IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

THE CONTINENTAL INSURANCE COMPANY, a New Hampshire insurance company, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a New Hampshire insurance company,

Plaintiffs,

v.

RUTLEDGE & COMPANY, INC., a Delaware corporation, and JOHN RUTLEDGE, individually,

Defendants.

RUTLEDGE & COMPANY, INC.,

Counterclaim-Plaintiff,

v.

THE CONTINENTAL INSURANCE COMPANY, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, and CNA FINANCIAL CORPORATION,

Counterclaim-Defendants.

C.A. No. 15539

OPINION

This case involves a dispute between a limited partner and the general partner of a Delaware limited partnership. The parties ask the Court to resolve the following two issues. One, does the limited partnership agreement permit limited partners to withdraw at will, or did the parties orally amend the agreement to suspend temporarily the limited partners' withdrawal rights? Two, does the limited partnership agreement permit the general partner to receive fees directly from portfolio companies? These issues are before the Court on cross-motions for summary judgment.

I. FACTUAL BACKGROUND

Individual defendant John Rutledge is an experienced economist who has advised hundreds of companies regarding their financial affairs. He served as an economic advisor to both Presidents Ford and Reagan. One of Rutledge's advisee companies was plaintiff Continental Insurance Company ("Continental"). Not long after he began his relationship with Continental in 1981, Charles Parker, the Chief Investment Officer of Continental Asset Management ("CAM"), and Gerald Bollman, an executive Vice President of CAM, and Rutledge began considering

Initially, JRP planned to invest in public equity but switched to a private equity investment strategy mid-stream. At the same time that RCI, in its role as general partner of JRP, was negotiating private equity investments with potential portfolio companies, it was also collecting fees from the same companies. It collected these fees solely in its capacity as RCI and not on behalf of the JRP limited partnership.

Continental and RCI initially agreed that JRP would invest in public equity because Rutledge maintained advisory relationships primarily with public companies. Continental was to infuse the portfolio companies with capital, and Rutledge would provide the companies with a financial strategy in order to improve its performance. The improved performance would increase the value of the limited partnership's investment in that company.

As indicia of the partners' intentions, the parties attached appendices to the Agreement discussing JRP's investment strategy. In pertinent part, the operations section of Schedule B to the Agreement provides:

> We anticipate that the Partnership will ... invest in situations only where there is a clear exit for the Partnership. This implies restricting the Partnership's investment activities to either a) marketable securities, or b) private securities which contain provisions allowing the

JRP's auditor, Deloitte & Touche, informed RCI that it had earned carried interest (i.e., percentage of partnership profits) due to quarterly increases in the value of JRP's passive investments in public equity.[2] RCI informed Deloitte & Touche that it and Continental had agreed to calculate carried interest on an annual rather than quarterly basis. Deloitte & Touche would not recognize the change absent an amendment to the Agreement. As a result, RCI and Continental amended the Agreement in September 1993. While the parties amended the accounting section of the Agreement, RCI and Continental did not amend the Agreement to reflect the alleged oral modification of the withdrawal provision.

Following this amendment to the Agreement, RCI continued to invest in private equity. It caused JRP to make six additional investments between 1993 and 1995. In November 1994, RCI caused JRP to invest $9.1 million in United Refrigerated Services ("URS"). Simultaneously, URS paid RCI $270,000 as a transaction fee, or a closing fee, which Rutledge earned for negotiating the transaction. URS paid RCI the

[2] Continental had funded JRP at inception rather than upon capital calls. Consequently, JRP maintained a pool of cash. JRP invested this cash in passive public equity until it needed it to fund strategic investments. In addition to increases in value of strategic investments, JRP earned some profit from its passive investments of its cash pool.

and announced a plan for Robert M. Bass and Chase Manhattan Corporation to infuse equity into the company.

Continental's weakened financial condition affected JRP's financial strategy. As part of its attempt to maintain its financial health, Continental began replacing risky asset classes with conservative investment grade fixed income securities. Pursuant to this new strategy, Continental liquidated $600 million in public equity holdings and sought to withdraw its capital from JRP. RCI informed Continental that approximately $10 million of capital in JRP had not been committed to investments. RCI had already invested the remaining fund capital in illiquid assets, or had made commitments on behalf of JRP which had not yet closed. Continental instructed RCI to fulfill its outstanding commitments, and send Continental the $10 million in uncommitted cash.

The financial turmoil eventually affected the ownership and management structure of both Continental and CAM, Continental's investment subsidiary. Between December 1994 and May 1995 CNA Financial Corporation ("CNA") purchased all outstanding Continental stock. During that time, Parker retired from Continental, and CAM eliminated its equity department, dismissing all employees in that

the Agreement permitted the limited partner to withdraw from the partnership and to be paid its capital account.

The parties, however, could not agree on a method to value JRP's assets in order to accomplish JRP's winding up. Following dissolution, the Agreement instructs the general partner to distribute JRP's assets according to the relative size of each partner's capital account on the date of dissolution. The Agreement defines the size of each partner's capital account in the following manner: RCI receives 25 percent of JRP's profit off the top, and the remaining 75 percent is distributed into Continental's and RCI's respective capital accounts according to their partnership percentages. As a result, the manner in which JRP values its assets affects the size of the post-dissolution distribution each partner receives.

Continental suggested that Houlihan, Lokey value the assets according to Generally Accepted Accounting Principles ("GAAP"). In addition, Continental suggested that the assets be distributed in-kind to avoid any emergency liquidation of largely illiquid investments. St. Dennis, however, became concerned with discount factors used in GAAP determinations and proposed a different valuation methodology. RCI moved forward with JRP's asset valuations using its own methodology,

did not disclose that it gave Houlihan Lokey this directive when it asked Houlihan Lokey to value JRP's assets.

RCI distributed limited partnership assets to Continental on October 10, 1996 according to the percentages derived from Houlihan Lokey's valuation. It continues to manage JRP as an ongoing entity distributing, rather than reinvesting, profits gained from harvesting JRP's successful investments. Distributions after October 10, 1996 have complied with Houlihan Lokey's valuation.

II. CONTENTIONS OF THE PARTIES

First, Continental asks the Court to find that it properly withdrew from JRP according to the terms of the Agreement. Furthermore, it asks the Court to cause RCI to properly value JRP's assets according to the terms of the Agreement and make appropriate distributions, whether those distributions are liquidation shares or distributions in kind. Second, Continental claims that RCI has improperly received fees from portfolio companies in breach of its duty of loyalty. It asks this Court to award Continental compensatory damages sustained by it as a result of RCI's fiduciary breach.

factual disputes simply because they have filed cross-motions for summary judgment.[7] Although the current dispute before the Court presents a case ripe for a decision on summary judgment because it arises from the application of a written limited partnership agreement,[8] the Court also maintains the discretion to deny summary judgment if it decides that a more thorough development of the record would clarify the law or its application.[9] With this standard in mind, I turn to the two primary issues in dispute.

B. Continental Withdrew From JRP as of September 30, 1995

As a preliminary matter, the Court notes that while RCI now challenges Continental's right to withdraw from JRP, it has made capital account distributions to Continental *as if it had withdrawn ever since 1995*. Moreover, the Court notes the *timing* of RCI's challenge to Continental's withdrawal rights. RCI did not vigorously assert that the parties entered into an oral amendment to the Agreement until *after*

---

[7] *See United Vanguard Fund v. Takecare, Inc.*, Del. Supr., 693 A.2d 1076, 1079 (1997).

[8] *See Theater Acquisitions, L.P. v. Reading Co.*, Del. Ch., C.A. No. 15742, slip op. at 5, Chandler, C. (April 23, 1998).

[9] *See Alexander Indus., Inc. v. Hill*, Del. Supr., 212 A.2d 917, 918-19 (1965).

The dispute before the Court arises from Section 23(c) of the Agreement and the alleged oral modification of this section. The clause at issue explicitly states that "a Limited Partner may voluntarily withdraw from the Partnership upon the giving of written notice of withdrawal to the Partnership (i) at least thirty (30) days prior to the end of any Cycle...." According to these terms, Continental had every right to withdraw from the limited partnership. Consequently, absent an oral modification, the plaintiffs prevail in this litigation and the Court will find that they properly withdrew from the limited partnership.

This issue, therefore, hinges on three questions. Does the limited partnership agreement permit oral modifications? If so, have the defendants presented sufficient evidence to prove an oral modification occurred? And if so, have the defendants proven all the elements of a contract modification?

1. The Agreement Calls For a Written Amendment

In its effort to resolve contract disputes, the Court looks first to the contract itself. In some cases, a contract provision, to which the parties previously and privately agreed, anticipates the area of discontent and provides a resolution to the conflict. Where contract language speaks to

These terms seem to authorize RCI to unilaterally amend the Agreement, rendering a writing unnecessary. In order for RCI to unilaterally amend the Agreement, however, such an amendment cannot adversely affect any limited partner. Although RCI has discretion under the Agreement to determine whether amendments adversely affect the limited partner, RCI could not in good faith claim that the amendment it seeks to uphold does not adversely affect Continental. Suspending the limited partners' power to withdraw from the limited partnership does adversely affect the limited partners.

Indeed, RCI has not formally asserted that it unilaterally amended the Agreement. Instead, RCI contends that the parties' prior course of dealing effectively waives any writing requirement. RCI claims that the discretion Section 28 provides RCI to unilaterally amend the Agreement demonstrates that the parties had good reason to forgo writings. RCI's authority under Section 28 rendered writings superfluous because RCI, in reliance on Section 28, could simply amend any agreements reached, whether or not those agreements were written. Consequently, RCI and Continental opted for discussions rather than writings. Moreover, RCI claims that due to the close working relationship among Rutledge, Bollman, and Parker, the parties preferred to confront issues that arose by

Agreement in writing. The Court cannot deem the demand for written modifications waived.

2. *RCI Has Not Met Its Evidentiary Burden to Prove an Oral Modification*

Even assuming RCI could unilaterally amend the Agreement by invoking Section 28, the Court still would not uphold the alleged oral modification. Delaware law's aversion to oral modifications of written agreements further saps any strength from defendants' argument. A party asserting an oral modification must prove the intended change with "specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document."[15] Absent a written modification, the Court finds itself in a precarious position. In order to recognize the oral modification, the Court must take defendants at their word, despite plaintiffs' denial of any alteration. To make such a leap of faith, however, the Court must first rule out the possibility that the asserting party has alleged an oral modification in an attempt to unilaterally alter a pre-existing, but unfavorable, agreement. In an effort to screen out parties' attempts to

---

[15] *Reeder v. Sanford School, Inc.*, Del. Supr., 397 A.2d 139, 141 (1979).

RCI misplaces its reliance on *Haft*. The Court, in *Haft*, addresses whether *terms* in an agreement are definite and certain enough to be binding, or are so ambiguous that the Court cannot assign the terms a cohesive meaning. Where terms in an agreement are so vague that a Court cannot determine the existence of a breach, then the parties have not reached a meeting of the minds, and a Court should deny the existence of the alleged agreement.[17] Here, the parties do not argue over the certainty or ambiguity of terms. Both RCI and Continental agree on what the alleged oral modification would say. The parties in this case argue over the very existence of the oral modification of the Agreement, not the certainty or ambiguity of its terms. Consequently, *Haft* is inapposite and RCI must meet the evidentiary threshold established in *Reeder* in order to satisfy this Court that the parties actually entered into an oral modification of the written Agreement. Thus, RCI must present specific and direct evidence.

The defendants rely heavily on the limited partnership's shift in investment strategy from public equity investments to private equity investments to prove the legally binding modification. In their brief and again at oral argument, the defendants explain that the original contract's

[17] *Haft*, 877 F. Supp. at 906.

binding agreement limiting the parties' right to withdraw from the limited partnership once it began investing in private equity. Bollman, in his affidavit, testifies that he explicitly told RCI that he supported the shift to private equity investment. Bollman's affidavit also specifically states that he explicitly told RCI to seek other similar investments. When the affidavit discusses withdrawal rights, however, Bollman's statements become quite vague. He does not say that he informed RCI that Continental would not withdraw. Instead, he says, based on his conversations with Rutledge, he merely understood that he was committing Continental to remain a limited partner until RCI could appropriately liquidate the private equity investments. This testimony only indicates Bollman's silent understanding, not facts indicating that he and RCI reached an oral agreement. Bollman's affidavit does not reveal facts constituting forbearance of Continental's legal rights under the agreement, nor any desire to do so. There is a difference between wanting to preserve the limited partnership in order to realize greater profit while still maintaining the legal right to withdraw, and relinquishing the legal right to withdraw altogether. Moreover, the only written correspondence between RCI and Bollman regarding the shift to private equity investments, a December 26, 1991 letter, contains no

the limited partnership in any way, then plaintiffs' counsel's question would have compelled Parker and Bollman to answer differently.

Despite the defendants' reasonable argument, the facts they allege do not rise to the level of "specificity and directness" required for the Court to enforce the alleged oral amendment. The facts defendants allege only confirm that the parties anticipated maintaining the investments until profitable harvesting points, but do not establish that the parties agreed upon an alteration of their withdrawal rights. Parker's deposition indicates that this is a proper reading of the facts. Counsel asked Parker if, by agreeing to private equity investments, he was "making a commitment not to pull out of that particular investment prior to the time it reached maturity in the ordinary course?" Parker did not answer yes. Instead he said that "[a]ll of the investments were made with [the] *expectation* that it would be held without impairment to maturity … ." (Emphasis added.)

The Court notes that if it read the facts differently, the affidavits might contradict the depositions. To the extent the affidavits contradict the depositions, this Court will exclude the offending affidavit testimony. A party cannot raise a genuine issue of material fact by submitting

request.[21] Past consideration, as opposed to true consideration, however, cannot form the basis for a binding contract. A party cannot rely on a pre-existing duty as his legal detriment in an attempt to formulate a contract.[22] Here, the defendants clearly rely on past consideration, which renders the alleged oral modification unenforceable.[23]

The defendants allege the existence of three forms of consideration to support the alleged oral modification. One, the defendants claim they suffered a detriment because they had to carry the private equity investments at cost on the accounting books, and therefore would receive less "carried interest," or percentage of fund profit, than if they had carried the investments at their true market value. The defendants, however, agreed to carry private equity investments at cost when they first entered into the Agreement. This obligation thus constitutes a pre-existing duty upon which the defendants cannot rely as consideration for the alleged modification.

---

[21] *13 North Enterprises, Inc. v. Bruner*, Del. Ch., C.A. No. 1179, mem. op. at 2, Chandler, V.C. (July 8, 1992).

[22] *McAllister v. Kallop*, Del. Ch., C.A. No. 12856, mem. op. at 14, Chandler, V.C. (July 28, 1995).

[23] I note that RCI did not offer to forgo its own withdrawal rights in exchange for the plaintiff's promise to do the same. I remain unsurprised. RCI could not have withdrawn from the limited partnership if, as it claims, it wanted to maintain long-term investments because its withdrawal would have forced an immediate dissolution and winding up of the partnership. *See* the Agreement, § 23(a). Thus, RCI attempts to rely on other forms of consideration.

4. The Court Will Not Invoke Promissory Estoppel as a Substitute for Consideration

The Court also will not entertain defendants' invitation to invoke promissory estoppel as a substitute for consideration. Defendants cannot prevail under this theory. To succeed on a claim for promissory estoppel, the promisee must prove that the promisor made a promise with the intent to induce action or forbearance, that promisee actually relied on the promise,[24] and that promisee suffered an injury as a result.[25] The asserting party must be able to prove these elements of promissory estoppel by clear and convincing evidence.[26] Moreover, the promise, in such a case, must be definite and certain.[27] Here, for the reasons previously discussed, Bollman and Parker did not specifically promise RCI to forbear Continental's withdrawal rights. The Court recognizes

[24] The plaintiff's brief suggests that a necessary element of promissory estoppel is "reasonable" reliance, not simply reliance. Although it cites no Delaware cases, the brief refers to a number of federal jurisdictions, including the District of Delaware, which embrace "reasonable" reliance as an element of promissory estoppel. The Court need not confront whether imputing a reasonableness requirement into the reliance element is appropriate under Delaware law because the defendants have failed to prove by clear and convincing evidence other necessary elements. The Court agrees, however, that reliance on an oral promise that directly contradicts a written contract, at a minimum, stretches the definition of reasonable.

[25] *VonFeldt v. Stifel Financial Corp.*, Del. Supr., 714 A.2d 79, 87 (1997).

[26] *Reeder*, 397 A.2d at 139.

[27] *State v. Simpson*, Del. Ch., C.A. No. 899, let. op. at 7, Hartnett, V.C. (Sept. 24, 1990)("An essential element of promissory estoppel is that the promisor's representation must be reasonably definite and certain so that the intentions of the parties can be ascertained.")

I note that cases invoking the implied covenant of good faith and fair dealing should be rare and fact-intensive. Only where issues of compelling fairness arise will this Court embrace good faith and fair dealing and imply terms in an agreement.[31]

RCI claims that Continental's withdrawal violates the implied covenant of good faith and fair dealing because it deprives RCI its ability to maximize the partnership profit. RCI's argument contains two weaknesses. First, the parties' reasonable expectations at the time of contract formation indicate that both parties recognized the possibility of private equity investments, but agreed to the withdrawal provisions in Section 23 anyway. Indeed, the defendants in their own brief in support of summary judgment write that "the Agreement expressly contemplates investments by the Partnership in securities which are subject to transfer restrictions. The Agreement confers on RCI discretion to value in good faith securities 'the transferability of which is [sic] restricted.'" Although the parties expected to invest largely in public equity, they did negotiate terms which authorized private equity investment. In that light, Continental cannot act in bad faith if, at the time of contract formation,

---

[31] *Cincinnati SMSA L.P. v. Cincinnati Bell Cellular Systems Co.*, Del. Supr., 708 A.2d 989 (1998).

6. Damages

The limited partners withdrawal dissolves the limited partnership as of September 30, 1995. Delaware law dissolves the limited partnership as a matter of law after all limited partners have withdrawn.[33]

Section 24 of the Agreement governs the general partner's responsibilities for winding up the limited partnership upon dissolution. The relevant section states:

> On dissolution of the Partnership, the General Partner ... will wind up the Partnership's affairs and will distribute the Partnership's assets in the following manner and order: (a) in satisfaction of the claims of all creditors of the Partnership; and (b) any balance to the Partners in the relative proportions that their respective Capital accounts bear to each other, those Capital Accounts to be determined as of the Year ended on the date of the dissolution.

Pursuant to this section of the agreement, RCI must wind up the limited partnership, and make all future winding up distributions based upon the ratio of the partners' respective capital accounts as of the date of dissolution, September 30, 1995.

It seems that RCI has made winding up payments to the limited partners every year after 1995. Continental, however, challenges the method RCI used to value the limited partnership's assets in order to

[33] 6 Del. C. § 17-801(4).

partnership capital. The parties to the Agreement contracted around the duty of loyalty in this regard, RCI claims and, therefore, its receipt of fees from portfolio companies remains perfectly legitimate under the terms of the Agreement.

This dispute highlights a defining tension between contract principles and fiduciary duties. In the limited partnership context, Delaware law resolves this conflict in favor of contract law, rendering fiduciary duties default rules. Consequently, parties to a limited partnership can enter into a contract which diminishes the general partner's fiduciary duties.[34] In order to absolve the general partner from his duties of loyalty or care, the general partner and limited partners must make their intentions plain.[35] Typically, parties place an explicit clause in the limited partnership agreement to that effect.[36] Where a contract clause amends the fiduciary duties a general partner owes the limited partners, a court will give full force to the terms of the contract.[37]

---

[34] *Sonet v. Timber Co., L.P.*, Del. Ch., 722 A.2d 319 (1998).

[35] *Id.*

[36] *See Kahn v. Icahn*, Del. Ch., C.A. 15916, mem. op. at 5-7, Chandler, C., (Nov. 12, 1998).

[37] Many opt for the limited partnership form in Delaware precisely in order to embrace this flexibility. *Kahn* at 6; DRLPA 17-1101(d). Commentators considering the subject agree that limited partnerships' contract theory based structure provide incentives for parties to opt for the limited partnership over other forms of business organizations. *Sonet* at 322 n.8. As such, parties, otherwise unwilling to shoulder fiduciary burdens, maintain the opportunity to form limited partnerships precisely because the parties can contract around some or all of the fiduciary duties the general partner typically owes the limited partners.

scope of section 18, it must decide whether RCI's actions fall within that scope.

1. Section 18 Entitles RCI to Take Partnership Opportunities, But Not to Self-Deal

The first part of this analysis requires the Court to interpret a contract provision to determine to what degree Section 18 diminishes the general partner's duty of loyalty. The law mandates the court distill and enforce the reasonable, shared expectations of the parties at the time they contracted.[38] To do so, the Court applies principles of contract construction that courts have traditionally employed in construing written contracts. Courts refer to the primary rule of construction as the clear meaning rule.[39] Where the parties have created an unambiguous integrated written statement of their agreement, the clear meaning rule instructs courts to enforce the plain meaning of contractual language as understood by a hypothetical third party.[40] Here, the Court must assess whether the contract language unequivocally establishes the parties' reasonable expectations.

---

[38] *U.S West, Inc. v. Time-Warner Inc.*, C.A. No. 14555, mem. op. at 9, Allen, C. (June 6, 1996).
[39] *Id.*
[40] *Id.*

100 companies. He is a professional economic advisor. Thus, his success depends on advising many companies. He would not have accepted a position as general partner if the terms of the position would have completely limited his other lucrative business opportunities. The Court finds it perfectly logical that the parties included Section 18 in the Agreement. Continental, which covets Rutledge's participation, agreed to the clause in order to secure Rutledge's acceptance of the general partner position. The resulting section entitles Rutledge to pursue other investments and business opportunities while occupying the general partner position at JRP.

Section 18, however, does not permit RCI to engage in transactions involving self-dealing in which RCI stands on both sides of a transaction. Section 18 includes the terms "other business activities." This language indicates that the parties intended to diminish the general partner's duty of loyalty where it is implicated by "other" business activities, or activities *outside* the limited partnership. Section 18, on the other hand, does not address situations where the general partner's actions *within* the limited partnership implicate the duty of loyalty—where the general partner engages in self-dealing. No contractual language eschews the general partner's duty to the limited partner to refrain from entering into

personally from his [disloyal] conduct."[44] Even if the investments which RCI negotiated on behalf of the limited partnership prove profitable for the limited partners, RCI's allegedly disloyal acts entitle the limited partners to recover from RCI improper fees portfolio companies may have paid RCI in its role as general partner. Delaware law does not allow a disloyal fiduciary to profit from his breach.[45]

2. The Court Must Make a Factual Determination About Whether Section 18 Protects RCI's Specific Actions In This Case

Now, the Court turns to the second part of its analysis — did RCI's actions fall within the scope of section 18? RCI claims the portfolio companies paid it fees for advisory services, and these advisory services clearly represent the type of activity the parties intended to ordain when they entered into the Agreement. These services qualify as "other business activities of every kind and description" within section 18. The services include, claims RCI, advisory services, investment banking services, and payment for sitting on the board of directors of a number of portfolio companies. Consequently, RCI claims that section 18

[44] *See Thorpe v. CERBCO, Inc.*, Del. Supr., 676 A.2d 436, 445 (1996).
[45] *Thorpe*, 676 A.2d at 445 (*citing Guth v. Loft, Inc.*, Del. Supr., 5 A.2d 503, 510 (1939)).

struggles to label RCI's receipt of fees as "other business activities" under Section 18.

Continental contends that although RCI claims it performed director, advisor, and investment banking services, RCI may not have actually performed such services. Instead, Continental suggests that RCI has merely labeled the fees it has received as advisory, investment banking, and directors fees, while actually accepting those fees in return for performing its function as general partner — causing limited partnership funds to be invested in private equity. Such activity — receiving extra fees for performing the functions expected of a general partner — involves self-dealing, which section 18 does not explicitly permit. Such self-dealing implicates RCI's duty of loyalty.

Continental has come forward with a number of specific facts bolstering its arguments. Continental argues that the timing of the fees evidences self-dealing because supposed advisory fee payments often coincided with investments of limited partnership capital. For example, Stone Manufacturing Co. ("SMC") gave RCI a two-year-$1.1 million advisory deal, a $250,000 increase over RCI's former rate, just after RCI caused the limited partnership to loan SMC $4,250,000.

Despite the compelling and powerful facts Continental presents, material facts remain in dispute. I must ask the parties to develop facts at a trial in order to answer the following question: Exactly what actions did Rutledge take as an advisor, investment banker, or member of a board of directors, *in addition to merely negotiating investment of limited partnership capital*, that would constitute "other business" under section 18 of the limited partnership agreement?

If the facts developed at trial satisfy the court that RCI did, in fact, perform *other services* in return for compensation, then Section 18 permits RCI to retain the fees earned from such "other business activities." But if the facts demonstrate that RCI received the fees for performing the business of the limited partnership, and has merely called the fees advisory, investment banking, or director fees, then RCI will have engaged in self-dealing which Section 18 does not permit. In this latter event, RCI will have implicated its duty of loyalty to Continental, and thus will have to disgorge the fees which portfolio companies improperly paid it. In Delaware, it remains a fundamental principal that a disloyal fiduciary may not profit from his breach.[49]

[49] *Bomarko, Inc. v. International Telecharge, Inc.*, Del. Ch., C.A. No. 13052, mem. op. at 54, Lamb, V.C. (November 4, 1999) (*citing Thorpe*, 676 A.2d at 445).

general partner's breach of the limited partnership agreement. But, if the limited partnership agreement remains unambiguous, then §17-1101(d)(1) does not apply. A general partner cannot wrongly rely in good faith on a misinterpretation of a contract clause if it is subject to only one plausible interpretation.

Section 18 is unambiguous and, therefore, I reject the invitation to invoke §17-1101(d)(1). As explained earlier, Section 18 permits RCI to embrace other business opportunities, but it does not authorize self-dealing. RCI cannot in good faith interpret Section 18 to enable it to appropriate limited partnership property for its own gain to the exclusion of the limited partners. Such an interpretation ignores the word "other" in the phrase "other business activities" in Section 18. Inclusion of the word "other" limits the scope of Section 18 to activities outside the limited partnership and exclusive of RCI's role as general partner.

4. The Acquiescence Defense

RCI also invokes the acquiescence defense. It claims that even if receipt of fees from portfolio companies breached the duty of loyalty it

Continental, on the other hand, claims no knowledge whatsoever of RCI's receipt of fees. In order for the defense of acquiescence to apply, RCI must prove that Continental had knowledge that portfolio companies paid RCI fees for investing limited partnership money, but despite this knowledge never objected to the fees. RCI, however, has produced little evidence demonstrating that Continental knew the portfolio companies had been paying RCI. Instead, RCI again only makes conclusory statements such as "Continental had knowledge or notice that RCI and/or its personnel received fees from portfolio companies beginning with the first Partnership investment in HEI in summer 1991 and on numerous occasions thereafter."[52]

RCI claims that, at the time the parties signed the limited partnership agreement, Bollman told Rutledge to keep all fees the portfolio companies paid to him because he believed that Rutledge's involvement in portfolio companies would be beneficial to the limited partnership. Bollman's affidavit does indicate that he approved RCI's receipt of fees for actual advisory services performed for the portfolio companies. Bollman's affidavit does not, however, demonstrate approval for any self-dealing in which RCI may have been engaged.

[52] Def. Br., p. 46.

necessary. I direct counsel to confer and agree on possible dates to schedule this matter, as well as submit a form of order implementing this decision.