidation to the Limited Partners.

Pursuant to this plan, the General Partners sold one of Partnership III's properties in January 1997. The purchase price for this property was $13,600,000. After closing costs and escrow items, the Partnership realized $13,079,000 from the sale. The plaintiff alleges the amount realized was artificially depressed because the General Partners took a "property disposition fee" of $340,000 and received $52,000 from the purchaser, who had a prior relationship with a General Partner's affiliate, as an "investment advisory fee."

One month later, on February 18, 1997, the General Partners mailed additional Consent Solicitations ("1997 Consent Solicitations") to the Limited Partners. These solicitations provide the following:

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[7] The plaintiff alleges that the General Partners insisted that any prospective purchaser of Partnership properties keep Birtcher Properties as the manager of the properties under the same compensation agreements. The potential deterrent effect of such a requirement on potential purchasers is noted by the plaintiff.

> In seeking to sell or dispose of the Partnership's remaining properties if the Dissolution is approved, the General Partner does not intend to place any restrictions on indications of interest it may solicit from third parties in connection with the Dissolution. The Limited Partners are advised in this regard that, because of the General Partner's long-standing experience with the Partnership properties, transactions may be structured that provide that the General Partner or its affiliates agree to continue managing the Partnership's properties following their sale, to make or retain an investment interest in the properties, or otherwise to participate or be involved in a transaction entered into pursuant to the Dissolution.
>
> If the Limited Partners consent to the Dissolution, they also will be deemed to have consented to any transaction that may be undertaken to accomplish the liquidation and winding up of the Partnership and will not be entitled to approve or disapprove of any such transaction, including transactions which may involve the General Partner's participation or involvement. However, a "Reorganization Transaction" (as defined [in] the Partnership Agreement) sponsored by the General Partner or its affiliates would continue to require [the] approval of 80% in interest of the Limited Partners. There is no current agreement or understanding with respect to any Reorganization Transaction.[8]

The plaintiff characterizes these solicitations as seeking "carte blanche to dissolve the Partnerships and liquidate all of their assets (at unspecified prices, to unidentified purchasers, and on unspecified terms) . . . ."[9] Moreover, the plaintiff alleges that the 1997 Consent

[8] This language is taken from Paragraph 62 of the First Amended Corrected Class Action Complaint—Civil Action filed in the *Bigelow/Diversified Secondary Partnership Fund 1990 v. Damson/Birtcher Partners,* Pa. Ct. Com. Pl., Philadelphia County, No. 2928, March Term, 1997. This complaint is attached to, and incorporated into, the Amended Complaint filed in this Court.

[9] Amended Complaint ¶ 50.

Solicitations were materially false and misleading in several ways. For example, the plaintiff notes that the Consent Solicitations state that there is "no current agreement or understanding to sell or dispose of any property . . . ." The plaintiff argues that this statement is misleading because the General Partners failed to disclose that at about this time Glenborough Realty Investment Trust had offered to purchase all of the Partnerships' properties at 94% of their appraised value but was told by defendants to delay any pursuit of the purchase until the Consent Solicitations were approved. The Glenborough offer had a value of $82.5 million.

In response to the 1997 Consent Solicitations, Bigelow tiled an action in the Pennsylvania Court of Common Pleas seeking to enjoin the Consent Solicitations as well as other forms of relief." Ultimately, however, in March 1997, a majority of the Limited Partners approved the 1997 Consent Solicitations, and, accordingly, a resolution to liquidate promptly was approved.

Before plaintiff could re-tile the dismissed Pennsylvania claims in California, some of the defendants filed a declaratory judgment action in this

[10] By Order, dated June 10, 1997, the Pennsylvania action was dismissed on *forum non conveniens* grounds, with the expectation that the claims would be asserted in California.

Court seeking a declaration that the plaintiffs claims were without merit and that the 1997 Consent Solicitations were valid in all respects. [11]

Following the dismissal of the Pennsylvania complaint, the General Partners began to seek purchasers for the Partnerships' properties. The plaintiff alleges that this time period, Spring/Summer 1997 to Spring/Summer 1998, coincided with a particularly robust time for real estate investment trusts and other entities involved in the commercial real estate business. According to the plaintiff, the General Partners failed to capitalize on this active market and sold no properties during this period."

In the second quarter of 1998, the defendants disclosed that they had agreed in principle to sell all of the Partnerships' properties to Abbey Investments, Inc. ("Abbey"). The transaction was proposed at an initial bid of $85 million, subject to due diligence. The proposed deal also included a $3.3 million termination fee payable to the defendants should Abby terminate the Defendants' management agreements after the sale.

On August 12, 1998, the defendants notified the Limited Partners that

[11] *Damson/Realty Income Fund II, Limited Partnership v. Bigelow/Diversified Secondary Partnership Fund, 1990 L.P.*, Del. Ch., C.A. No. 15740. This action was voluntarily dismissed without prejudice on April 6, 2001.

[12] Ultimately, the properties attracted the interest of several potential purchasers. Those potential purchasers and their proposed transactions are discussed below.

they were negotiating with Abbey over a reduced sale price because Abbey's due diligence had uncovered that occupancy rates and profitability were lower than initially disclosed. These negotiations lead, in November 1998, to a revised purchase price of approximately $79 million. Finally, in January 1999, the negotiations with Abbey broke down when the price it was willing to pay was reduced to approximately $70 million.

Two months later, in March 1999, the primary defendants entered into a letter of intent to sell all but two properties to Praedium Performance Fund IV ("Praedium") for approximately $70 million.[13] The plaintiff alleges that the defendants insisted that Praedium hire an affiliate to provide management services as a precondition to an agreement, and that like Abbey, Praedium used the due diligence period to try to negotiate price reductions. This deal also failed.

Ultimately, the primary defendants were able to sell seven of the properties to Rubin Pachulski Dew Properties LLC ("Rubin") and all but one of the remaining properties to other purchasers. The deal with Rubin included provisions not only maintaining the Birtcher defendants in a management role with the attendant management fees but also provided the

[13] This price reflects the expectation that the other two properties would be sold for approximately $10 million.

Birtcher defendants with an "equity kicker" of 10% of any profits Rubin realized on the properties after receiving a 15% cumulative return on its investment.

The net proceeds from the sale of all of the properties but one totaled approximately $60 million. Initially, the defendants refused to distribute any of these proceeds because of the pending litigation. However, as a result of the efforts by certain Limited Partners and their counsel, the General Partners finally distributed over $48 million of the proceeds to the Limited Partners.

Asserting both class and derivative claims arising out of this background, Bigelow filed this action on September 9, 1998.

III. ANALYSIS

A. Summary of the Arguments

Bigelow asserts that the defendants' efforts to sell the Partnerships' properties have harmed it, and the other Limited Partners similarly situated, in various ways. In addition to other injuries, the plaintiff alleges that: (1) the defendants improperly allocated to themselves over $400,000 in "disposition fees"; (2) the defendants should have sold the properties to

Glenborough for $10 million more than they ultimately received; and (3) that the price realized was $10 million less than the 1998 appraisal values.[14]

The Moving Defendants have moved to dismiss the plaintiffs claims.[15] The motions are premised on two general theories. First, the Moving Defendants argue that they are not properly before this Court because the Court lacks personal jurisdiction over these defendants[16] and because both process and service of process were insufficient.[17] Second, they seek dismissal because, they argue, the plaintiff has failed to state a claim against them for which relief can be granted.'[18]

Lack of Personal Jurisdiction and Failure of Process and Service of Process

The Moving Defendants argue that the Court lacks personal jurisdiction over them because, as nonresidents not actively doing business in Delaware, they do not have sufficient minimum contacts with this jurisdiction to satisfy both general constitutional requirements and Delaware's long-arm statute. The Moving Defendants also argue that the

[14] The plaintiff also alleges, upon information and belief, that half of the properties sold have already been re-sold, or are in the process of being re-sold, for a more than $10 million total profit.
[15] DBP and BLP, the General Partners of the Nominal Defendants, have not moved for dismissal.
[16] Court of Chancery Rule 12(b)(2).
[17] Court of Chancery Rule 12(b)(4) & (5).
[18] Court of Chancery Rule 12(b)(6).

plaintiff has failed to cause the issuance of process or to effect service of process. The plaintiff counters that the Court can exercise personal jurisdiction over the Moving Defendants because their conduct as officers, affiliates, and general partners of other defendants is inextricably intertwined with that of both the non-moving defendants and other moving defendants. Thus, as its argument goes, the Court has "transactional" jurisdiction over all defendants. Regarding service of process, Bigelow argues that any criticism of a technical failure in official service of process would elevate form over substance in light of the litigation history between these parties.

Failure to State a Claim

The Moving Defendants argue that the plaintiff has failed to state a claim against them for several reasons. First, the Moving Defendants argue that as "upstream" partners, equity owners and officers, they do not owe this plaintiff or the putative class any fiduciary duties and, thus, could not have breached any fiduciary duty. Moreover, they assert that the plaintiff has failed to plead sufficient facts to trace conduct through to the Moving Defendants. They also assert that they are not signatories to the Partnership Agreements and, thus, cannot be liable for breach of contract. The plaintiff, in opposing the motions, argues that these "upstream" defendants exercised sufficient control over "downstream" defendants, including the Partnerships,

to create fiduciary duties to the plaintiff along the length of the branches of the family tree.'" Plaintiff also asserts that these defendants, as signatories to the Consent Solicitations, are liable for breach of contract.

B. Applicable Standards

This matter is presently before the Court on a motion to dismiss. It is well-settled that a motion to dismiss, under Court of Chancery Rule 12(b)(6), will be denied unless "'it appears with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff[] would not be entitled to relief.'"[20] In making this determination, the Court must "accept all well-pleaded facts as true and draw all inferences in a light most favorable to the non-moving party."[21] Mere conclusory allegations, however, "will not be accepted as true absent specific allegations of fact to support them."[22]

A motion under 12(b)(2) is different from a motion to dismiss under 12(b)(6) in that a motion under 12(b)(2) presents a factual matter-whether the defendant acts in a way that satisfies both statutory and constitutional

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[19] Although conceding that it has not alleged an "aiding an abetting" claim, Bigelow, nonetheless, briefed such a cause of action.
[20] *McMullin v. Beran*, Del. Supr., 765 A.2d 910, 916 (2000) (citations omitted).
[21] *In re New Valley Corp. Derivative Litig.,* Del. Ch., C.A. No. 17649, mem. op. at 10, Chandler, C. (Jan. 11, 2001).
[22] *Id.*

jurisdictional requirements-and not merely a legal question alone.[23] Thus, a plaintiff facing the burden of fighting a motion to dismiss under Rule 12(b)(2) is not limited to the allegations in the complaint and may be afforded some discovery.[24] The plaintiff is only held to the allegations in the complaint when the allegations in the complaint indicate that the claim of jurisdiction is "frivolous."[25] Upon challenge by the nonresident defendants, it is the plaintiffs burden to make a *prima facie* showing that the Court has personal jurisdiction over each of the defendants.[26] To make such a showing, the plaintiff must demonstrate "facts sufficient to meet the requirements not only of the long arm statute, but also constitutional due process."[27]

C. Lack of Personal Jurisdiction

Plaintiff relies upon Delaware's long arm statute, 10 *Del. C.* § 3104, as the basis for this Court's personal jurisdiction over the Moving Defendants. Although the parties have argued why the long arm statute does

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[23] *See Hart Holding Co., Inc. v. Drexel Burnham Lambert, Inc.,* Del. Ch., 593 A.2d 535, 538 (1991).
[24] *Id.* at 538-39.
[25] *Id.* at 539.
[26] *See Greenly v. Davis,* Del. Supr., *486* A.2d *669, 670* (1984); *Hornberger Mgmt. Co. v. Haws & Tingle General Contractors, Inc.,* Del. Super., 768 A.2d 983, 986 (2000); *RJ Assoc., Inc. v. Health Payors' Org. Ltd. P'ship, HPA, Inc.,* Del. Ch., C.A. No. 16873, mem. op. at 9, Jacobs, V.C. (July 16, 1999).
[27] *Hornberger Mgmt., 768* A.2d at 986.

or does not apply and whether or not notions of due process would be offended by allowing this action to go forward against these defendants, on the facts of this case, I do not have to decide these issues in order to rind that the Court does have personal jurisdiction over the Moving Defendants.

"Personal jurisdiction is a right which can be waived."[28] "Waiver" has been defined as "'an intentional relinquishment or abandonment of a known right or privilege.'"[29] Here, the Moving Defendants raised the issue of lack of personal jurisdiction in their answers. That does not, however, "'preserve the defense in perpetuity.'"[30] A defendant can waive or abandon a previously raised defense of lack of personal jurisdiction if the defendant's subsequent conduct does "'not reflect a continuing objection to the power of the court to act over the defendant's person.'"[31] Put another way, in determining whether a defendant has waived his defense of lack of personal jurisdiction, or has consented to jurisdiction, it is instructive to look at whether the defendant has abandoned a solely defensive posture and become an actor in the cause.[32]

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[28] *Id.* at 987 (citations omitted).
[29] *Grynberg v. Burke,* Del. Ch., 388 A.2d 443, 446 (1978) (quoting *Johnson v. Zerbst, 304* U.S. 458 (1937)).
[30] *Hornberger Mgmt., 768* A.2d at 987 (citations omitted).
[31] *Id.* at 988 (citations omitted).
[32] For a similar discussion concerning general appearances, see *King v. King,* Del. Fam. Ct., 513 A.2d 773, 778-79 (1985).

I find that the Moving Defendants, by their conduct in this action, have waived their objection to personal jurisdiction because their conduct "does not reflect a continuing objection to the power of the court to act over the defendant's person." On October 27, 2000, defendant DBP, not a party to the present motion, filed in this action a Motion for Permission to Communicate With Putative Class Members (the "Communications Motion") for the purpose of making settlement offers to potential members of the class that Bigelow seeks to represent. While I recognize that this was DBP's Motion and not that of the Moving Defendants, I am convinced that even though they were not nominally parties to the Communications Motion, all defendants were real parties in interest in that motion.

The Communications Motion was signed by counsel not only on behalf of DBP, but also on behalf of all the Moving Defendants.[33] The defendants sought the Court's blessing over communications with putative class members for the purpose of settling the claims asserted in this action. As one would expect, the settlement would be conditioned upon a release by the Limited Partners of any rights that might be asserted not only in this action but generally against the defendants. Under each Settlement

[33] Communications Motion at 13. The Reply and Further Support of General Partners' Motion for Permission to Communicate with Putative Class Members, filed November 30, 2000, was also signed by counsel on behalf of all the Moving Defendants.

Agreement and Release,[34] each of the Moving Defendants is identified as a releasee.

Because a "successful" communication on the part of DBP with a putative class member would have had the effect of settling and releasing all claims of that putative class member against all defendants, the benefits of the Court's ruling allowing the communications inured to all defendants.[35] Moreover, if the Court does not now have jurisdiction over all defendants, how could it have effectively enforced and policed those communications if the limitations of the Court's ruling were violated either by a defendant not a party to the Communications Motion or for the benefit of a defendant not a party to the motion? For these reasons, I find that all defendants have become active actors in this cause and have submitted to the jurisdiction of the Court for purposes of this action.[36]

D. Insufficiency of Process and Service of Process

A defendant may waive not only the defense of lack of personal jurisdiction, but it may also waive the defenses of insufficiency of service of

[34] Communications Motion, Exs. A, B & C.
[35] The Court approved, subject to certain conditions, the application to communicate with potential class members.
[36] Because I have found that the defendants have waived objection to, or have consented to, personal jurisdiction of this Court, I need not address the constitutional requirements of due process and "minimum contacts." *See Ush Ventures v. Global Telesystems Group, Inc.,* Del. Super., C.A. No. 97C-08-086, let. op. at 7, Quillen, J. (May 21, 1998) (citing *Sternberg v. O'Neil*, Del. Supr., 550 A.2d 1111-12 (1998)).

process and insufficiency of process.[37] For the reasons that persuaded me that the Moving Defendants have waived their personal jurisdiction defenses, I also find that those defendants have waived any defense based on insufficiency of service of process or insufficiency of process.

E. Failure to State a Claim

The Amended Complaint sets forth three counts: both derivative and class breach of fiduciary duty claims (Counts I and III) and a breach of contract claim (Count II). I will turn first to the breach of contract claim and then to the fiduciary duty claims.

1. Breach of Contract.

The plaintiff premises its breach of contract claim against the Moving Defendants on their status as signatories to the Consent Solicitation.[38] These defendants were not parties to the Consent Solicitations, but the Consent Solicitations were signed by them or on their behalf in their capacity as representative for entities below them in the "family tree."[39] One who

[37] *Fredman v. Bloomfield*, Del. Ch., C.A. No. 3020, Marvel, C. (Jan. 19, 1981); Court of Chancery Rule 12(h).

[38] Birtcher Properties is not a signatory to any of the Consent Solicitations.

[39] For example, the signature block in the 1997 Consent Solicitation for Damson/Birtcher Realty Income Fund II appears as follows:

> BIRTCHER/LIQUIDITY PROPERTIES,
> a California general partnership
>
> By: Birtcher Investors, a California limited partnership,
> General Partner of Birtcher/Liquidity Properties

By: Birtcher Investments, a California general partnership, General Partner of Birtcher Investors

By: Birtcher Limited, a California limited partnership, General Partner of Birtcher Investments

By: BREICORP, a California corporation, formerly known as Birtcher Real Estate Inc., General Partner of Birtcher Limited

By: _____
Arthur B. Birtcher
Co-chairman, BREICORP.

By: _____
Ronald E. Birtcher
Co-chairman, BREICORP.

By: _____
Robert M. Anderson
Executive Director, BREICORP.

By: LF SPECIAL FUND I, L.P.,
a California limited partnership
General Partner of
Birtcher/Liquidity Properties

By: LIQUIDITY FUND ASSET MANAGEMENT, INC.,
a California corporation
General Partner of LF Special Fund I, L.P.

By: _____
Richard G. Wollack,
Chairman, Liquidity Fund Asset Management, Inc.

By: _____
Brent R. Donaldson,
President, Liquidity Fund Asset Management, Inc.

Plaintiff's Opposition to the Motion to Dismiss, Ex. 10.

executes an agreement in his representative capacity does not become liable as a party for any breach of that agreement.[40] Because the Moving Defendants are not parties to the Consent Solicitations, they cannot be held liable for any breach of the Consent Solicitations as a matter of contract.[41] Thus, the plaintiff has failed to state a breach of contract claim against the Moving Defendants.

2. Breach of Fiduciary Duty.

BLP and DBP, the non-moving General Partners of the Nominal Defendants, without question have fiduciary duties to the Partnerships and their Limited Partners. The Moving Defendants, however, assert that they are not in a fiduciary relationship with the Partnerships or with the Limited Partners and, thus, do not owe fiduciary duties to either the Partnership or the limited partners. While mere ownership – either direct or indirect – of the general partner does not result in the establishment of a fiduciary relationship, those affiliates of a general partner who exercise control over the partnership's property may find themselves owing fiduciary duties to

[40] *See Beal Bank, SSB v. Lucks,* Del. Ch., C.A. No. 14896, mem. op. at 12, Lamb, V.C. (Sept. 14, 2000).

[41] *Wallace.* v. *Wood,* Del. Ch., 752 A.2d 1175, 1180 (1999) ("It is a general principle of contract law that only a party to a contract may be sued for breach of that contract."). I note that the plaintiff has not sought to allege a tortious interference with contract claim. I also note that the plaintiff points out that some of the Moving Defendants signed the Partnership Agreements, but, again, the executions were in their representative capacities.

both the partnership and its limited partners.[42] Plaintiff, in its Amended Complaint, has repeatedly lumped the many defendants together for purposes of alleging the existence of fiduciary duties and the breach of those duties. While it seems unlikely that the Amended Complaint will ever be cited as a model of clarity, it does allege that Moving Defendants, in addition to BLP and DBP, have controlled the day-to-day operations and affairs of the Partnerships. Plaintiff alleges, with specific potential transactions as examples, a long-term course of conduct by the Moving Defendants with the purpose of deterring a sale of the Partnerships' properties in order that DBP, BLP and the Moving Defendants might continue to receive fees. Defendants are generally said to have used their control of the affairs of the Partnerships to receive unearned disposition fees, management contracts, and "equity kickers" from the eventual purchasers of the Partnerships' properties.

The Moving Defendants challenge plaintiffs assertion that they control the property of the Partnerships. First, they point to the joint and equal ownership of the General Partners by the Liquidity defendants and by

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I have considered the Partnership Agreements and the Consent Solicitations on these Motions to Dismiss because all parties invited such a review.

[42] *Wallace v. Wood, 752* A.2d at 1180-82. *In Wallace,* a motion to dismiss was denied where "[p]laintiffs repeatedly, in detail, and in a nonconclusory manner allege[d] defendants personally caused the Limited Partnership to enter into self-interested transactions adverse to the interests of the Limited Partners." *Id.* at 1181.

the Birtcher defendants. If, for example, the Liquidity defendants only own a 50% stake in the general partner, can they be said to control the partnership property? Perhaps the Liquidity defendants do not, in fact, control the Partnerships and their properties, but, for purposes of a motion to dismiss, I must accept the allegation that the Moving Defendants together are able to exercise such control, and did exercise such control, for their benefit and to the detriment of the Limited Partners. Second, the Liquidity defendants recite plaintiffs allegation that the Liquidity defendants' interests are "non-managing."[43] This allegation, the Liquidity defendants argue, is inconsistent with and refutes the allegation that they exercised or were able to exercise the control necessary in order to be charged with fiduciary duties running to the Limited Partners. The Court, however, must construe the allegations of the Amended Complaint by making all reasonable inferences for the plaintiffs benefit. Under that standard, I cannot read the one passing reference to "non-managing" as overcoming the prior allegations of control because, for example, non-managing may simply refer to the routine real estate management details as opposed to the more significant, at least for

[43] Amended Complaint ¶ 69.

purposes of the pending motions, decisions regarding broader business issues.[44]

In sum, under the relatively lenient standard with which the sufficiency of complaints is evaluated, the control and self-dealing allegations in the Amended Complaint satisfy the standards set forth in *Wallace* v. *Wood* for imposing potential fiduciary liability on affiliates of the General Partners. The Amended Complaint, notwithstanding its multiple limitations, may be fairly read to allege that (i) Moving Defendants controlled the general partners and, thus, the Partnerships' properties; and (ii) the Moving Defendants engaged in self-interested dealings for their benefit at the expense of the Limited Partners. Accordingly, the Moving Defendants' motion to dismiss the Amended Complaint for failure to state a claim is denied.[45]

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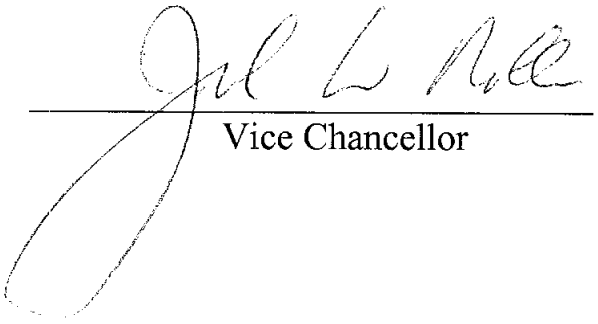
[44] While most of plaintiff's allegations regarding the conduct of the Moving Defendants tend to lump all of them together, it should be noted that plaintiff did make specific allegations with respect to Birtcher Properties. Perhaps it is coincidental that Birtcher Properties is not in the chain of ownership leading from the individual defendants down to the General Partners. In short, the Amended Complaint alleges that Birtcher Properties benefited from the alleged breach of fiduciary duties by receiving property management fees and by the other Moving Defendants' insistence that Birtcher Properties be retained to manage the properties even after a sale.

[45] The plaintiff has suggested an interest in amending its Amended Complaint to add an "aiding and abetting" claim. Plaintiff's Opposition to the Motions to Dismiss, at 21 n. 18. If plaintiff seeks to amend its Amended Complaint, it should file a motion under Court of Chancery Rule 15.

IV. CONCLUSION

For the foregoing reasons, the Moving Defendants' motions to dismiss as to plaintiffs breach of contract claim (Count II of the Complaint) are granted. Otherwise, the Moving Defendants' motions to dismiss are denied.

IT IS SO ORDERED.



Vice Chancellor