

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DAVID C. FANNIN AND LUCILLE S.)
FANNIN AS CO-TRUSTEES OF THE DAVID)
C. FANNIN REVOCABLE TRUST DATED)
AUGUST 3, 1995 AND THE LUCILLE)
STEWART FANNIN REVOCABLE TRUST)
DATED AUGUST 3, 1995,)

Plaintiffs,)

v.)

C.A. No. 12541-VCF)

UMTH LAND DEVELOPMENT, L.P., UMT)
SERVICES, INC., UMT HOLDINGS, L.P.,)
UMTH GENERAL SERVICES, L.P., UNITED)
MORTGAGE TRUST, UNITED)
DEVELOPMENT FUNDING, L.P., UNITED)
DEVELOPMENT FUNDING IV, UNITED)
DEVELOPMENT FUNDING X, L.P., TODD)
F. ETTER, HOLLIS M. GREENLAW,)
MICHAEL K. WILSON, BEN L. WISSINK,)
CARA D. OBERT, AND MELISSA H.)
YOUNGBLOOD,)

Defendants,)

and)

UNITED DEVELOPMENT FUNDING III,)
L.P.,)

Nominal Defendant.)

ORDER

WHEREAS:

A. On July 7, 2016, Plaintiffs filed their original Verified Derivative and Class Action Complaint for Breach of Fiduciary Duties asserting claims arising from real estate development loans made by United Development Funding, III, L.P. (“UDF III” or the “Partnership”);¹

B. On January 16, 2018, the Court granted Defendants’ motion to stay this action in favor of prior-filed actions in the United States District Court for the Northern District of Texas (the “Texas Actions”);

C. Following resolution of the Texas Actions, the Court entered a stipulation and order lifting the stay;

D. On April 29, 2019, Plaintiffs filed their Verified Second Amended and Supplemental Derivative and Class Action Complaint (the “Complaint”). The Complaint alleges claims on behalf of nominal defendant UDF III and its limited partners against: (1) UMTH Land Development, L.P. (“UMTH LD” or the “General Partner”), which is the general partner of UDF III; (2) UMT Services, Inc. (“UMT Services”), which is the general partner of the General Partner; (3) certain entities affiliated with the General Partner; and (4) six individual defendants who are alleged

¹ Unless noted otherwise, capitalized terms are as defined in the Court’s July 31, 2020 Memorandum Opinion. *Fannin v. UMTH Land Development L.P.*, 2020 WL 4384230 (Del. Ch. July 31, 2020). A corrected opinion with non-substantive changes has been filed contemporaneously with this Order.

to “control and ultimately own” the General Partner: Todd F. Etter, Hollis M. Greenlaw, Michael K. Wilson, Ben L. Wissink, Cara D. Obert, and Melissa H. Youngblood (collectively, the “Individual Defendants”). The Complaint alleges that the General Partner, UMT Services, and the Individual Defendants owed and breached their fiduciary duties to the Partnership and its limited partners. Plaintiffs also allege that affiliates of the General Partner aided and abetted the breaches of fiduciary duty alleged in the Complaint and were unjustly enriched;

E. On June 28, 2019, Defendants filed two separate motions to dismiss the Complaint.² The Individual Defendants’ motion sought dismissal on the basis that they do not owe fiduciary duties to UDF III or its limited partners. The Individual Defendants urged the Court to reject this Court’s precedent of *In re USACafes, L.P. Litig.*, 600 A.2d 43 (Del. Ch.), *appeal refused sub nom. Wyly v. Mazzafo*, 602 A.2d 1082 (Del. 1991), and its progeny, which hold that the persons who ultimately control a corporate general partner owe fiduciary duties to the limited partnership and its limited partners.³ UMT Services, the general partner of the General Partner, however, did not argue that it did not owe fiduciary duties to UDF III or its Limited Partners;⁴

² Dkts. 124 & 125.

³ *See* Individual Defs.’ Opening Br. 8-30 (arguing that *USACafes* was “wrongly decided”).

⁴ Entity Defs.’ Reply Br. 42 (“The UDF Entity Defendants do not contend that UMTH LD and UMTS do not owe fiduciary duties to UDF III or its Limited Partners.”).

F. On July 31, 2020, the Court issued a Memorandum Opinion (the “Opinion”) granting in part and denying in part Defendants’ motions to dismiss the Complaint. The Opinion adhered to *USACafes* and the cases that have followed it as *stare decisis*.⁵ The Opinion concluded that the Complaint stated a claim that defendants Etter, Greenlaw, Wilson, and Wissink (collectively, the “Appealing Defendants”) breached their fiduciary duties to the Partnership and its limited partners, but concluded the Complaint did not state a claim that defendants Obert and Youngblood owed fiduciary duties to the Partnership or its limited partners;

G. On August 10, 2020, the Appealing Defendants filed a Motion for Certification of Interlocutory Appeal (the “Motion”).⁶ The Motion seeks certification of an interlocutory appeal limited to the issue of whether the Appealing Defendants owe fiduciary duties to the partnership and its limited partners;⁷

H. The Appealing Defendants argue that the portion of the Opinion that followed *USACafes* as *stare decisis* “decide[d] a substantial issue of material importance that merits appellate review before a final judgment.”⁸ The Appealing Defendants contend that the interlocutory order satisfies three of the eight factors in Delaware Supreme Court Rule 42(b)(iii) that must be considered on a motion to

⁵ Op. 48-52.

⁶ Dkt. 144.

⁷ Mot. ¶ 5.

⁸ *Id.* ¶¶ 6-7.

certify an interlocutory appeal: “(i) whether the interlocutory order involves a question of law resolved for the first time in Delaware; (ii) whether the decisions of the trial courts are conflicting upon the question of law, and (iii) whether review of the interlocutory order may serve considerations of justice”;⁹

I. On August 20, 2020, Plaintiffs filed an opposition to the Motion. Plaintiffs argue there are no exceptional circumstances warranting certification of interlocutory review where the Court has not made a final determination on the merits of Plaintiffs’ claims, and the Court conducted a “straightforward application of *USACafes*’ well-settled principles.”¹⁰ Plaintiffs also argue that the criteria in Supreme Court Rule 42(b)(iii) are not met;¹¹

NOW, THEREFORE, the Court having considered the Motion, Plaintiffs’ opposition, and the criteria set forth in Supreme Court Rule 42, IT IS HEREBY ORDERED, this 28th day of August, 2020, as follows:

1. Supreme Court Rule 42(b)(i) provides that “[n]o interlocutory appeal will be certified by the trial court or accepted by [the Delaware Supreme] Court unless the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment.” Supr. Ct. R. 42(b)(i). “Interlocutory appeals should be exceptional, not routine, because they disrupt the

⁹ *Id.* ¶ 6. The non-appealing Defendants do not oppose the Motion. Dkt. 146.

¹⁰ Pls.’ Opposition ¶¶ 7-9.

¹¹ *Id.* § B.

normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources.” Supr. Ct. R. 42(b)(ii). After a careful consideration of the record before this Court, I am satisfied that the Opinion does not decide a substantial issue of material importance that merits appellate review before a final judgment.

2. The Opinion does not decide a substantial issue that relates to the merits of the case.¹² The Opinion merely decided, applying the liberal standard of Court of Chancery Rule 12(b)(6), that the Complaint stated a claim against the Appealing Defendants for breach of fiduciary duty. The Delaware Supreme Court has concluded that interlocutory review is not warranted if “no final determination [is] being made on the merits of plaintiff’s claims, but only that plaintiff would be afforded the right to pursue discovery related to the allegations of the complaint.”¹³

3. The centerpiece of Appealing Defendants’ argument is that an interlocutory appeal would afford the Delaware Supreme Court “its first opportunity to issue guidance on the holding in *USACafes*.”¹⁴ In fact, however, the Delaware Supreme Court has been presented with at least two prior opportunities to review the

¹² A substantial issue of material importance is one that “relate[s] to the merits of the case.” *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973).

¹³ *Fuqua Indus., Inc. v. Lewis*, 504 A.2d 571 (Del. 1986) (TABLE) (refusing interlocutory appeal); *see also Musk v. Arkansas Teacher Ret. Sys.*, 184 A.3d 1292 (Del. 2018) (refusing interlocutory appeal where the trial court denied a motion to dismiss and held that the plaintiff met its pleading stage burden supporting a reasonable inference that a CEO was a controlling stockholder while acknowledging that discovery might prove otherwise).

¹⁴ Mot. ¶ 19.

holding in *USACafes* on an interlocutory basis. First, in *USACafes*, the individual defendants sought interlocutory review on the issue of “[w]hether directors of a corporate general partner may be said to owe fiduciary obligations to the limited partnership (or its limited partners) whose management is subject to their indirect control.” *Wyly v. Mazzafo*, 602 A.2d 1082 (Del. 1991) (TABLE). The Delaware Supreme Court refused the interlocutory appeal, concluding that “review of the interlocutory order will not serve considerations of justice, will not terminate the litigation, will delay adjudication of the merits and will fragment the case and result in piecemeal appeals.” *Id.* Twenty-four years later, the Delaware Supreme Court was presented another opportunity to review *USACafes* in *Renco Group, Inc. v. MacAndrews AMG Holdings LLC*, 2015 WL 1830476 (Del. Ch. Apr. 20, 2015) (declining to certify interlocutory appeal), *appeal refused*, 113 A.3d 1081 (Del. 2015) (TABLE). In *Renco*, the plaintiff sought an interlocutory appeal, arguing: “The Delaware Supreme Court should be given the opportunity to review the scope and application of *USACafes* in the context of a LLC agreement that preserves controller liability for breach of fiduciary duties.” Pl.’s Appl. for Certification of Interlocutory Appeal, *Renco Gp., Inc. v. MacAndrews AMG Holdings LLC*, C.A. No. 7668-VCN (Dkt. 281). In denying interlocutory review, the Delaware Supreme Court noted that interlocutory review would not resolve the litigation. *Renco Gp., Inc. v. MacAndrews AMG Holdings LLC*, 113 A.3d 1081 (Del. 2015) (TABLE).

4. Under Supreme Court Rule 42(b)(iii), the Court considers the following eight factors in determining whether to certify an interlocutory appeal:

(A) The interlocutory order involves a question of law resolved for the first time in this State; (B) The decisions of the trial courts are conflicting upon the question of law; (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order; (D) The interlocutory order has sustained the controverted jurisdiction of the trial court; (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; (F) The interlocutory order has vacated or opened a judgment of the trial court; (G) Review of the interlocutory order may terminate the litigation; or (H) Review of the interlocutory order may serve considerations of justice.

Supr. Ct. R. 42(b)(iii). After considering the factors articulated in Supreme Court Rule 42(b)(iii) and making its “own assessment of the most efficient and just schedule to resolve the case,” the Court “should identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interests of justice. If the balance is uncertain, the trial court should refuse to certify the interlocutory appeal.” *Id.*

5. The Appealing Defendants assert that the interlocutory Opinion satisfies three of the factors listed under Supreme Court Rule 42(b)(iii): “(i) whether the interlocutory order involves a question of law resolved for the first time in Delaware; (ii) whether the decisions of the trial courts are conflicting upon the

question of law, and (iii) whether review of the interlocutory order may serve considerations of justice.”¹⁵ The Appealing Defendants concede that none of the other five factors supports certification of an interlocutory appeal.

6. First, the Opinion does not “involve[] a question of law resolved for the first time in this State.” Supr. Ct. R. 42(b)(iii)(A). The Appealing Defendants’ argument as to this factor conflates the Opinion and *USACafes*. Although the Delaware Supreme Court has not addressed the holding in *USACafes*, the Opinion did not resolve this question of law “for the first time.” The Opinion followed *USACafes* and its progeny as *stare decisis*. *Contra In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, 2018 WL 3599809, *2 (Del. Ch. July 26, 2018) (granting certification where “[t]his precise question has not been directly addressed by prior case law”).

7. Second, the decisions of the trial courts are not conflicting on the issue of whether persons who control a corporate general partner can owe fiduciary duties to a limited partnership or the limited partners. “[T]his Court has followed *USACafes* consistently[.]” *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 671 (Del. Ch. 2012). The Appealing Defendants have not cited any opinion of this Court declining to follow *USACafes*, and the Opinion does not present one.

8. The Appealing Defendants argue that there is a conflict between the

¹⁵ Mot. ¶ 6.

doctrine of *USACafes* and Delaware law regarding the separate legal identities of corporate and alternative business entities in other contexts.¹⁶ The Appealing Defendants cite to prior opinions of this Court that noted the tensions created by *USACafes* and the principles of corporate separateness.¹⁷ But the cases that commented on *USACafes* ultimately followed the precedent set by that decision. *E.g.*, *Paige Capital*, 2011 WL 3505355 at * 30 (holding a managing member of a general partner owed fiduciary duties to the limited partnership and its limited partners because “[*USACafes*] and its progeny have established that a director, member, or officer of a corporate entity serving as the general partner of a limited partnership . . . who exercises control over the partnership’s property owes fiduciary duties directly to the partnership and its limited partners”); *Feeley*, 62 A.3d at 670 (observing that the controller of the general partner can be potentially held liable for breach of fiduciary duty because “in this Court, and for purposes of this decision, *USACafes* and its progeny are *stare decisis*.”). For purposes of Supreme Court Rule

¹⁶ Mot. ¶¶ 10-17.

¹⁷ *See, e.g., id.* ¶ 14 (citing *Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 2011 WL 3505355 (Del. Ch. Aug. 8, 2011)); *id.* ¶ 15 (citing *Feeley*, 2012 WL 966944).

42(b)(iii), the Opinion creates no conflict among the decisions of the trial courts.¹⁸

9. The Appealing Defendants argue that “[t]he conflict between the holding of *USACafes* (and the Opinion) and Delaware law is clear when looking at the analogous context of demand futility” because Delaware statutory law requires “plaintiffs to make a demand upon the general partner and does not provide or permit an alternative analysis where the general partner is an entity.”¹⁹ The Opinion is not in conflict with other decisions of this Court as to application of the demand futility analysis. The Appealing Defendants argued to this Court that demand futility must be assessed solely from the perspective of the general partner. The Opinion did just that, and determined that there was reasonable doubt as to the General Partner’s independence and disinterestedness in considering a demand.²⁰ The Opinion expressly noted that “the Court is not determining demand futility based upon the independence or disinterestedness of the humans that ultimately control [the General Partner].”²¹ Accordingly, the Opinion does not conflict with any decision addressing

¹⁸ The Motion’s reliance on *Shaev v. Wyly*, 1998 WL 155540 (Del. Ch. Mar. 26, 1998), is misplaced. Mot. ¶ 7. In *Shaev*, then-Vice Chancellor Steele held that the Supreme Court should have an opportunity to review his interpretation of a recent Supreme Court decision in *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171 (Del. 1988), because his decision “arguably is in conflict with an earlier decision of this Court.” *Shaev*, 1998 WL 155540, at *1. The Opinion does not conflict with other decisions of this Court, and unlike in *Shaev*, an interlocutory review here would not potentially terminate the litigation. *Id.*

¹⁹ Mot. ¶ 2.

²⁰ Op. 79-90.

²¹ *Id.* 87.

demand futility.²²

10. Third, an interlocutory appeal of the Opinion would not serve considerations of justice. The issues raised in the Complaint as to the non-appealing parties will be essentially the same even if the Delaware Supreme Court reverses this Court on the issue of whether the Appealing Defendants owe fiduciary duties to the Partnership and its limited partners. Those remaining issues, including whether the General Partner and its general partner breached their fiduciary duties, will require the same discovery, regardless of whether the Appealing Defendants are successful on appeal. The Appealing Defendants are directors and/or officers of the general partner of the General Partner, and three of the Appealing Defendants constitute a

²² The Motion suggests that a plaintiff may never satisfy demand futility by alleging facts that create reason to doubt whether the persons who control a corporate general partner were disinterested and independent. Mot. ¶ 12. But this Court has considered demand futility from the perspective of the board of the corporate general partner. *See, e.g., DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *18 (Del. Ch. Sept. 30, 2013) (holding demand should be directed to the board of the general partner because the board was elected by the limited partners and owed fiduciary duties to the limited partners); *Brinckerhoff v. Enbridge Energy Co.*, 2011 WL 4599654, at *7 (Del. Ch. Sept. 30, 2011) (finding demand excused as to both the general partner and the general partner's board), *aff'd*, 67 A.3d 369 (Del. 2013). In the two decisions cited in the Motion, it was the *defendants* who argued that demand should be considered solely from the perspective of the humans that govern the corporate general partner, not the general partner itself. *See, e.g., Gerber v. EPE Holdings, LLC*, 2013 WL 209658 at *13 (Del. Ch. Jan. 18, 2013) (holding demand was futile as to the general partner and rejecting defendants' argument that demand should not be excused because its board was disinterested and independent); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 1998 WL 832631, at *5 (Del. Ch. Nov. 10, 1998) (rejecting defendants' "argument that a limited partner challenging a corporate general partner's acts must make pre suit demand to the corporate general partner's board of directors").

committee that makes all investment decisions for the limited partnership, including those that are the subject of the claims in this case.²³ Therefore, the Appealing Defendants are nearly certain to be subjects of discovery, regardless of whether they remain as defendants. To allow this case to proceed to final judgment presents the possibility that the Appealing Defendants will prevail on the merits, and the issues presented for interlocutory review might be avoided as moot. An interlocutory appeal in this instance will not substantially narrow the issues of this litigation and will delay final adjudication of the merits. For this reason, the Appealing Defendants' reliance on Vice Chancellor Glasscock's certification in *Straight Path Communications* is misplaced.²⁴ *Straight Path Commc'ns*, 2018 WL 3599809, at *1 (“[I]f my decision on the Motions to Dismiss were reversed, the matter would be at an end. An interlocutory appeal, therefore, might avoid the necessity for discovery and trial, the expense and effort of which would be wasted if a reversal came only upon final review on appeal.”).

11. The five other factors in Supreme Court Rule 42(b)(iii) do not support an interlocutory appeal. The question of law presented does not relate to the constitutionality, construction, or application of a statute of this State. The Opinion has not sustained the controverted jurisdiction of the trial court. The Opinion has

²³ Op. 8-9.

²⁴ Mot. ¶ 18.

not reversed or set aside a prior decision. The Opinion has not vacated or opened a judgment, and review of the Opinion will not terminate the litigation. *See* Supr. Ct. R. 42(b)(iii)(C)-(G).

12. Based upon careful consideration of the factors identified in Supreme Court Rule 42(b)(iii), the most efficient and just schedule to resolve this case is to proceed with fact discovery and adjudication of the merits. The likely benefits of interlocutory review do not outweigh the probable costs, such that interlocutory review is in the interests of justice.

13. For the foregoing reasons, the Court concludes that the Opinion did not decide an issue of material importance that merits appellate review before a final judgment. Therefore, certification of an interlocutory appeal is not appropriate under Supreme Court Rule 42, and the Appealing Defendants' Motion is **DENIED**.

/s/ Paul A. Fioravanti, Jr.
Vice Chancellor