IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ALAN WURTZEL, INDIVIDUALLY	:	COMMERCE PROGRAM
AND ON BEHALF OF THOSE	:	JUNE TERM 2001
SIMILARLY SITUATED	:	
v.	:	
	:	No. 3511
PARK TOWNE PLACE ASSOCIATES	:	Control No. 90648
LIMITED PARTNERSHIP, et al.	:	

OPINION

I. Introduction

Alan Wurtzel has initiated a class action on behalf of himself and all limited partners of the defendant Park Towne Place Associates Limited Partnership ("Partnership") as of May 29,2001. In addition to the partnership, Wurtzel has named two other defendants: the sole general partner of the Partnership, PTP Properties, Inc. ("PTP") and its affiliate, AIMCO Properties L.P. ("AIMCO").[1]

The proposed class is specifically framed as to those individuals who were limited partners in the defendant partnership as of May 29, 2001. This date is significant: it falls after a series of three tender offers that Wurtzel alleges was part of a deceptive plan by the defendants to make below market tender offers to acquire enough interests to increase management fees and to effectuate a merger that would "freeze-out" non-selling limited partners at a price below market value. Amended Complaint, ¶ 21. Although the limited partnership units had initially been sold for either $75,000 or $100,000, defendants' first tender offer to plaintiff and the class of limited

[1] Amended Complaint, ¶¶ 1-5 & 20.

partners in March 1999 was $8,208 per unit. Amended Complaint, ¶¶ 16 & 23. In explaining why he rejected this offer, Wurtzel testified at the certification hearing that "[t]he first one, $8,000 for a $100,000 investment, I thought was insulting and not worthy of serious consideration."[2] This first tender offer, according to plaintiff, did not reveal that the defendants intended to increase the tender offer price in a very short period of time first to $48,533 per unit in May 2000 and then to $66,788 per unit in February 2001. These offers, Wurtzel alleges, were in breach of the partnership agreement, the fiduciary duty it imposed and were inherently fraudulent. Not only did the defendants state that each of the tender offers presented a price that was fair, but they also stated there was no intention to raise the fee structure for the general partner and manager. As of January 2000, however, management fees were increased from 3% to 5% resulting in nearly $1,000,000 in annual increased fees.[3] Thereafter, the defendants proposed a merger on May 29, 2001 that this court enjoined due to the defendant PTP's misrepresentation that a vote by the remaining limited partners was unnecessary.

These facts frame the contours of the proposed class action. To determine whether it should be certified, however, the facts must be analyzed in terms of the relevant rules and precedent to see if the procedural prerequisites are satisfied so that this action can serve as a "procedural device designed to promote efficiency and fairness in handling large numbers of similar claims."[4] For the reasons set forth below, plaintiff's claims for Breach of Partnership

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[2] 5/8/2002 N.T. at 21.

[3] Amended Complaint, ¶¶ 23-31.

[4] Janicik v. Prudential Insurance Co., 305 Pa. Super. 120, 141, 451 A.2d 451, 461 (1982) (citation omitted).

Agreement, Breach of Fiduciary and Common Law Fraud are certified as a class action.

II. Findings of Fact

The Parties

1. In 1986 Plaintiff Alan Wurtzel purchased a limited partnership interest in defendant Park Towne Place Associates Limited Partnership ("Partnership"). Amended Complaint, ¶ 1; Answer to Amended Complaint,¶ 1.

2. The Defendant Partnership is a Delaware limited partnership formed in 1985. It owns Park Towne Place, consisting of 980 rental apartments located on the Benjamin Franklin Parkway in Philadelphia, Pennsylvania (the "property"). It registered to do business in the Commonwealth on or around November 21, 1985. Amended Complaint, ¶ 3; Answer to Amended Complaint,¶ 3.

3. The Defendant Partnership sold 380 limited partnership units to investor limited partners for $75,000 to $100,000 per unit. Plaintiff Alan Wurtzel purchased his unit for $100,000. Complaint,¶ 16; Amended Complaint,¶ 16; Answer to Amended Complaint, ¶16.

4. Defendant PTP Properties, Inc. ("PTP"), a corporation organized under Delaware law, is the sole general partner of the Partnership. It is an affiliate of defendant AIMCO. In September 1996, PTP registered to do business in Pennsylvania. Amended Complaint, ¶ 4; Answer to Amended Complaint, ¶ 4.

5. Defendant AIMCO is a Delaware limited partnership that has been registered to do business in Pennsylvania since June 1995. AIMCO gained control of PTP, the general partner of the Partnership. AIMCO also controls the company that manages the property. Amended Complaint,¶ 4 & 20; Answer to Amended Complaint, ¶ 4 & 20.

The Partnership Agreement

6. In 1986, the Partnership's initial general partner and limited partner entered into the Amended and Restated Limited Partnership Agreement ("1986 Partnership Agreement") that is a focal point of Wurtzel's class action. Amended Complaint, ¶ 15. A copy of this 1986 Partnership Agreement is attached as Exhibit 1 to the original Complaint.

7. The 1986 Partnership Agreement provides that the general partner "shall at all times act in a fiduciary manner toward the Partnership and the Limited Partners." Amended Complaint, ¶ 18(a)(citing 1986 Partnership Agreement § 5.2).

8. The 1986 Partnership Agreement provides that "the rights of the Partners. . . .as among themselves. . . .shall be governed by the terms of this Agreement." Complaint, ¶ 18(d) (citing 1986 Partnership Agreement, § 11.14).

9. There is a choice of law provision in the 1986 Partnership Agreement which provides that the "Agreement shall be construed and enforced in accordance with the laws of Delaware." 1986 Partnership Agreement, §11.6.

10. In 1996, the Partnership Agreement was amended to require consent by 66 2/3% of the limited partnership units to any action by the general partner to a merger. Amended Complaint, ¶ 19.

The Tender Offers and the Proposed Merger of May 29, 2001

11. In March 1999, AIMCO made an offer to purchase the limited partners' units for $8,208.Amended Complaint, ¶ 23; Answer to Amended Complaint, ¶ 23.

12. On May 2000, AIMCO offered to purchase the units of the limited partners for $48,533 per unit. AIMCO tendered another offer in February 2001, but this time it raised its offer to $66,788 per unit. Amended Complaint, ¶ 24; Wurtzel v. Park Towne Place Apartments

Ltd. 2001 WL 1807405 (Phila. Com. Pleas 2001)(Findings of Fact 12 & 13).

13. Plaintiff alleges that in each of these 3 tender offers, AIMCO stated that it and the general partner both regarded the price as fair. Amended Complaint, ¶ 25 (citing Complaint, Exs. 3, 4, 5). In none of these tender offers, plaintiff alleges, did defendants reveal their "intention to increase the tender price in future transactions over a short period of time." Amended Complaint, ¶ 29(d).

14. As a result of these 3 tender offers, plaintiff alleges that AIMCO acquired approximately 58.14% of all limited partnership units in the Partnership. Amended Complaint, ¶¶ 21-24, 31.

15. By a May 29, 2001 Letter and Information Statement, the defendant Partnership informed all the limited partners that effective June 29, 2001 the Partnership and a wholly owned subsidiary of defendant AIMCO would merge. The defendant Partnership told the limited partners that no majority vote was needed to approve the merger because AIMCO owned a majority of the interests in the partnership. The limited partners were notified that they could accept either $81,422 or 1776 partnership common units of AIMCO. "Contractual appraisal rights" were offered to limited partners, but these rights would have to be pursued individually in separate litigation. Amended Complaint, ¶ 32.

16. According to Plaintiff, the price of $81,422 did not represent a fair market value but had been calculated at liquidation value. The price was thus calculated on the assumption that the seller was under an extreme compulsion to sell. Amended Complaint, ¶¶ 34.

17. Plaintiff alleges that with this proposed merger, defendants violated their fiduciary duty set forth in the 1986 Partnership Agreement and were attempting to "freeze out" the limited partners. Amended Complaint, ¶ 36.

Plaintiff's Proposed Class Action

18. Wurtzel responded to this proposed merger by filing a class action complaint against the defendants on June 28, 2001. Wurtzel filed the complaint on behalf of himself and those 194 limited partners of the Partnership as of May 29, 2001. Complaint, ¶¶ 2 & 9.

19. The class action complaint consisted of four counts: Breach of Fiduciary Duty, a Derivative Action against PTP and AIMCO for Breach of Fiduciary Duty, Breach of Partnership Agreement and Common Law Fraud.

20. Plaintiff sought, inter alia, to enjoin the merger preliminarily, to enjoin the defendants from paying less than fair value for the units, to impose a constructive trust as well as monetary damages. Complaint,¶¶ 52; 56; 59; 64.

21. This court granted a Temporary Restraining Order on June 28, 2001.

22. Plaintiff alleges that after the entry of this TRO, the defendants falsely advised at least one limited partner that the "merger became effective June 29, 2001." Plaintiff further alleges that prior to June 28, 2001, some limited partners decided to accept the proposed consideration for their units and some of these were allegedly paid after the entry of the TRO. Amended Complaint, ¶¶ 40 & 43.

23 By order and opinion dated September 11, 2001, this court granted plaintiff's petition for a preliminary injunction because the proposed merger of the partnership without obtaining the consent of two thirds of the partnership interests violated amended section 5.8 of the Partnership Agreement by depriving the limited partners of their right to vote on the merger. Wurtzel v. Park Towne Place Apartments Ltd., 2001 WL 1807405 at *3 (Phila. Com. Pleas 2001).

24. This court concluded that Wurtzel had a clear right to relief on his claim that PTP

breached its fiduciary duty to the limited partners by misrepresenting that the merger could take place with the consent of only AIMCO and PTP. Wurtzel v. Park Towne Place Apartments, 2001 WL 1807405 at *5 (Phila. Com. Pleas 2001).

25. Based on these conclusions, this court issued an order preliminarily enjoining the defendants from:

(a) purchasing limited partnership units from the limited partners of defendant Park Towne Place Associates Limited Partnership; and

(b) undertaking the announced merger of defendant Park Towne Place Associates Limited Partnership with Park Towne Place Transitory Company, LLC, Wurtzel v. Park Towne Place Apartments, 2001 WL 1807405 (Phila. Com. Pleas 2001)(Order).

26. Plaintiffs filed a Motion for Class Certification on September 21, 2001. Defendants filed a response arguing that Counts I, III and IV of the Complaint should be dismissed, because, inter alia, defendants had decided to abandon the May 29, 2002 merger based on this court's conclusion that § 5.8 of the 1986 Partnership Agreement requires that 2/3 of the limited partners approve any merger. Defendants' 10/15/2001 Response, ¶ 7.

27. The defendants subsequently filed a motion seeking clarification of the September 11, 2001 order. On October 10, 2001, this court issued an order clarifying that the limitations imposed on the purchase of limited partnership units related solely to transactions in furtherance of the May 29, 2001 proposed merger. It thus ordered:

> 2. The defendants are preliminary enjoined from purchasing limited partnership units from the limited partners of defendant Park Towne Place Associates Limited Partnership in furtherance of the announced merger of the defendant Park Towne Place Associates Limited Partnership with Park Towne Place Transitory Company, LLC. Wurtzel v. Park Towne Place Associates, June 2001, No. 3511 (10/10/2001 order).

28. Plaintiff opposed defendant's motion for clarification and filed a cross motion concerning

communication with the putative class members. Oral arguments were scheduled on plaintiff's motion, but Wurtzel withdrew the motion.

The November 2, 2001 Tender Offer

29. On November 15, 2001, Plaintiff filed a Petition for a Preliminary Injunction to enjoin a tender offer dated November 2, 2001 that was addressed to the limited partners of the Partnership. The plaintiff asserted, inter alia, that the tender offer was misleading, coercive and deceptive. More specifically, he focused on the alleged deficiencies and misrepresentations of the Private Placement Memorandum ("PPM"). See Plaintiff's 11/15/2001 Petition, Memorandum at 1-2, 12-26.

30. After considering plaintiff's arguments and the relevant documentation, this court by order dated December 4, 2001 denied the Petition to Enjoin the November 2, 2002 tender offer.

31. In a subsequently issued opinion, this court explained that "on the preliminary record presented, Wurtzel failed to establish a clear right to relief because he has not shown that the defendants in the Tender Offer/Private Placement Memorandum breached their fiduciary duty to disclose all facts material to the offer in an atmosphere of complete candor." Wurtzel v. Park Towne Place Assoc. Ltd., 2002 WL 373041 at *17 (Phila. Com. Pleas 2002).

32. The parties disputed the number of limited partners who tendered their interests in response to the November 2001 tender offer. By letter dated September 13, 2002, however, defense counsel admitted that the May 6, 2002 affidavit by Dora Chi, Vice President of AIMCO, had been in error when she stated that 102 limited partners had responded to the November 2001 tender offer. In fact, only 49 limited partners responded to the November 2001 offer and 56 limited partners had responded to the May 29, 2001 Merger Proposal. See 10/9/2002 Stipulation with 9/13/2002 letter from defense counsel and 9/11/2002 Affidavit by Dora Chi. Alan Wurtzel did not respond to the November 2001 tender offer.

Plaintiff's Amended Class Action Complaint

33. On October 25, 2001 plaintiff filed a motion to file an amended complaint, which was granted on December 14, 2001. Pursuant to that order, the amended complaint attached to the motion was deemed filed. Defendants filed an Answer on January 15, 2002.

34. The Amended Complaint, like the first Complaint, seeks to represent a class of 194 limited partners as of May 29, 2001. The proposed class did not include the defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the defendants. Amended Complaint, ¶ 2.

35. The Amended Complaint alleges that AIMCO had devised a business scheme of purchasing general partnerships positions in real estate limited partnerships and then violated its fiduciary duty by making below market tender offers to raise management fees and eventually to force freeze-out mergers when enough units were obtained. Amended Complaint,¶ 21.

36. As part of this alleged scheme, plaintiff alleges that AIMCO in March 1999 began the series of three tender offers to purchase plaintiff's and other limited partners' units, representing that AIMCO and the general partner regarded the offered price as fair. The consideration offered for the first tender offer was $8,208. Amended Complaint ¶¶ 23-25.

37. Plaintiff alleges that in each of these 3 tender offers, AIMCO also misrepresented that it had no intention of pursuing a merger when as early as 2000 it had planned a freeze-out merger. Amended complaint, ¶ 26.

38. A consequence of these tender offers, plaintiff alleges, was a $1,000,000 increase in the annual fees paid to AIMCO's affiliates in 2000. Amended Complaint, ¶ 28.

39. According to Plaintiff, another result of these three tender offers was that AIMCO acquired 58.14 percent of all limited partnership interests. This harmed not only those limited partners who tendered their interests at an unfair price but it all remaining limited partners who were thereby deprived of their "right by majority vote to oppose any improper actions by the general partner." Amended Complaint, ¶ 31.

40. In announcing the proposed merger on May 29, 2001, Plaintiff alleges that the defendants breached their fiduciary duties and the partnership agreement by stating, inter alia, that the proffered price of $81,422 per unit was fair and that no majority vote was needed. Amended Complaint, ¶¶ 32-40

41. Plaintiff asserts that defendants have acquired a majority of the units through deceptive tender offers and the deceptive merger information statement with the following consequences:

a) Defendants have deprived the proposed class members of their right under the Partnership Agreement to remove the general partner, to disapprove those amendments proposed by the general partner which require a majority vote and to protect themselves by majority vote against any improper actions of the general partners and;

b) Defendants are in a position to acquire a super-majority which would allow them to deprive the proposed class members of the "ability to prevent another freeze-out merger at less than fair value." Amended Complaint, ¶ 46.

42. On May 8, 2002, a Certification Hearing was held. See generally, 5/8/2002 Notes of Testimony (hereinafter "N.T.").

III. Discussion

A. Overview

Alan Wurtzel filed his initial class action complaint on June 28, 2001 seeking--among other goals--to enjoin a merger that was announced in the Information Statement dated May 29, 2001 ("May 29th Merger Proposal") in which the partnership and a wholly-owned subsidiary of defendant AIMCO would merge. Complaint, ¶¶ 25; 52(1); 59 (1) & 64 (1). Wurtzel was successful in this attempt: not only did this court preliminarily enjoin the merger but the defendants subsequently informed all parties that they had voluntarily decided to abandon the proposed merger. Wurtzel nonetheless persisted in his action against the defendants by filing an amended complaint.

Both parties have raised a great deal of smoke and fire on issues such as standing and mootness that on closer examination are not relevant to the procedural task at hand of deciding whether the class proposed by Wurtzel should be certified. These issues will nonetheless be addressed in the relevant context of the criteria for class certification such as typicality,[5] commonality or adequacy of representation. When appropriate, it will also be explained why these seemingly threshold issues are not dispositive because (1) they impermissibly go to the merits; (2) they are irrelevant in light of the new emphasis of the Amended Complaint, and; (3) the precedents upon which they rely are inapposite.

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[5] Defendants tend to lump together arguments concerning the typicality and commonality requirements for class certification with the issue of whether plaintiffs have suffered harm. See, e.g., Defendants 7/10/2002 Memorandum at 5-9. For example, defendants' arguments that plaintiff has suffered no harm, that his claim is moot or that he lacks standing because the merger was abandoned also raises issues of "typicality" or "commonality" and will be discussed under those rubrics. See id. at 7-8, n. 7 infra as well as Section III(B)((2)(a)(ii) and Section III(B)(3) infra.

The central focus required by the motion for class certification presently before this court are the allegations in Wurtzel's Amended Complaint. More specifically, the claims in this Amended Complaint of Breach of Fiduciary Duty (Count I), Breach of Partnership Agreement (Count III) and Common Law Fraud (Count IV) must be scrutinized to determine their appropriateness for a class action. Plaintiff has clarified that he does not seek certification of Count II, a derivative action for breach of fiduciary duty against PTP and AIMCO. Plaintiff's 6/10/2002 Memorandum at n.2.

B. Requirements for Class Certification Under Pa.R.C.P. 1702

Class actions are "inherently a 'procedural device designed to promote efficiency and fairness in the handling large numbers of similar claims.'"[6] The requirements for certifying a class action are set forth in the Pennsylvania Rules of Civil Procedure and relevant precedent. Pennsylvania Rule of Civil Procedure 1702 outlines five prerequisites for a class action:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the defenses of the class;
> (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in 1709; and

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[6] Janicik v. Prudential Insurance Co., 305 Pa. Super. 120, 141, 451 A.2d 451, 461 (1982)(citation omitted). One commentator has identified three characteristics of class actions. First, they encourage "economies of scale throughout the justice system" by permitting similar claims to be litigated together. Class actions also facilitate "greater justice by establishing a collective vehicle for small plaintiffs" who might not otherwise have the incentive or resources to prosecute their claims. Finally, class actions protect defendants "from inconsistent obligations that might by created by varying results in different courts" while assuring that similarly situated plaintiffs receive analogous recoveries. Phair, "Resolving the Choice-of-Law Problem in Rule 23(B)(3) Nationwide Class Actions," 67 U. Chicago Law Rev. 835, 836 (2000). Since Pennsylvania's rules for class actions are modeled on the federal rules, this analysis of Federal Rule 23 is relevant to Pennsylvania Rules 1702 and 1708. Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45-46 n.4, 501 A.2d 635, 637 n. 4 (1985).

> (5) a class action provides a full and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708. Pa.R.C.P. 1702.

The party seeking certification bears the burden of proving that the case is appropriate for a class action, but if he establishes a prima facie case for certification the burden shifts to the opposing party. D'Amelio v. Blue Cross, 347 Pa. Super. 441,*449, 500 A.2d 1137, *1141 (1985), app. denied, 514 Pa. 627, 522 A.2d 556 (1986). A court may not make a class action determination until after the pleadings are closed "to ensure that the class proponent is presenting a non-frivolous claim capable of surviving preliminary objections." Janicik v. Prudential Insurance Co., 305 Pa. Super. 120, *129, 451 A.2d 451, *455 (1982)(citing Pa.R.C.P 1707).

In making its determination as to whether a class should be certified, the merits of a claim should not be considered. Baldassari v. Suburban Cable TV Co., 2002 WL 1974552 at *5 (Pa.Super. 2002)(the trial court abused its discretion when it "confused the elements of proof necessary to establish class certification with the elements of proof necessary to establish the merits of the case"); Cavanaugh v. Allegheny Ludlum Steel Corp., 364 Pa. Super. 437,*446, 528 A.2d 236, *240 (1987)("Instead of focusing on the Plaintiff's obligation to establish the factors relevant to class certification, the lower court improperly examined the merits of the litigation"). The rules also require a hearing on class certification. Pa.R.C.P. 1707. As the explanatory note to Rule 1707 explains, the focus should be on the class allegations and not the merits:

> The hearing is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy or with attacks on the other averments of the complaint. Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only. Pa.R.C.P. 1707 - Explanatory Note - 1977.

Finally, Pennsylvania courts have consistently observed that "'decisions in favor of maintaining a class action should be liberally made." Janicik v. Prudential Insurance Co., 305 Pa.

Super. 120, 128, 451 A.2d 451, 454 (Pa. Super. 1982)(quoting Bell v. Beneficial Consumer Discount Co., 241 Pa. Super. 192, 360 A.2d 681 (1976)). The allegations of the amended complaint must therefore be scrutinized in light of the relevant rules and precedent.

1. Numerosity

Plaintiff Wurtzel must establish that his proposed class is "so numerous that joinder of all members is impracticable." Pa.R.C.P. 1702 (1). This requirement is satisfied and a class is sufficiently numerous where "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants should plaintiffs sue individually." Baldassari, 2002 WL 1974552 at *4(citations omitted).

Plaintiff's amended complaint proposes a class of "approximately 194 limited partners" of defendant Park Towne Place Associates Limited Partnership ("Partnership") as of May 29, 2001 except defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the defendants. Amended Complaint, ¶¶ 2 & 9. That number would clearly satisfy the numerosity requirement, since courts have approved classes of similar size ranging from 123 to 250 plaintiffs. See ABC Cleaning Co. v. Bell Pa., 293 Pa. Super. 219, 228 n.6, 438 A.2d 616, 621 n.6 (Pa. Super. 1981)(250 class members); Temple University v. Pa. Department of Public Welfare, 30 Pa. Cmwlth. 595, 374 A.2d 991 (1977)(123 hospital class members). See also Garnet Valley School Dist. v. Hanlon, 15 Pa. Cmwlth. 476, 327 A.2d 215, 218 (1974)(7 to 30 class members) . The Superior Court has observed that "the class representative need not plead or prove the number of class members so long as she is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be

practicable to join." Janicik v. Prudential, 305 Pa.Super. at 132, 451 A.2d at 456. Wurtzel, in proposing a class of limited partners as of May 29, 2001, has met this burden.[7]

2. Commonality

The second prerequisite for class certification is that "there are questions of law or fact common to the class." Pa.R.C.P. 1702(3). As the Superior Court explained, "common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant would be proof as to all." Allegheny County Housing Auth. v. Berry, 338 Pa. Super. 338, 342, 487 A.2d 995, 997 (1985). Because the three differing claims in Wurtzel's Amended Complaint for Breach of Fiduciary Duty, Breach of Partnership Agreement and Common Law Fraud raise different issues, the first two claims will be analyzed separately from the Common Law Fraud Claim to determine whether the requirements of 1702(2) have been met.

Wurtzel asserts that there are numerous questions of law that are common to the proposed class, including:

a. Whether defendants owe a fiduciary duty to the limited partners;
b. Whether defendants' misconduct . . . . constitutes a breach of that duty;
c. Whether the defendants' misconduct constitutes a breach of the Partnership Agreements, and;

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[7] Defendants initially argued that the proposed class of 194 limited partners had been decreased by 106 members who voluntarily sold their interests in response to a November 2001 tender offer. See Defendants' 5/7/2001 Supplemental Memorandum at II (unnumbered pages). Plaintiff disputed that these units were sold in response to the tender offer, and argued instead that 56 of the 106 limited partners had tendered their interests closely around the time of the May 29th Merger Proposal so that only 49 or 50 limited partners responded to the November 2001 tender offer. 5/8/2002 N.T. at 5-6. See also 10/9/2002 Stipulation. This conflict over the size of the proposed class does not, however, go to the issue of numerosity, since defendants claim instead that the loss of these limited partners would affect the plaintiffs' ability to satisfy the commonality, typicality or adequacy of representation requirements for class certification. Defendants' 5/7/2002 Memorandum at II. The dispute as to the composition and size of the class will therefore by analyzed in those contexts.

d. Whether defendants' misconduct constitutes an attempt to defraud the limited partners. Amended Complaint, ¶10.

a. Claims for Breach of Fiduciary Duty and Breach of Partnership Agreement

A common root of Wurtzel's claims for Breach of Fiduciary Duty and Breach of Partnership Agreement is the 1986 Partnership Agreement and its 1996 amendment. Amended Complaint, ¶¶ 15-19. In section 5.2, the 1986 partnership agreement provides that the general partner "shall at all times act in a fiduciary manner toward the Partnership and Limited Partners."[8] In 1996, this agreement was amended to require the consent of 66 2/3% of the limited partnership units to any action by the general partner causing the Partnership to merge with any entity. Amended Complaint, ¶ 19. This partnership agreement as well as the Offering Memorandum distributed to all potential investors are common documents that go to the core of plaintiff's action.

There are other common documents as well. Plaintiff alleges that when defendant AIMCO acquired total control of the partnership's general partner and its management company, it devised a "fraudulent scheme' that consisted of making below market tender offers for limited partnerships so that it could increase management fees and eventually orchestrate a freeze-out merger. Amended Complaint, ¶¶ 20-21. As evidence of this scheme, plaintiff points to three tender offers (March 1999, May 2000 and February 2001) and their related documents. See Amended Complaint, ¶¶ 23-25, citing Complaint, Exs. 3-5. This common course of conduct resulted, plaintiff argues, in AIMCO's acquisition of approximately 58.14 % of all limited

[8] Amended Complaint, ¶ 18(a). The Partnership Agreement is attached as Ex. 1 to the Complaint.

partnership interests. This harmed not only those who tendered for less than a fair value but those who did not tender and were thereby deprived "of their right by majority vote to oppose any improper actions by the general partner." Amended Complaint, ¶ 31. The documents of these tender offers, likewise, form a common core of facts.

The May 29th Merger Proposal is another element in the deceptive scheme that plaintiff alleges violated the partnership agreement and breached defendants' fiduciary duty. A document specifically referenced by plaintiff, the May 29 2001 Letter and Information Statement attached to a draft merger agreement constitute other common factual elements of plaintiff's claim that the defendants improperly misled all class plaintiffs that a majority vote was not necessary to approve the merger "because AIMCO owns a majority of the limited partnership units." Amended Complaint, ¶32(c).

To establish his claims for Breach of Fiduciary Duty and Breach of Partnership Agreement plaintiff therefore will present uniform documents that were sent to all members of the proposed class. They will thus focus on a uniform pattern of conduct by the defendants as well as common, identical documents directed to all plaintiffs. In Janicik, the Superior Court observed that "[c]laims arising from interpretations of a form contract generally give rise to common questions." Janicik, 305 Pa. Super. at *133, 451 A.2d at 457(citations omitted). See also Baldassari v. Suburban Cable TV, 2002 WL 1974552 at 5. Pennsylvania courts have also consistently recognized that common questions exist where the plaintiffs' legal grievances arise "out of the 'same practice or course of conduct'on the part of the class opponent." Foust v. SEPTA, 756 A.2d 112, 120-21 (Pa. Cmwlth. 2000), app.denied, 565 Pa. 652, 771 A.2d 1289 (2001)(plaintiffs' class action seeking medical monitoring due to exposure to PCBs presented common issues of

fact and law since their claim arises from the same course of conduct). See also Sharkus v. Blue Cross, 494 Pa. 336, 345, 431 A.2d 883, 887-88 (1981)(class action by medical insurance subscribers against the insurer and participating hospitals based on breach of contract and fiduciary duty presented common issues of fact and law where insurer retroactively determined costs were unnecessary and sought to recover them from the subscriber rather than from the hospital); Buchanan v. Century Federal Savings and Loan Assoc., 374 Pa. Super. 1, 542 A.2d 117 (1988)(class action by mortgage borrowers against banking institutions premised on claim of breach of fiduciary duty in violating indenture provisions of a mortgage). These documents and the common course of conduct establish the common questions of law and fact required by Pa.R.C.P. 1702(2).

i. Potential Defense Based on the November 2001 Tender Offer and Its Effect on the Commonality Requirement

Defendants argue that plaintiff cannot satisfy the commonality requirement because "106 limited partners chose to sell their interests voluntarily in response to the November 2001 PPM" which reflects "a divergence of interests between Wurtzel and the majority of the proposed class." Defendants' 5/7/2002 Memorandum at 5 unnumbered. This Private Placement Memorandum ("PPM"), the defendants point out, contained the statement that "[a] limited partner who exchanges his units in the offer may not participate in or benefit from the relief requested in the litigation."Id. at 6 unnumbered. Thus, those 106 limited partners who tendered their interests in response to the November 2001 tender offer "are subject to unique defense which defeat commonality and typicality" based on the defense of waiver or estoppel. Id. Defendants' argument is unpersuasive for several reasons.

First, and most glaringly, although defendants have repeatedly asserted that 106 limited partners tendered their interests in response to the November 2001 tender offer, in a recent letter and stipulation defense counsel concedes that the affidavit dated May 8, 2002 of a Vice President of AIMCO, Dora Chi, mistakenly stated that the November 2001 tender offer had been distributed to all the limited partners as of May 29, 2001. In fact, it was only distributed to those limited partners who had not received consideration for responding to the May 29, 2001 tender offer. The practical significance of this admission is that as many as 56 limited partners were given consideration in response to the May 29, 2001 merger proposal and that only 49--not 106--limited partners tendered their interests in response to the November 2001 tender offer.[9]

While these factual misrepresentations are disturbing since they undermine defendants' repeated assertions that claims relating to the May 29, 2001 merger proposal are moot, they would merely suggest that the unique "defenses" raised by defendants as a hindrance to the commonality requirement would apply to 56 members of the class rather than 106. This ignores a key fact: the point of reference for plaintiff's proposed class is the date of May 29, 2001 and the 194 limited partners as of that date. Hence, the focus must be on the alleged deceptive actions prior to and up to May 29, 2001 rather than on actions after that date.

Moreover, the source of the waiver and estoppel issue that defendants identify is a provision in the November 2001 PPM.[10] This provision, cast in a formal, written document,

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[9] See 10/9/2002 Stipulation with 9/13/2002 letter from defense counsel and 9/11/2002 Affidavit by Dora Chi.

[10] Plaintiff, in contrast, focuses on language in the letter of transmittal accompanying the PPM. That letter, however, would also be a common document. See Plaintiff's 6/10/2002 Memorandum at 15.

would be uniform as to all those limited partners who tendered in response to it. There is no indication that plaintiff Wurtzel would lack the capacity or incentive to raise legal arguments against this defense.

In support of this argument that this potential defense would destroy the commonality of plaintiff's claim, defendants cite a federal case, Guenther v. Pacific Telecom., Inc., 123 FRD 333 (D.Or. 1988).[11] Its facts, however, are distinguishable. In Guenther, certification was denied because of unique defenses of waiver and estoppel applicable based on the actions and/or knowledge of two of the representative plaintiffs. Guenther, 123 FRD at 338-39. In the instant case, in contrast, the source of the potential defense is a common document and its effect not on Wurtzel, as class representative, but on those who tendered in response to the November 2001 offer. The defenses unique to the representative plaintiffs in Guenther are thus distinguishable from the common legal issue raised by the written waiver provisions in the PPM or letter of transmittal accompanying it.[12] The Pennsylvania precedent cited by plaintiff, Johnson v. Concord Mutual, 450 Pa. 614, 620-21, 300 A.2d 61, 65 (1973), likewise is not dispositive since Johnson does not deal with a class action--or its commonality requirement-- at all. Instead, it focused on the invalidity of a waiver provision in an insurance policy where uninsured benefits had been

[11] See Defendants' 5/7/2002 Memorandum at 7-8 unnumbered. As federal precedent, Guenther would be merely persuasive not binding.

[12] Defendants' 5/7/2002 Memorandum at 6-7 unnumbered. See Plaintiff's 6/10/2001 Memorandum at 16 ("This is not a situation in which the defendants have a different defense against each of 50 former limited partners; to the contrary, the defense they refer to (waiver and estoppel) are common to all 50 alike and therefore, even if asserted at trial, will amount to but one single legal issue as compared to a whole host of other common factual and legal issues").

required by statute and the claimed written waiver on its face was neither conspicuous nor clear.[13]

Finally, if a defense of waiver and estoppel should be asserted and then prove unwieldy, those affected by it could be divided into a subclass under Pa.R.C.P. 1710. As the Superior Court has observed, "[t]hroughout the class action the court has extensive powers to protect absent class members and ensure the efficient conduct of the action" through such means as creating subclasses or limiting issues. Janicik v. Prudential Ins. Co., 305 Pa. Super. at 130, 451 A.2d at 455. They would still share the many common issues of law and fact set forth in the Amended Complaint.

ii. Mootness of Plaintiff's Claims Due to Abandonment of the May 29, 2001 Merger

Defendants have argued that plaintiff's claims are moot in light of defendant's voluntary decision to abandon the May 29th Merger Proposal.[14] It is, of course, "the settled law of this Commonwealth that if, at any stage of the judicial process a case is rendered moot, it will be

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[13] Defendants' 5/7/2002 Memorandum at 6-7 unnumbered. In discussing potential defenses, defendants tend to reference simultaneously precedent relating to the typicality and commonality requirements, but the precedent dealing with typicality likewise is ultimately distinguishable. For instance, defendants rely on Fleck v. Cablevision, 763 F. Supp. 622 (D.D.C. 1991) to show that unique defenses destroy the typicality requirement. See Defendants' 5/7/2002 Memorandum at unnumbered 7. The class action in Fleck was brought by limited partners against a general partner for allegedly violating the Securities and Exchange Act as well as his fiduciary duty in connection with an agreement to amend the terms of the partnership agreement. The court concluded that because the class representatives, in contrast to 70% of the class, did not vote for the amendment at issue they were subject to a unique defense. Hence, they were not typical and the class could not be certified. Fleck, 763 F. Supp. at 626-27. The facts of Fleck differ from those of the instant case where the proposed class as of May 29, 2001 consists of those limited partners who had not tendered their interests in response to prior offers. Wurtzel, in contrast to the plaintiffs in Fleck, clearly falls within that class and thus satisfies the typicality requirement.

[14] See, e.g. Defendants' 10/15/2001 Memorandum at 5-6. Defendants also argue that Wurtzel lacks standing because defendants have abandoned the merger. Id. at 3-4. The standing issue is discussed in Section III(B)(3) infra.

dismissed." Temple Univ. v. Pa. Dept. of Public Welfare, 30 Pa. Cmwlth 595, 600, 374 A.2d 991, 995 (1977). Defendants' argument that plaintiff's claim is moot, however, is unpersuasive on various scores. First, the Amended Complaint focuses on the alleged scheme of the defendants through a series of 3 misleading tender offers to increase management fees and to gain control of the partnership so that they could undertake a merger at a price substantially below fair value. The focus of the amended complaint is thus on the three tender offers and their harmful effects on the remaining limited partners as of May 29, 2001. See Amended Complaint, ¶ 21. These effects were not rendered moot by the abandonment of the proposed merger.

Defendants also fail to address the significance of plaintiffs' request that the preliminary injunction against the May 29, 2001 Merger proposal should be made permanent. Amended Complaint, ¶¶ 54(1); 62(1); 66(1). That request remains outstanding. Moreover, defendants' statement that they have abandoned the May 29th Merger was far from emphatic. Indeed, they qualified their abandonment by stating that "they would not attempt to proceed with any merger or sale of Associates while this case remains pending in this Court, nor will any future transaction which they might propose be based on the appraisal prepared by Koeppel Tener Real Estate Services, Inc. which is described in the Complaint and the Court's decision."[15] As the Commonwealth Court has observed, it "is also well established that voluntary cessation of allegedly illegal conduct does not moot out a case since such a situation would allow the party acting wrongly to revert, upon dismissal of the proceedings, to the offensive pattern of conduct." Temple Univ. v. Pa. Dept. of Welfare, 30 Pa. Cmwlth. at 600, 374 A.2d at 995.

[15] Wurtzel v. Park Towne Associates Ltd., 2002 WL 373041 at *3 & n.12 (citing Plaintiff's 9/28/2001 Motion for Clarification, Memorandum at 2)(emphasis added).

Finally, the admissions in the letter dated September 13, 2002 from defense counsel conceding that limited partnership units may have been tendered and consideration provided to as many as 56 limited partners in response to the May 29, 2001 Merger Announcement suggest that the merits of the issues raised by counsel concerning the Merger Proposal are not moot.

b. Common Law Fraud Claim

Wurtzel asserts a claim of common law fraud claim against all defendants in Count IV. That count alleges more specifically that the defendants acquired partnership units for a fraction of their cost from the limited partners through fraudulent misrepresentations in the three tender offers in 1999, 2000, and 2001 and in the Merger Information Statement of May 29, 2001. Amended Complaint, ¶ 64. The factual basis of this fraud claim is thus the same as the claims for Breach of Fiduciary Duty and Breach of Partnership Agreement. Various courts have concluded, however, that claims of common law fraud are not amenable to class certification because the need to show reliance defeats the commonality requirement. See, e.g., Gaffin v. Teledyne, 611 A.2d 467, 468, 474 (Del. 1992)(citing In re One Bancorp Sec. Litig., 136 F.R.D. 526, 533 (D.Me 1991); Gavron v. Blinder Robinson & Co., 115 F.R.D. 318, 324 (E.D.Pa. 1987); Beebe Pacific Realty Pacific Trust, 578 F.Supp. 1128, 1152 (D.Ore. 1984); Katz v. Camdisco, Inc., 117 FRD 403, 412 (N.D. Ill. 1987)).

i. Choice of Law Analysis: Conflict Between Delaware and Pennsylvania Law on the Necessity of Showing Reliance for a Common Law Fraud Claim

As a threshold issue, it is necessary to decide which state law applies[16] for determining

[16] A choice of law analysis was not required for the Breach of Partnership Claim because under section 11.6 of the Partnership Agreement, Delaware law applies to that agreement. It would thus also apply to section 5.2 of the Partnership Agreement which requires the General Partner to act in a fiduciary manner towards the limited partners and partnership.

whether plaintiff's fraud claim presents common issues of fact. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985)(merely because a particular state forum has jurisdiction over a class action does not resolve the issue of which state law applies). The first step in a choice of laws analysis is determining whether there is a conflict. If the potentially applicable laws of two different states do not conflict, no choice of laws analysis is required. Ratti v. Wheeling v. Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. 2000), app. denied, 567 Pa. 715, 785 A.2d 90 (2001)(Under Pennsylvania law, no choice of law analysis is required if the laws of different states do not conflict). When asked specifically to brief this subtle issue, plaintiff argues that the laws of Pennsylvania and Delaware do not conflict and "the substantive elements of fraud are the same in both jurisdictions." Plaintiff's 6/10/2002 Memorandum at 23. He then cites the Pennsylvania case of Gibbs v. Ernst, 538 Pa. 193, 647 A.2d 882, 889 (1994) and the Delaware case of Stephenson v. Capano Dev., Inc. 462 A.2d 1069, 1074 (Del. 1983). Both cases set forth essentially the same elements for common law fraud. The Stephenson court outlined the following elements of common law fraud under Delaware law:

> At common law, fraud (or deceit) consists of:
> 1) a false representation, usually one of fact, made by the defendant;
> 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
> 3) an intent to induce the plaintiff to act or to refrain from acting;
> 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
> 5) damage to the plaintiff as a result of such reliance.[17]

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[17] Stephenson v. Capano Dev. Inc., 462 A.2d 1069, *1074 (Del. Sup. 1983)(emphasis added). Similarly, the Pennsylvania Supreme Court in Gibbs v. Ernst, 538 Pa. 193, *207, 647 A.2d 882, 889 (1994) outlined the elements of fraud: "(1) a representation, (2) which is material to the transaction at hand; (3)made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." Despite the different wording and enumeration, the basic elements set forth are the

Clearly, under both of these cases cited by plaintiff reliance is an element of common law fraud under both Pennsylvania and Delaware law. This requirement of showing reliance, however, poses serious problems for the certification of plaintiff's common law fraud claim. In fact, the Delaware Supreme Court in Gaffin v. Teledyne, Inc., 611 A.2d 467, 474 (Del. 1992) found the requirement of showing reliance to maintain a common law fraud claim an insurmountable obstacle for class certification. As the Gaffin court explained, "[a] class action may not be maintained in a purely common law or equitable fraud case since individual questions of law or fact, particularly as to the element of justifiable reliance, will inevitably predominate over common questions of law." Gaffin, 611 A.2d at *474 (emphasis added). In support of this conclusion, the Gaffin court cited cases from a variety of jurisdictions.[18]

aa. Reliance and Fraud Under Pennsylvania Law

Until recently, Pennsylvania courts have likewise repeatedly emphasized that claims premised on common law fraud are inappropriate for a class action. See, e.g. Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12, 16 n.17 (1976), cert. denied, 429 U.S. 828 (1976)(Because a

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same. The key point for the present analysis concerning certification is that reliance is an element of fraud under both Pennsylvania and Delaware law.

The plaintiff in Stephenson, who sought to purchase a house from the defendant developer, asserted a claim, inter alia, under the Delaware Consumer Fraud Act, 6 Del.C. §§ 2511-26. The court noted that while this Act encompassed the elements of common law fraud listed above, it differed since "[a]n unlawful practice under § 2513(a), however, is committed regardless of reliance by the plaintiff." Stephenson, 462 A.2d at 1074. This distinction is critical. Since Wurtzel is not asserting a claim under the Act, he cannot claim this presumption of reliance as applying to his allegations of common law fraud.

[18] See Gaffin, 611 A.2d at 474 (citing One Bancorp Sec. Litig., 136 FRD 526, 533 (D.Me. 1991); Katz v. Comdisco, Inc., 117 FRD 403, 412 (N.D. Ill. 1987); Gavron v. Blinder Robinson & Co., 115 FRD 318 (E.D.Pa. 1987); Beebe v. Pacific Realty Trust , 578 F. Supp. 1128 (D. Ore. 1984)).

fraud action requires a showing of reliance and "such a showing would normally vary from person to person, this cause of action is generally not appropriate for resolution in a plaintiff-class action"); Prime Meats v. Yochim, 422 Pa.Super. 460, 470-71, 619 A.2d 769, 774 (1993), app. denied, 538 Pa. 627, 646 A.2d 1180 (1994)("Clearly, the existence and subsequent proof of the existence of common law fraud or of reliance generally, would require an individual determination as to each potential class member"). See also Ross v. Shawmut Dev. Corp., 460 Pa. 328,334, 333 A.2d 751, 753 (1975)(trial court properly denied certification of a class action by tenants because "the representations made by appellee's representatives and the reliance on these representations would differ for every member of the alleged class).

Recently, however, the Pennsylvania Superior Court in Basile v. H & R. Block,Inc., 729 A.2d 574, 584 (Pa. Super. 1999), vacated on other grounds, Basile v. H & R. Block Inc., 563 Pa. 359, 761 A.2d 1115 (2000)("Basile I") concluded that a class action premised on the Unfair Trade Practices Consumer Protection Law (UTPCPL), 73 P.S. section 201-2 et seq. which, like common law fraud requires a showing of reliance, could be certified where a fiduciary duty was alleged. In such cases, the Basile I court reasoned, reliance could be presumed. The Basile I court thus stated that it agreed with the trial court that:

> [T]he UTPCPL requires a showing of detrimental reliance in private actions based on all provisions of the statute. Additionally, we recognize that an action under the UTPCPL may not be amenable to class certification due to discrepancies in the respective levels of reliance displayed by individual class members. In this case, however, we find no need for a demonstration of reliance by any member of the class due to the nature of the parties' relationship. Because Block, as plaintiff's agent was bound to conform to the duty of a fiduciary, reliance by the class plaintiffs was implicit and is established by operation of law as to all matters within the scope of agency. Basile I, 729 A.2d at 584 (emphasis added).

Although the analysis of the principal/agent relationship in Basile I was ultimately vacated

by the Supreme Court, its conclusion that reliance can be presumed where there is a fiduciary relationship was not reviewed by the Supreme Court and thus remains viable.[19]

Various other courts have applied the analysis of Basile I to conclude that in a class action premised, inter alia, on fraud, reliance may be presumed where there is a fiduciary duty so that the commonality requirement is satisfied. In Johnson v. Grand Cru Property One Limited Partnership, 49 Pa. D. & C. 4th 531, 538 (Montgomery Com. Pleas), the court concluded that a class action by tenants against an apartment complex for discontinuance of electrical service

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[19]The plaintiffs in Basile proposed a class action consisting of taxpayers who had retained the services of H. & R. Block (Block) to file their tax returns under Block's Rapid Refund service. Plaintiffs alleged that Block was their fiduciary or agent and owed them a duty to disclose that the rapid refunds offered to them were, in reality, short term, high interest loans. Basile v. H & R. Block, 729 A.2d at 577. The Superior Court concluded that the parties' interaction was sufficient to establish an agency relationship with attendant fiduciary duties. It thus did not address plaintiff's assertion that a fiduciary duty also arose by virtue of a confidential relationship with the defendant. Id., 729 A.2d at 584 & 582.

Upon review, the Pennsylvania Supreme Court reversed the Superior Court as to its conclusion that the pleadings established a principal-agency relationship between plaintiffs and H & R Block. Basile v. H & R Block, 563 Pa. 359, 369, 370, 761 A.2d 1115, 1121 (2000)("Basile II"). It noted, however, that its review was limited to the agency issue alone and that the Superior Court had not addressed the issue of whether the defendant owed plaintiffs a fiduciary duty based on an alleged confidential relationship. It therefore remanded the case to the Superior Court for a consideration of the confidential relationship issue. Id., 563 Pa. at 372, 761 A.2d at 1122.

Significantly, the Pennsylvania Supreme Court did not address the Superior Court's ruling that reliance need not be shown where there was an alleged fiduciary relationship. On remand, the Superior Court found a prima facie showing of a confidential relationship between the parties. Basile v. H & R Block, 777 A.2d 95, 98 (Pa. Super. 2001), app. denied, 806 A.2d 857 (Pa. 2002)("Basile III"). It refused, however, to revisit its prior ruling as to the presumption of reliance because the remand limited its jurisdiction to "consider the confidential relationship issue in the first instance." Id., 777 A.2d at 100. Nonetheless, in remanding the case to a factfinder, the Basile III court stated that "if upon remand the plaintiffs succeed in demonstrating a confidential relationship with Block, their reliance inherent in a finding of fiduciary duty will be presumed for the purposes of claims under UTPCPL. Id., 777 A.2d at 107-08 (emphasis added).

The initial ruling of the Superior Court in its 1999 Basile I opinion on the issue of reliance was thus unaffected by the subsequent review of the Supreme Court, and reiterated in Basile III.

premised, inter alia, on fraud, does not present specific questions as to reliance. The Johnson court reasoned that under Basile v. H & R Block, 729 A.2d 574 (Pa. Super. 1999), reliance is implicit in the fiduciary duty that existed between the parties." Id., at 538. Similarly, in Katlin v. Tremoglie, 43 Pa. D. & C. 4th 373, 391 (Phila. Com. Pleas 1999), Judge Levin concluded that in class action by plaintiffs who were treated by defendant unlicensed psychiatrist, plaintiffs' claim for fraud presented common issues of fact and law. In so doing, he applied Basile I and observed that "Basile is based on a general recognition that when a special relationship exists between the parties, certain disclosure obligations are implicit, and, thus, reliance is presumed." Katlin, 43 Pa. D & C 4th at 391.

bb. Reliance and Common Law Fraud Under Delaware Law

Under Pennsylvania law, therefore, Wurtzel's fraud claim would not fail due to the requirement of showing individualized proof of reliance. The same result would not occur under Delaware law. As plaintiff noted, the elements of a fraud claim under Delaware law are set forth in Stephenson v. Capano Dev., 462 A.2d 1069, 1074 (Del. 1983)[20] which required proof of reliance. The precise issue of the effect of the need to show reliance on the viability of a class action premised on common law fraud claim was addressed specifically by the Delaware Supreme Court in Gaffin v. Teledyne, Inc., 611 A.2d 467, *474 (Del. 1992). Significantly, the Gaffin court concluded that "a class action may not be maintained in a purely common law or equitable fraud case since individual questions of law or fact, particularly as to the element of justifiable reliance, will inevitably predominate over common questions of law or fact." Id. at 474. It also rejected as inapposite precedent from federal courts that certified both federal securities claims and pendent

[20] See Plaintiff's 6/10/2002 Memorandum at 23-24.

common law fraud claims based on the same course of conduct. "Such cases," the Gaffin court observed, "are readily distinguishable from the present case, however, since they are primarily based on federal securities law violations." Id., 611 A.2d at 474, n.8 (citations omitted).

The Gaffin court did note that the facts before it were unique since the only remaining defendant was a corporate defendant with no fiduciary duty claims, only common law fraud.[21] However, in Dieter v. Prime Computer, Inc., 681 A.2d 1068 (Del.Ch. 1996), a case that did involve claims of fiduciary duty and equitable fraud, the Chancery Court followed Gaffin to conclude that the equitable fraud claim could not be certified due to the necessity of showing individual reliance. Id., 681 A.2d at 1076.

Admittedly, Delaware precedent is not totally clear as to relation between fiduciary duty claims and fraud claims for the purposes of class certification. For instance, in Zirn v. VLI Corp., 621 A.2d 773 (Del. 1993), the Delaware Supreme Court dealt "summarily" with a post-trial argument by defendants that an equitable fraud claim should not have been certified in an action by shareholders asserting that inadequate disclosures concerning a merger constituted equitable fraud and breach of fiduciary duty. Id., 621 A.2d at 777. The Zirn court rejected this argument, noting "so long as the fiduciary claims survive, class certification continues to be appropriate." Id., 621 A.2d at 783. It is unclear, however, whether this merely means that where, as a practical matter, there is a viable basis for class certification, there is no need to delve into the

[21] Gaffin v. Teledyne, Inc., 611 A.2d at 472. The class action in Gaffin was initiated by shareholders of Teledyne, Inc who claimed that they were deprived of the right to make an informed decision in regards to a stock repurchase offer. The Delaware Supreme Court reversed the Court of Chancery for failing to decertify the class "since this is a common law fraud case and individual questions of law or fact concerning each individual shareholder's justifiable reliance predominated over any questions of law or fact common to the class." Id., 611 A.2d at 468.

exact legal theory upon which certification is premised after a trial has been held.[22] The Zirn court did not explicitly address the reliance issue, and noted that in contrast to the Gaffin court, it had not been presented with a formal motion as to the class certification issue. In any event, in Gaffin, the Delaware Supreme Court clearly states under Delaware law "a class action may not be maintained in a purely common law" claim due to the reliance issues. Gaffin, 611 A.2d at 474. This analysis in conjunction with that of Dieter v. Prime Computers establishes that there is a conflict between Pennsylvania and Delaware on this issue of whether a common law fraud claim may be certified due to the necessity for individualized proof of reliance.[23]

Plaintiff seeks to avoid this result with several arguments and lines of precedent. He

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[22] The Delaware Chancery Court in Parfi Holding AB v. Mirror Image Internet, Inc., 794 A.2d 1211, *1235 (Del. Ch. 2001) suggested, for instance, that as a practical matter claims for breach of fiduciary duty can encompass the same claims as a common law fraud claim even though their formal elements are distinct. After noting that the "law of fiduciary duty provides a flexible and plaintiff-friendly remedy for situations when conflicted directors issue additional shares to a majority shareholder for inadequate consideration," the court concluded that in "view of this reality, it makes no sense for me to hold that every consciously unfair self-dealing transaction involves an implied false representation of fact directed to the corporation or its shareholders, giving rise to a claim for common law fraud. This seems to me to strain the tort of fraud for no useful purpose." Id.

[23] This conclusion was also supported by Oliver v. Boston Univ., 2000 WL 1091480 (Del. Ch. 2000). In Oliver, plaintiffs had argued that under Gaffin a fraud claim could be maintained as a class action so long as it was not the only claim. The Chancery Court rejected this argument:

> After reviewing the applicable precedent, I disagree that the Supreme Court intended its holding to be interpreted in that manner. Support for my interpretation can be found in my decision in Dieter v. Prime Computer, in which the class claims alleging breach of fiduciary duty were certified but the fraud claims were not. Explaining my rationale, I wrote "[l]ogic suggests that each individual shareholder would, given its unique personal circumstances, find a court examining its position differently in order to determine whether and to what extent it relied on the disclosures to reach a decision on the actions solicited. In light of the explicit language from the Supreme Court; I cannot certify the [fraud claims]."

Oliver v. Boston Univ., 2000 WL 1091480 at*10.

argues somewhat enigmatically that "Wurtzel was not damaged by his reliance on AIMCO's deceptions" since "he never tendered." Rather, he argues that he "was damaged by fraud committed against limited partners who did rely on AIMCO's deceptions in the pre-merger tender offers, and who therefore tendered their units."[24] It is not clear how this argument eliminates the need to show reliance; it merely shifts the focus from the plaintiff class to those limited partners who tendered their units in response to the offer. In support of this argument, Plaintiff cites Cowin v. Bresler, 741 F.2d 410 (D.C. Cir. 1984).[25] Cowin is inapposite since it does not deal with whether reliance is an element of common law fraud, but rather focuses on standing to assert claims under section 14(a) of the 1934 Act, 15 U.S.C. §78n(a) in regards to allegedly misleading proxy statements. Indeed, the common law fraud claims in Cowin had been dismissed by the trial court.[26]

Plaintiff also cites other federal cases for the proposition that reliance can be presumed for those limited partners who did not tender their units and that the burden is on the offeror-defendant to disprove reliance.[27] These cases are also inapposite. In Affiliated UTE Citizens of

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[24] Plaintiff's 6/10/2002 Memorandum at 13.

[25] See Plaintiff's 6/10/2002 Memorandum at 13, n. 12 (citing Cowin v. Bresler, 741 F.2d 410, 427 (D.C.Cir. 1984)).

[26] Plaintiff in his memorandum cites language from Cowin, indicating the limited scope of its analysis of reliance under the statutory scheme of section 14(a) of the 1934 Act, 15 USC § 78n(a): "The injury Cowin alleges was not caused by his individual reliance on deceptive proxy solicitations. Rather, his claim is that other shareholders elected appellees as directors because they were misled by the proxy materials. The installation of appellees as directors and their subsequent actions has injured plaintiff. This injury is totally divorced from any reliance, or lack of reliance, on Cowin's part and falls precisely within the scope of injury Congress sought to protect." Cowin, 741 F.2d at 427. See Plaintiff's 6/10/2002 Memorandum at 13 & n. 12.

[27] Plaintiff's 6/10/2002 Memorandum at 14 & n. 14.

Utah v. United States, 406 U.S. 128, 153-54 (1974), the United States Supreme Court concluded that positive proof of reliance was not required where there was an allegation of failure to disclose information in violation of Rule 10b-5, of the Securities and Exchange Act of 1934. In reaching this conclusion, the court stressed the broad proscriptions embraced by Congress "to substitute a philosophy of full disclosure for the philosophy of caveat emptor. . . . in the securities industry" and thus "intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" Affiliated UTE Citizens, 406 U.S. at 151-52. Eisenberg v. Gagnon, 766 F.2d 770, 784-86 (3d Cir. 1985), cert. denied, 474 U.S. 946 (1985) likewise dealt with violation of federal securities laws and the necessity of showing reliance for class actions under Rule 10b-5. See also Sharp v. Coopers & Lybrand, 649 F.2d 175, 185-89 (3d Cir. 1981)(recognizing rebuttable presumption of reliance under Rule 10b-5 in a case involving misrepresentations and omissions in an opinion letter to prospective buyers of partnership interests).

These securities fraud cases premised on the Securities Exchange Act of 1934 and the underlying legislative intent are distinct from the fraud claims asserted by plaintiffs premised on state common law. In fact, the Delaware Supreme Court in Gaffin v. Teledyne, Inc., 611 A.2d 467 (1992) specifically found analogous precedent inapposite to common law fraud claims. After noting "another line of cases in which some federal courts have certified both federal securities claims and pendent common law fraud claims where plaintiffs' common law and federal securities claims are based on the same course of conduct by defendants," the Gaffin court concluded "[s]uch cases are readily distinguishable from the present case, however, since they are primarily based on federal securities law violations." Gaffin, 611 A.2d at 474 n. 8 (citations omitted).

Under Delaware precedent, therefore, plaintiff's common law fraud claim would fail to satisfy the commonality requirement of Pa.R.C.P. 1702(2).

ii. Choice of Applicable Law for Determining Whether There Are Common Questions of Law or Fact As To the Common Law Fraud Claim

It is therefore necessary to decide whether Pennsylvania or Delaware law would apply in determining whether the commonality requirement for class certification under the Pennsylvania Rules of Civil Procedure are satisfied. The basic procedural framework for class certification is, of course, determined by the Pennsylvania Rules of Procedure. See Ferraro v. McCarthy-Pascuzzo, 777 A.2d 1128, 1137 (Pa. Super. 2001); Crawford v. Manhattan Life Ins. Co., 208 Pa. Super. 150, 162 n.2, 221 A.2d 877, 884, n.2 (1966) (procedural law of forum state applies to prescribe the rules by which the parties may have their substantive rights enforced judicially). However, to determine whether the procedural prerequisites of Pa.R.C.P. 1702(2) requiring common issues of law and fact have been satisfied, the substantive law concerning common law fraud must be analyzed for the sole purpose of determining if the claim is amenable to class certification based on the type of proof that must be marshaled. More simply, it must be determined whether the common law fraud claim requires individualized proof or whether it can be established on a class-wide basis.[28]

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[28] Commentators have pointed out that a conflict of laws analysis can be complex and fatal to the certification of a class action on the commonality issue. William Torchiana, "Choice of Law and the MultiState Class: Forum Interests in Matters Distant," 134 U.Pa.L. Rev. 913, 926 (1986)("If questions of fact are common, but multiple questions of law exist, then the common questions of fact will not predominate over the individual question of law, and the action will fail the predominance test); Ryan, "Uncertifiable?: The Current Status of Nationwide State-Law Class Actions," 54 Baylor Law Review 467, 474 (2002)("If a nationwide state-law governed class otherwise meets the Rule 23(a) and 23(b)(3) requirements, the choice-of-law inquiry will ordinarily make or break certification"). See note 39 infra.

As the forum state, Pennsylvania conflict of laws principles are applicable to determine whether Pennsylvania or Delaware substantive law applies. Troxel v. A.I. DuPont, 431 Pa. Super. 464, 467, 636 A.2d 1179, 1180 (1994), app. denied, 538 Pa. 648, 647 A.2d 903 (1994). Under Pennsylvania conflict of laws principles, courts apply a combination of "government interest" analysis and the "significant relationship" approach of Section 145 of the Restatement (Second of Conflicts). With this "flexible" approach, courts analyze "the policies and interests underlying the particular issue before the court." Troxel, 431 Pa. Super. at 467-68, 636 A.2d at 1181. The analysis is flexible, not mechanical, as the Troxel court explained:

> The relevant inquiry, therefore, is not the number of contacts each litigant has had with a state. Instead, a court must evaluate "the extent to which one state rather than another has demonstrated by reason of its policies and their connection and relevance to the matter in dispute a priority of interest in the application of its rule of law. Troxel, 431 Pa. Super. at 468, 636 A.2d at 1181 (citations omitted).

The following factors may be considered, but they should be analyzed qualitatively rather than quantitatively: "the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation, and place of business of the parties; and the place where the relationship between the parties is centered." Laconis v. Burlington County Bridge, 400 Pa. Super. 483, 492, 583 A.2d 1218, 1222-23(1990), app. denied, 529 Pa. 615, 600 A.2d 532 (1991). See also Restatement of the Law (Second) - Conflict of Laws, § 145.

Finally, the conflicting interests of each state must be analyzed within the context of the specific facts at issue in a particular case: "Whether the policies of one state rather than another should be furthered in the event of a conflict can only be determined within the matrix of specific litigation." Rosen v. Tesoro Petro., 399 Pa. Super. 226, 233, 582 A.2d 27. 31 (1990)(quoting

McSwain v. McSwain, 420 Pa. at 94, 215 A.2d at 682).

Plaintiff suggests that both Pennsylvania and Delaware have significant interest in the present litigation. As for Pennsylvania, he notes that two of the three defendants-- Park Towne Place Associates Limited Partnership and PTP, Inc. are domiciled in Pennsylvania and maintain their principal place of business here. All three defendants have registered to do business in Pennsylvania: the partnership registered in November, 1985; defendant PTP registered in 1996 and defendant AIMCO registered in June 1995. Pennsylvania is also the location of the real estate that is at the center of the parties' relationship. Park Towne Place, comprising 980 apartment units, is located on the Benjamin Franklin Parkway in Philadelphia, Pennsylvania. The conduct which forms the basis for the claims of the putative class concerns the ownership, management and value of that real estate. Consequently, the partnership's "revenue stream" is generated in Pennsylvania. Moreover, approximately 39 members of the proposed class are Pennsylvania residents. [29] Delaware, in contrast, also has a strong interest since each of the three defendants was formed under Delaware law.

The weight of these factual links tips the scale in favor of Pennsylvania law. The 1986 Partnership Agreement that is the central focus of the class action complaint, however, has a choice of law provision that provides that "[t]his agreement shall be construed and enforced in accordance with the laws of Delaware." See 1986 Partnership Agreement, § 11.6. This contractual choice of law provision alone is not dispositive as to the law applicable to plaintiff's tort claim. As one federal court has observed:

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[29] Plaintiff's 9/12/2002 Memorandum at 13 & 20; Plaintiff's 6/10/2002 Memorandum at 22-23 & 24; Amended Complaint, ¶¶ 3, 4, & 5.

> Contractual choice of law provisions, however, do not govern tort claims between contracting parties unless the fair import of the provision embraces all aspects of the legal relationship. Courts analyze choice of law provisions to 'determine based on their narrowness or breadth, whether the parties intended to encompass all elements of their association.'" Jiffy Lube International, Inc.v. Jiffy Lube of Pa., Inc., 848 F.Supp. 569, *576 (E.D.Pa. 1994).[30]

The choice of laws provision in the Partnership Agreement clearly states that the "agreement" shall be construed in terms of Delaware law, thereby suggesting a narrow scope for the application of Delaware law. The fraud claim in Wurtzel's amended complaint focuses on the allegedly misleading tender offers in 1999, 2000 and 2001 as well as the May 29, 2001 Merger Information Statement. Amended Complaint, ¶ 64. The fraud at issue, therefore, arose from acts external to the agreement. Nonetheless, since the fraud was allegedly committed by a general partner, the fiduciary duty set forth in § 5.2 of the 1986 Partnership Agreement is necessarily implicated.See Amended Complaint, § 18(a).

These "facts" and "issues" raised in the present litigation must be interpreted in light of the interests of the respective states. In Troxel v. A.I. Dupont Institute, 431 Pa. Super. 464, 636

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[30] An alternative approach for deciding which law to apply in a case involving fraud is to focus on the location from which the fraud emanated. See, e.g. Gruber v. Price Waterhouse, 117 F.R.D. 75, 82 (E.D.Pa. 1987)(in a case involving allegedly fraudulent public offering materials for stock, focus on the law of the state from which the misstatements emanated). That focus provides little clarity here since neither party has provided any information on the place of emanation of the tender offers at issue. The documents for each of the tender offers at issue are attached as exhibits to the initial complaint. The letter dated April 22, 1999 relating to the Partnership's April 1999 tender offer has a letterhead bearing an address in Carlstadt, New Jersey. See Complaint, Ex. 3. The letters of transmittal for the May 24, 2000 and February 9, 2001 tender offers likewise give a New Jersey address for the "information agent." Complaint, Exs. 4, Annex III & 5, Annex III. This is not dispositive since New Jersey has no other interest in this dispute and none of the parties suggest that New Jersey law should apply. Moreover, this approach seems akin to the lex loci delecti rule that was formerly applied, but then rejected, in a choice of law analysis by Pennsylvania courts. See Troxel v. DuPont Inst., 431 Pa. Super. 464, 467-68, 636 A.2d 1179, 1180-81 (1994).

A.2d 1179, for instance, the Superior Court analyzed not only the facts of the case but which state--Delaware or Pennsylvania--had a greater interest in the application of its law. Although the plaintiff in Troxel was a Pennsylvania resident, the court concluded that Delaware had a greater interest in the application of its laws where medical treatment in a Delaware facility was at issue. The Troxel court reasoned that while Pennsylvania, the forum state, had an interest in redressing wrongs against its residents that interest was outweighed by Delaware's "interest in regulating the delivery of healthcare in Delaware." Troxel, 431 Pa. Super. at 468-69, 636 A.2d at 1181.

Applying these considerations to Wurtzel's proposed class action leads to the conclusion that Pennsylvania, rather than Delaware, has evinced a greater interest in easing the standards for establishing fraud in the context of a fiduciary relationship. The Delaware Supreme Court in Gaffin, for instance, offers little rationale for its conclusion that a class action cannot be maintained based on a common law fraud claim. That court merely notes that common law fraud is inappropriate for a class action because it would require individualized proof of reliance and has been denied by various other courts. It dismisses as inapposite federal precedent that certified both federal securities claims and pendent common law claims because such actions were posited on federal securities law violations. It also suggests that choice of law issues weigh against certification of these fraud claims. Gaffin v. Teledyne, 611 A.2d at 474-75, n. 7 & n.8.

The Pennsylvania Superior Court, in contrast, has recently concluded in its two Basile decisions (i.e. Basile I and Basile III) that where a defendant is bound by fiduciary duties "reliance by the class plaintiffs is implicit and is established by operation of law as to all matters within the scope of the agency." Basile I, 729 A.2d at 584. The fiduciary duty in Basile was premised on either an agent/principal or a confidential relationship. In the instant case, the fiduciary duty is

specifically set forth in the 1986 Partnership Agreement.1986 Partnership Agreement § 5.2. Under Pennsylvania law, "the relationship between partners in a partnership derives from the partnership agreement." See Abbott v. Schnader, Harrison, Segal & Lewis, 2002 Pa. Super. 247, 805 A.2d 547, 552 (2002). In addition, Pennsylvania precedent provides generally that partners owe a fiduciary duty to each other.[31] Moreover, the Pennsylvania Supreme Court has evinced a special concern for providing a remedy for fraud among partners by easing the standards for establishing fraud. In Clement v. Clement, 436 Pa. 466, 260 A.2d 728 (1970), the Pennsylvania Supreme Court explicitly stated:

> There is a fiduciary relationship between partners. Where such a relationship exists, actual fraud need not be shown. . . . . It would be unduly harsh to require that one must prove actual fraud before he can recover for a partner's derelictions. Where one partner has so dealt with the partnership as to raise the probability of wrongdoing, it ought to be his responsibility to negate that inference. Clement, 436 Pa. at 468, 260 A.2d at 729.

In other words, the Clement court concludes that certain favorable "inferences" exist where a partner is asserting a claim of fraudulent conduct by another partner. For instance, if a partner fails to keep records of partnership activity and cannot make an accounting, "every presumption will be made against him." Id., 260 A.2d at 469. These favorable "inferences" and "presumptions" in Clement flowing from the fiduciary relationship of partners are analagous to the Superior Court's conclusion in Basile I that "reliance by the class of plaintiffs is implicit and is

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[31] See Clement v. Clement, 436 Pa. 466, 468, 260 A.2d 728, 729 (1970)("There is a fiduciary relationship between partners"); Bracht v. Connell, 313 Pa. 397, 402, 170 A. 297, 299 (1933)("Partners stand in a fiduciary relationship to copartners"); Harbour Hosp.Servs. Inc. v. GEM Laundry Servs., 2001 WL 1808556 at 10 (Phila. Com. Pleas 2001); Poeta v. Jaffe, 2001 WL 1113012 at 3 (Phila. Com. Pleas 2001). Under the Uniform Partnership Act, a partner is accountable as a fiduciary for the profits he obtains in the conduct of the partnership but without the consent of the other partners. 15 Pa.C.S.A.§ 8334(a). This applies to Limited Partnerships under 15 Pa.C.S.A. § 8311(b).

established by operation of law" where a fiduciary relationship exists. Basile, 729 A.2d 584. See also Basile, III, 777 A.2d at 107 ("the obligations of a defendant bound by a fiduciary duty relieve the plaintiff of the burden to prove reliance").[32]

There is another policy or "interest" of Pennsylvania courts that is significant. See generally Rosen v. Tesoro Petro. Corp., 399 Pa. Super. 226, 231, 582 A.2d 27, 30 (1990)("We must analyze the governmental interests underlying the issue and determine which state has the greater interest in the application of its laws"). Pennsylvania courts have repeatedly emphasized that it is the "policy of our Commonwealth that 'decisions in favor of maintaining a class action should be liberally made." Janicik v. Prudential Ins. Co., 305 Pa. Super. at 182 , 451 A.2d at 454. See also Baldassari v. Suburban Cable TV Co. Inc., 2002 WL 1974552 at 3 (Pa.Super. 2002); D'Amelio v. Blue Cross, 347 Pa. Super. 441, 449, 500 A.2d 1137, 1141 (1985).

In light of this precedent--both recent and longstanding--to ease the criteria for establishing fraud in the context of fiduciary duties as well as the strong factual ties that link this litigation to Pennsylvania, Pennsylvania law applies to plaintiff's common law fraud claim.Under that precedent, the common law fraud claim should therefore be certified.

3. Typicality

A third requirement for certification under Rule 1702 is "typicality" in which "the claims

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[32] The case for certification is arguably stronger in Wurtzel than in Basile because of the differing sources of fiduciary duty. While the fiduciary duty in Wurtzel is set forth in an agreement common to all proposed class members, the fiduciary duty in Basile based on either an agent/principal or confidential relationship potentially raises isssues of fact. See Goren, "A Pothole on the Road to Recovery: Reliance and Private Class Actions Under Pennsylvania's Unfair Trade Practice and Consumer Protection Law," 107 Dickinson L. Rev. 1, 37-38 (2002) (suggesting how the presumptions and inferences flowing from a fiduciary duty can be critical for class certification).

or defenses of the representative parties are typical of the claims or defenses of the class." Pa.R.C.P. 1702(3). The typicality requirement is closely related to the requirements of commonality and adequacy of representation. D'Amelio v. Blue Cross, 347 Pa. Super. 441,458, 500 A.2d 1137, 1146 (1985), app. denied, 514 Pa. 630, 522 A.2d 559 (1986). The purpose of this rule "is to determine whether the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class." D'Amelio, 347 Pa. Super. at 458, 500 A.2d at 1146. The typicality requirement has also been characterized as "related to the concept of constitutional standing" on the theory that "a person cannot litigate claims of a class of which he is not a member." Ablin, Inc. v. Bell Telephone Co., 291 Pa. Super. 40, 49, 435 A.2d 208, 213 (1981)(citations omitted).

Defendants have alternatively argued that Wurtzel lacks standing and does not satisfy the typicality requirement. To the extent these arguments implicate Pa.R.C.P. 1702(3),they will be analyzed together. Before Wurtzel filed his amended class action complaint, defendants initially argued that Wurtzel lacked standing to represent this class action and that his claim became moot because the May 29th merger had been abandoned after this court issued a preliminary injunction against the merger. See Defendants' 10/15/2001 Memorandum at 3. In this initial argument, defendants noted that "standing" can have 2 possible meanings in the context of a class action: (1) whether the class has suffered harm or (2) whether the class representative can represent the interests of the class.[33] It was the first type of standing, with its focus on harm, that defendants

[33] See Defendant's 10/15/2001 Memorandum at n. 3. An example of how "standing" is relevant to the typicality requirement in a class action is exemplified in another case cited by defendants, McMonagle v. Allstate, 460 Pa. 159, 331 A.2d 467 (1975). In McMonagle, the

asserted plaintiff lacked. Procedurally, however, this type of challenge would be raised in a preliminary objection and not as a response to a class certification motion.[34] Not surprisingly, therefore, the Pennsylvania cases defendants rely upon deal with standing in the context of preliminary objections to the continued viability of the class action rather than in the context of a class certification motion. See, e.g., Citizens for State Hosp. v. Com., 553 A.2d 496 (Pa. Cmwlth. 1989); Nye v. Erie Insurance Ex., 504 Pa. 3, 470 A.2d 98 (1983)(lack of standing raised in

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Superior Court concluded that a class action could not be maintained by a representative plaintiff who did not fall within the proposed class (i.e. a class of insureds whose benefits were diluted under one coverage because of payments under another coverage by the same insurer). The court concluded that "one who has never been subjected to or threatened with subjection to the challenged conduct may not maintain a class action on behalf of those who allegedly were victimized by the conduct." Id., at 460 Pa. At 169, 331 A.2d at 472. See Defendant's 10/15/2001 Memorandum at 4. In contrast to the plaintiff in McMonagle, Wurtzel was subjected to the same grievances as the other members of his proposed class.

[34] See Niemiec v. Allstate Ins. Co., 721 A.2d 807, 810 (Pa. Super. 1998). In emphasizing the clear differences between a preliminary objection in the nature of a demurrer asserting lack of standing and a class certification motion, the Niemiec court observed:

> Unlike a motion for class action certification, preliminary objections attack directly, inter alia, the legal sufficiency of the claims included in the complaint. It is axiomatic that the disposition of preliminary objections necessarily involves an examination of the merits of the pleaded cause of action....The difference is clear: upon a motion for class certification the court may consider whether a claim may be brought by a class of plaintiffs, whereas at the earlier, preliminary objection stage, the court must decide whether there exists a valid claim to be brought at all, no matter who the plaintiff. Niemiec, 721 A.2d at 810.

Lack of standing is typically raised by preliminary objections. Kuropatwa v. State Farm Ins. Co., 554 Pa. 456, 721 A.2d 1067 (1998)(preliminary objections as to whether insured had standing to file suit against automobile insurer to compel payment of medical bills when payment was denied due to peer review); Lee v. Municipality of Bethel Park, 156 Pa. Cmwlth. 158, 162, 626 A.2d 1260, 1262 (1993)(preliminary objection as to the standing of former police officers who challenged refunds from pension fund); LSC Holdings Inc. v. Ins. Comm., 151 Pa. Cmwlth. 377, 381, 616 A.2d 1118, 1120 (1992)(preliminary objections as to standing of shipping company to file petition for reimbursement of payments to injured employees). Preliminary objections asserting lack of standing are also asserted in the early pleading stages of class actions. See, e.g., Treski v. Kemper Nat. Ins. Co., 449 Pa. Super. 620, 674 A.2d 1106, 1110 (1996); Citizens for State Hosp. v. Com., 123 Pa. Cmwlth. 150, 152, 553 A.2d 496, 497 (1989)(sustaining preliminary objections and dismissing class action complaint for lack of standing).

preliminary objections to class action complaint).

Moreover, while these cases concluded that plaintiffs lacked standing, the facts alleged as to harm differ significantly from those of the Wurtzel action. The plaintiffs in Citizens for State Hosp., for instance, failed to set forth allegations of specific harm to them due to the threatened closure of the hospital that would not be the same as for all "citizens of Pennsylvania." Citizens, 123 Pa. Cmwlth. at 157, 533 A.2d at 499. Likewise, the plaintiff in Nye failed to allege how the estate of his deceased daughter was injured by the acts of various insurers except for the one insurer by whom she had been insured. Nye, 504 Pa. at 6, 470 A.2d at 100. In contrast, the allegations of harm in the Wurtzel class action complaint are significantly different as to standing [35]since they are specific to the proposed class, their partnership agreement and the harm due to defendants' alleged breach of the partnership agreement, fiduciary duty and fraud in the 3 tender offers. Consequently, this precedent cited by defendants is inapposite both as to its procedural context and its facts.

An example of why this argument, with its suggestion that the plaintiffs have suffered no harm, skirts perilously close to the merits in a manner that is inappropriate for a class certification motion is illustrated by Cavanaugh v. Allegheny Ludlum Steel Corp., 364 Pa. Super. at 441-46, 528 A.2d at 238-240. In Cavanaugh, the Superior Court concluded that the trial court erred in

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[35] For standing, a plaintiff must show harm: "As a general matter, the core of the concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no right to obtain a judicial resolution of his challenge. Kuropatwa v. State Farm Ins. Co., 554 Pa. at 460, 721 A.2d at 1069. Under Pennsylvania law, a plaintiff establishes standing if "(1) the plaintiff has a substantial interest in the controversy (2) that interest is direct, and (3) that interest is immediate." LSC Holdings, Inc. v, Ins. Comm., 151 Pa.Cmwlth. at 382, 616 A.2d at 1121(citing William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1978)).

refusing to certify a class action by consumers against a corporation for allegedly polluting public waters by releasing slimicide into the Allegheny River. The trial court denied the motion for class certification on the grounds that plaintiff had not proven that the water was contaminated. According to the appellate court, this was error because "[i]nstead of focusing on the plaintiff's obligation to establish the factors relevant to class certification, the lower court improperly examined the merits of the litigation itself." Id., 364 Pa. Super. at 445-446, 528 A.2d at 240. In essence, the trial court erred by doing what defendants suggest this court should do: determine that plaintiffs have failed to establish harm. Whether plaintiff's allegations of harm ultimately set forth a viable claim remains to be seen. A challenge as to the merits, however, while appropriate for a preliminary objection or summary judgment, is not appropriate in the context of a motion for class certification.

After Wurtzel filed the amended complaint, defendants continued to argue that the class had suffered no harm due to the termination of the merger proposal. See, e.g Defendants' 7/10/2002 Memorandum at 6-10. In developing their argument that plaintiffs have suffered no harm, defendants at times verge into an argument on the merits, and at other times into an argument that plaintiffs have not satisfied the typicality requirement. The typicality issue emerges in two differing perspectives: the typicality of Wurtzel, as a class representative and the typicality of those members of the proposed class who tendered their interests in response to the November 2002 tender offer. Because defendants' arguments are not always clear, it is necessary to analyze the cases they cite and the purpose for which they are invoked.

Defendants cite, for instance, Shapiro v. Midwest Rubber Reclaiming Co., 626 F.2d 63 (8th Cir. 1980), cert. denied, 449 U.S. 1079 (1981) for the proposition that summary judgment

was properly entered where plaintiffs challenging an offer to exchange stocks for debentures did not respond to that offer by tendering their interests, thereby suffering no harm.[36] This court, in contrast to the Shapiro court, is not presented with a summary judgment motion as to the merits. Rather, the focus must be on whether Wurtzel satisfies the typicality requirement for certification. Shapiro does, however, deal with the typicality issue when it concludes that plaintiffs, who did not rely on the allegedly misleading offering statement, were not typical of their proposed class consisting of those who did. Shapiro, 626 F.3d at 71. In the instant case, however, the proposed class of 194 limited partners as of May 29, 2001, consists of those who did not respond to three prior tender offers. Wurtzel clearly falls within that proposed class and can serve as a typical representative of it.

Similarly, another case defendants rely on to argue that the proposed class does not satisfy the typicality requirements is Spivak v. Petro-Lewis Corp., 120 F.R.D. 693 (D. Colo. 1987). The plaintiffs in Spivak were challenging a tender offer as misleading. They had not responded to the tender offer yet sought to represent a class who had responded to it. Since the plaintiffs were asserting a claim under section 14(e) of 15 U.S.C. section 78(n)(e), the court had to grapple with the subtle issue of standing under that statute. See Spivak, 120 F.R.D. at 695-96. The court concluded that even if the plaintiffs, as class representatives, prevailed on the standing issue, litigating that issue could seriously drain the resources of the class action as a whole. Id. at 698. The facts of the class proposed by Wurtzel, once again, are distinguishable since, like Wurtzel,

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[36] See Defendants 7/10/2001 Memorandum at 7 (characterizing the Shapiro court as concluding that "the defendants were entitled to summary judgment because plaintiff's allegations provide[d] no basis on any legal theory for granting relief to them or the other members of their class as certified'").

none of the proposed class had responded to the 3 tender offers prior to the key date of May 29, 2001. Wurtzel thus is a typical representative of the proposed class. Moreover, the proposed class is not asserting a claim under a federal securities act.

Finally, defendants invoke Hundahl v. United Benefit Life Insurance Co., 465 F.Supp. 1349 (N.D. Texas 1979) as granting "summary judgment against plaintiffs who were challenging a tender offer but who had not tendered theirs." Defendants' 7/10/2002 Memorandum at 9. Yet as defendants' synopsis of Hundahl suggest, that court engaged in an analysis of the merits of plaintiffs' class action claim under the federal securities law. Plaintiffs, as a stockholders of Union Benefit Life Insurance Company ("Union"), alleged that Union together with a company acquiring increasing amounts of Union stock, engaged in a complex scheme to manipulate the price of Union stock and issued an allegedly misleading tender offer. The Hundahl court analyzed the legislative intent of section 14(e) of the Securities Exchange Act, 15 U.S.C.§ 78n(e)(1976) to conclude that the representative plaintiff, as a nontendering shareholder who thus was not misled by the alleged misrepresentations in the tender offer, was not the usual type of victim "for whose protection the Williams Act was fashioned." Hundahl, 465 F.Supp. at 1369. Hence, they lacked standing under section 14(e). As defendants note, the court then "granted summary judgment against plaintiffs who were challenging a tender offer, but who had not tendered their shares." Defendants' 7/10/2002 Memorandum at 9.

The proposed class action by Wurtzel, however, is not asserting any claims under section 14(e) or any federal securities act. The subtle analysis of the standing issue in Hundahl is thus inapposite. Moreover, Wurtzel is in the same position as the 194 members of the proposed class as to the Breach of Partnership and Breach of Fiduciary claims. He is thus a typical member of

the proposed class, in contrast to the representative plaintiffs in another case invoked by defendants, Kas v. Financial General Bankshares, Inc., 105 F.R.D. 453 (D.D.C. 1984).[37]

Defendants also develop their argument that the proposed class does not satisfy the typicality requirement by focusing on a different angle: not just whether Wurtzel is a typical representative of the class defined as of May 29, 2001 but also whether the typicality requirement has been destroyed by the subsequent actions of those limited partners who tendered their interests in response to the November 2001 tender offer. See Defendants' 5/7/2002 Memorandum at unnumbered 5. Defendants argue that those limited partners who tendered their interests in response to the November 2002 tender offer "evidence of a divergence of interests between Wurtzel and the majority of the proposed class." Id. Defendants also suggest that the members of the proposed class who tendered their units would be subject to a defense of waiver or estoppel. Id. at 6.

Defendants' arguments are unpersuasive for the reasons previously discussed in the context of the commonality issue. See Section III (B)(2)(a)(i). Moreover, the possibility that a common defense of waiver and estoppel might be posed against those limited partners who responded to the November 2001 tender offer would not, at this point, undermine the scores of common issues that unite the class. If such a defense were posed and proved unwieldy, a subclass might be created for that discrete group of limited partners under Pa.R.C.P. 1710. See also

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[37] The Kas court concluded that a representative plaintiff who had not tendered his shares in response to an allegedly misleading tender offer was not a typical representative of those shareholders who did rely on the offer and sold their interests. As that court explained, "the typicality requirement focuses on the representatives' position with respect to the defendants' conduct, and where the representative parties are subject to unique defenses, their claim is not typical of the class." Kas, 105 F.R.D. at 461.

Janicik v. Prudential, 305 Pa. Super. at 129, 451 A.2d at 455("[t]hroughout the class action, the court has extensive powers to protect absent class members and ensure the efficient conduct of the action"). The class proposed by Wurtzel thus satisfies the typicality requirements of Pa.R.C.P. 1702 (3).

4. Adequacy of Representation

A fourth requirement for certification under Rule 1702 is that "the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709." Pa.R.C.P. 1702(4). Rule 1709 requires the court to consider the following issues:

> (1) whether the attorney for the representative parties will adequately represent the interests of the class;
> (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and;
> (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed. Pa.R.C.P. 1709.

As previously discussed, Wurtzel qualifies as a typical representative of his proposed class. He is a highly qualified representative who was educated at Oberlin College, the London School of Economics and Yale Law School. After five years of practice with a Washington, D. C. lawfirm, Wurtzel became CEO of Circuit City Stores and served on its board as well as the boards of such companies as Dollar Tree Stores and TJX. 5/8/2002 N.T. at 11-12; Plaintiff's 9/12/2001 Memorandum at 23.

The adequacy of Wurtzel's attorneys to represent the class is generally presumed unless challenged. Dunn v, Allegheny County Property Assessment and Appeals Review, 794 A.2d 416. 425 (Pa. Cmwlth. 2002). Moreover, plaintiff's counsel have presented a more than adequate history of their past experience with class actions. See plaintiff's 9/12/2001 Memorandum at 22-

24 (outlining counsel's experience in complex commercial litigation). Defendants did raise an issue, however, as to the continued commitment of plaintiff's counsel to representing this class action in light of their decision to leave one law firm to join new ones. 5/8/2002 N.T. at 16-18; 48-51. After joining new firms and conducting the requisite conflict checks, plaintiff's counsel entered their appearance with their new addresses and reaffirmed their commitment to proceeding with this class action.[38]

5. Fair and Efficient Method of Adjudication

The final requirement under Rule 1702 for certification is that the action "provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708." Pa.R.C.P. 1702(5). To determine whether the class action provides a fair and efficient method of adjudication of a particular controversy, the court "must balance the interests of the litigants, present and absent, and of the court system." Janicik v. Prudential Ins. Co., 305 Pa. Super. at 141, 451 A.2d at 461(citations omitted). In contrast to federal class actions, "class actions brought under the Pennsylvania rules need not be 'superior' to other methods." Id. (citations omitted).

Pennsylvania Rule of Procedure 1708 sets forth the following requirements for determining whether a class action is a fair and efficient method for adjudicating a controversy:

> Rule 1708 -
> In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in

[38] See 7/11/2002 letter from Theodore Mann, attached to Plaintiff's 7/25/2002 Memorandum (stating that Mr. Mann entered his appearance in this case as a partner of the Wolf Block firm after it had completed a conflicts check); see also Praecipe for Substitution of Appearance by Marc Zucker dated 9/12/2002 (changing address but entering appearance for the Wurtzel class action).

subdivisions (a)(b)and (c).

(a) Where monetary recovery alone is sought, the court shall consider

(1) whether common questions of law or fact predominate over any question affecting only individual members;

(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claim of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate claims;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action;

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class;

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

Pa.R.C.P. 1708

In his Amended Complaint, Wurtzel seeks a combination of declaratory relief, injunctive relief and, where appropriate monetary damages. See, e.g., Amended Complaint, ¶¶ 54 & Wherefore Clause. Each requirement of Rule 1708 must therefore by considered.

6. Predominance of Common Questions of Law and Fact

As discussed supra in Section III(B)(2), plaintiff's Amended Complaint presents common

issues of fact and law that do predominate as to the claims for Breach of Partnership Agreement, Breach of Fiduciary Duty and Common Law Fraud.[39]

7. Management Difficulties

The proposed class action with its clearly delimited number of 194 limited partners as of May 29, 2001 does not pose difficult problems of management. While defendants have argued that those limited partners who responded to the November 2001 tender offer will be confronted with particular defenses of waiver and estoppel, this alone would not present insurmountable management problems. First, all the plaintiffs will have the same breach of partnership and fiduciary duty claims. The defenses will likewise emanate from the same documents and raise common issues of law and fact. Under rule 1710(c) it will be possible to divide a class into subclasses. As the Superior Court observed in Janicik, "[i]f later refinement of the issues reveals that seemingly similar contractual provisions merit differing interpretations, the court may create appropriate subclasses." Janicik v. Prudential Insurance Co., 305 Pa. Super. at 133, 451 A.2d at 457.

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[39] Determination of whether common issues of law predominate in a case that requires a choice of law analysis requires a subtle methodology. One commentator has aptly described that approach in the context of a federal court that must decide which state law applies:

> If a nationwide state-law governed class otherwise meets the Rule 23(a) and 23(b)(3) requirements, the choice-of-law inquiry will ordinarily make or break certification. Rule 23(b)(5) requires that common questions of law predominate. The predominance inquiry must be performed before class certification. Certification does not depend on the merits of the case. The court must, however, examine the merits to the extent necessary to determine certification. To determine whether common questions of law predominate, the court must determine what legal questions are necessary to resolve plaintiffs' claims. What legal questions are necessary depends on what law applies. What law applies depends on the choice-of-law inquiry.

Ryan, "Certifiable?: The Current Status of Nationwide State-Law Class Actions," 54 Baylor Law Rev. 467, 474 (2002). This was essentially the methodology in Section III(B)(2)(b).

8. Risk of Inconsistent Adjudications

Under Rule 1708(a)(3), a court must consider whether the prosecution of individual actions by members of the class would either result in inconsistent adjudications or adjudications that might be dispositive of the interests of other members of the class. In the instant case, the risk of such inconsistent adjudications is great since the fiduciary duty and partnership agreement claims flow from identical documents and patterns of conduct. Litigating each of these identical claims would pose a risk of inconsistent adjudications as well as the specter that determination of one poorly presented case might dispose of the claims of the other class members if each claim were tried separately. For these reasons, these claims are especially amenable to a class action.

9. Prior Litigation

None of the parties have suggested that there is any prior litigation surrounding this case other than a potential appraisal proceeding.[40] There is thus no impediment under Rule 1708(a)(4) to certification of the breach of partnership agreement and fiduciary duty claims.

10. Appropriateness of the Forum

The defendants have not objected to plaintiff's selection of the Philadelphia Court of Common Pleas as the forum for his class action. Plaintiffs allege that all of the defendants have registered to do business in the Commonwealth and that they regularly conduct business in Pennsylvania. Amended Complaint, ¶¶3-5 & 6. As plaintiff notes, approximately 39 members of the proposed class are Pennsylvania residents. Moreover, the property owned by the partnership, Park Towne Place, is a four building, 980 apartment complex located on Philadelphia's Benjamin

[40] See Plaintiff's 9/12/2001 Memorandum at 19. Plaintiff does not elaborate on the nature of such an appraisal proceeding but it appears to be linked to the "threatened" May 29, 2001 merger.

Franklin Parkway. Consequently, the partnership's "revenue stream" flows from Philadelphia.[41]

11. Complexity of Issues and Amount of Expenses in Relation to Potential Individual Recovery

Rule 1708(6) requires an analysis of "whether in view of the complexities of the issues and the expenses of litigation, the separate claims of individual class members are insufficient in amount to support separate actions." The expenses of this complex litigation could easily deter individual limited partners from pursuing it. While it is not possible to predict at this point the recovery potential for each individual, economies of scale dictate the wisdom to litigating these 194 identical claims together. Similarly, it appears that the potential recovery would be large enough to justify the expense and effort in proceeding with this class action.[42]

12. Actions by Defendants Justifying Final Equitable or Declaratory Judgment Relief Appropriate for the Entire Class

The Amended Class Action Complaint seeks both equitable and declaratory relief. Hence, it is necessary under Rule 1708(b)(2) to consider "whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class." As previously discussed, plaintiffs' claims against the defendants flow from the same documents and same course of conduct in disseminating allegedly misleading tender offers as part of a scheme to deprive the remaining limited parties of the power under the terms of their partnership agreement to replace the general

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[41] Plaintiff's 9/12/2001 Memorandum at 13, 20, & 2.

[42] Such an inquiry is required by Pa.R.C.P. 1708(a)(7), which requires a court to consider "whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action."

partner or resist future "freeze-out" mergers. The most effective approach would address the interests of the class as a whole.

Conclusions of Law

For all of these reasons, the present case is appropriate for certification as a class action as to the claims for Breach of Partnership, Breach of Fiduciary Duty and Common Law Fraud:

1. The class of 194 limited partners as of May 29, 2001 is sufficiently numerous that joinder of all members is impracticable.

2. There are questions of law or fact common to the class as to the claims for Breach of Partnership, Breach of Fiduciary Duty and Common Law Fraud.

3. The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.

4. The representative plaintiff will fairly and adequately assert and protect the interests of the class.

5. The representative attorneys for the plaintiffs will adequately represent the interest of the class.

6. There is no conflict of interest between the representative plaintiff and the class members that would impede the certification of a class action.

7. The class action will provide a fair and efficient method for adjudicating the claims for Breach of Partnership Agreement, Breach of Fiduciary Duties and Common Law Fraud.

8. Common questions of law or fact as to the Claims for Breach of Partnership Agreement, Breach of Fiduciary Duty and Common Law Fraud predominate over any question affecting only individual members.

9. There are no managerial or administrative difficulties which would discourage certification of this class action.

10. Prosecution of separate actions by individual class members could create a risk of inconsistent and varying adjudications and might subject the defendants to incompatible standards of conduct.

11. Individual adjudications could, as a practical matter, dispose of the interests of other class members who may not be parties of the adjudication, or would substantially impair their ability to protect such interests.

12. This forum is appropriate for the litigation of plaintiffs' claims for Breach of Partnership Agreement, Fiduciary Duty and Common Law Fraud on a class wide basis.

13. The complexities of issues, expenses of litigation and the undetermined, but potentially small amount of each individual class member's claims, are factors against the litigation of separate and individual claims but favor proceeding as a class action.

14. The defendants have acted on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

Date: _____ BY THE COURT:

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John W. Herron, J.