IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BRIAN C. FLYNN, JR., derivatively on Behalf of BALA EQUITY PARTNERS, L.P., on its own behalf and on behalf of BACHOW INVESTMENT PARTNERS III, L.P., as its general partners,	)	
Plaintiffs,	)	
v.	)	
PAUL S. BACHOW, BALA EQUITY, INC. (sometimes referred to or called BALA EQUITY PARTNERS, INC.),	)	C.A. No. 15885
Defendants.	)	
v.	)	
BALA EQUITY PARTNERS, L.P. and BACHOW INVESTMENT PARTNERS, III., L.P.,	)	
Nominal Defendants.	)	

MEMORANDUM OPINION

Submitted: June 25, 1998
Decided: September 18, 1998

Joseph A. Rosenthal of Rosenthal, Monhait, Gross & Goddess, Wilmington, Delaware. Attorney for MBTA Retirement Fund.

Edward Maxwell and Martin S. Lessner of Young, Conaway, Stargatt & Taylor of Wilmington, Delaware; OF COUNSEL: Judah I. Labovitz of Mann, Ungar, Spector & Labovitz, Philadelphia, Pennsylvania. Attorneys for Defendants.

STEELE, V.C.

I. Introduction

Plaintiff Brian C. Flynn, Jr. brings this derivative action, under 6 *Del. C.* § 17-1001, on behalf of Bachow Investment Partners III, L.P. ("BIP") and BIP's general partner, Bala Equity Partners, L.P. ("Bala"). Flynn requests injunctive relief and damages against Paul S. Bachow ("Bachow"), and Bala Equity, Inc. ("Bala Inc."), general partner of Bala.[1] He claims that Bachow wrongfully misappropriated a partnership opportunity in order to acquire FCC licenses to operate 38 GHz bandwith communications devices. Before me are two motions: defendants' motion to dismiss and a motion to intervene by one of BIP's limited partners, MBTA Retirement Fund ("MBTA").

A. Defendants' Motion to Dismiss

As to the motion to dismiss, I conclude that Flynn, whose limited partnership interest in Bala was extinguished by a buyback and who never had an interest in BIP has no standing to bring a derivative suit on behalf of either L.P.

I converted Bachow's motion to dismiss Flynn's claims into a motion for summary judgment, reviewed an affidavit signed by Flynn and considered whether there was any genuine issue as to any material fact. In his affidavit,

---

[1] The defendants are represented by the same law firm and their respective positions are consistent. Therefore, for convenience, I refer to them as "Bachow," when describing their collective legal and factual positions.

Flynn agreed that Bala enforced a buyback provision in Flynn's limited partnership agreement which extinguished Flynn's limited partnership interest in Bala before this suit was filed. The buyback extinguished Flynn's standing to bring a derivative claim on behalf of Bala under 6 *Del. C.* § 17-1002. Furthermore, because Flynn was never a partner in BIP, but was bringing what appears to be a double derivative suit on behalf of BIP through its general partner, Bala, the forced sale of Flynn's Bala limited partnership interest preempted his purported standing to sue on behalf of BIP, as well.

B. MBTA's Motion to Intervene:

As for MBTA's motion to intervene under Court of Chancery Rule 24, I deny it in part and grant it in part. MBTA filed its motion to intervene at a time it held a relevant partnership interest, but it did not hold the interest at the time of an alleged misappropriation of a partnership opportunity. Therefore, I deny MBTA's motion to intervene in order to assert its claim that the FCC license application constituted a misappropriated limited partnership opportunity belonging to BIP because MBTA acquired its limited partnership interest in BIP after the alleged misappropriation took place. I hold that 6 *Del. C.* § 17-1002 provides only one way for parties to a limited partnership to confer standing by

contract to bring a derivative suit upon a partner who obtains its interest after the disputed transaction. That one circumstance occurs when the interest is transferred "pursuant to terms of the partnership agreement from a person who was a partner at the time of the transaction."[2] MBTA fails to allege (and I fairly assume because it cannot) that it acquired a partnership interest from a person who was a partner at the time of the transaction. Section 17-1002 precludes MBTA's intervention in order to assert this claim because it prohibits the filing of a derivative suit by a partner who acquired its interest after the disputed transaction.

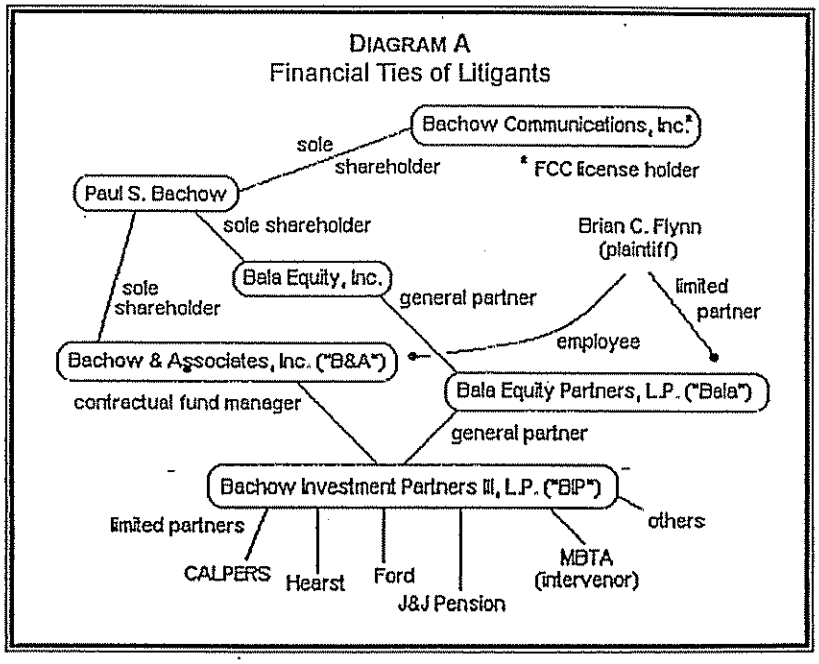
I grant MBTA's motion to intervene on a second related claim. MBTA points to language in the BIP Limited Partnership Agreement requiring Bachow to seek approval from BIP's investment advisory committee, composed of BIP limited partners, before he makes a personal investment of more than $500,000 in an operating company. MBTA alleges that Bachow failed to seek approval for his investment in the company acquiring the FCC licenses, Bachow Communications, Inc., and that this failure occurred after MBTA acquired its limited partnership interest in BIP. Although Bachow disputes both BIP's interpretation of the approval provision and the size of his investment in Bachow

[2] 6 *Del. C.* § 17-1002(b).

Communications, he points to no legal deficiency in this claim. The factual disputes Bachow raises are resolvable only upon a complete evidentiary record after the parties exchange discovery materials.

II. Background

As is the case with many limited partnership investment schemes, the financial relationships between the parties are complex. (See Diagram A) Bachow and his team of financial advisors solicited investments from some of the nation's most prominent foundations, pension funds, and large institutional investors.



Bachow's management team touted its experience in making investments in the area of telecommunications and in obtaining FCC licenses, a valuable asset for companies in that industry. The parties chose a Delaware limited partnership as the vehicle for their investments. The foundations and funds who invested money into BIP obtained limited partnership interests. Bachow installed Bala,

another Delaware limited partnership, as BIP's general partner. Although Bala, as general partner, is the entity legally responsible for managing BIP, Bala contracted the actual day-to-day management of BIP to Bachow & Associates, Inc. ("B&A"). B&A is a corporation owned 100% by Bachow devoted to managing portfolios for its investment fund clients such as BIP.

Some of the associates in B&A, including Flynn, were limited partners in Bala and as Bala limited partners were entitled to a certain percentage of the profit earned on BIP investments. Bala Equity Inc. served as Bala's general partner, a corporation owned solely by Bachow. Thus, through control of BIP's general partner's general partner, Bala Equity, and ownership of B&A, BIP's contractual fund manager, Bachow ultimately controlled BIP's investment decisions and day-to-day management.

The B&A management team, comprised of Bachow, Flynn, and the other B&A associates made BIP's investment decision at deal meetings. Two investments discussed at those meetings are relevant to this dispute. Sometime in December 1993, Flynn recommended at a deal meeting that BIP invest in Innova, a Seattle manufacturer of microwave radios used to transmit data at the 38 gigahertz bandwith of the microwave spectrum. Flynn and Bachow cooperated in doing due diligence into the technical feasibility and marketability of Innova's

radios. Flynn and Bachow reported back favorably on Innova, and B&A invested BIP's funds in Innova, acquiring a sizeable stake in the company.

While doing due diligence on the Innova investment, BIP's first and largest stake, Bachow came across news that the Federal Communications Commission ("FCC") would give away 38 GHz licenses to qualified applicants. The management team discussed the possibility of acquiring these licenses on behalf of BIP. Flynn maintains that B&A decided to make the acquisitions on behalf of BIP. Several other B&A associates as well as Bachow signed affidavits stating that FCC license acquisitions were discussed, but that B&A felt them too risky an investment for BIP.[3]

Bachow, using B&A associates, continued to investigate the possibility of obtaining the FCC licenses. Sometime around August 25, 1994, Bachow Communications Inc., a corporation 100% owned by Bachow, applied to the FCC for 38 GHz licenses in 30 metropolitan and other areas. FCC rules mandated that Bachow Communications reveal in its application any party who

[3] For the purposes of a motion to dismiss, I accept as true the facts alleged by the non-movant, Flynn, and make all inferences reasonably derived therefrom in Flynn's favor. ***Norman v. Paco Pharm. Serv., Inc.***, Del. Ch., C.A. No. 10417, mem. op. at 10, 15 DEL. J. CORP. L. 1091, 1101, Hartnett, V.C. (Sept. 22, 1989) (stating that to evaluate a motion to dismiss "all well plead factual allegations must be taken as being true" and that "a court must construe the complaint and all inferences contained therein in the light most favorable to the plaintiff").

was or might become a beneficial owner or transferee of the facilities to be licensed. Bachow only listed Bachow Communications, which effectively precluded transfer of the FCC licenses from Bachow Communications to BIP.

By March 1995, the FCC approved fifteen licenses, including licenses for some of the largest cities in the country. In order to finalize acquisition of the FCC licenses, the FCC requires that the licensee actually conduct radio transmissions at the licensed bandwidth in the licensed area. Upon doing so, the licensee "perfects" ownership of the license. Bachow needed radio transmitters, the equipment produced by Innova to complete the acquisition. Bachow struck a deal with Innova to purchase radio transmitters, and Bachow Communications used the radios to perfect its licenses.

III. Motion to Dismiss

Bachow contends that Flynn lacks standing to bring this suit. He points to the language of § 17-1002 of the Delaware Revised Uniform Limited Partnership Act ("DRULPA")[4] as support for that contention. DRULPA § 17-1002 sets forth the following conditions for bringing a derivative suit on behalf of a Delaware limited partnership:

---

[4] Codified at 6 *Del. C.* §§ 17-101 to 17-1111 [hereinafter DRULPA § __].

In a derivative action, the plaintiff must be a partner at the time of bringing the action and;

(1) At the time of the transaction of which he complains; or

(2) His status as a partner had devolved upon him by operation of law or pursuant to terms of the partnership agreement from a person who was a partner at the time of the transaction.[5]

The statute places two requirements on a plaintiff seeking to bring a derivative suit on behalf of a Delaware limited partnership. The first predicate for standing contained in DRULPA § 17-1002 requires that a derivative suit plaintiff be a partner of the limited partnership at the time "of bringing the action." Bachow argues that Flynn's failure to meet that condition is dispositive of Bachow's motion to dismiss. Flynn's limited partnership agreement with Bala granted Bala the right to buy back Flynn's limited partnership interest if Flynn's employment with B&A terminated.[6] The Bala limited partnership profits Flynn would enjoy were pegged to the profits earned for BIP by B&A's investment decisions, so Flynn's limited partnership interest in Bala was a form of performance-based compensation for his efforts at B&A. If Flynn left B&A, the Mandatory

[5] DRULPA § 17-1002.

[6] Mandatory Buy/Sell and Severance Agreement, signed Brian C. Flynn, Jr. and Paul S. Bachow (App. Defs.' Op. Br. Mot. Dismiss, Ex. E).

Buy/Sell and Severance Agreement provided that he would lose his employment benefits, *i.e.*, his Bala limited partnership interest, but it stipulated that Bala had to demand Flynn's limited partnership interest within 45 days of Flynn's termination.[7] It is undisputed that Bala did not enforce the buyback for some six months after Flynn's termination. The legal validity of Bala's late buyback of Flynn's limited partnership became an issue in litigation over Flynn's termination benefits filed in Pennsylvania federal district court.[8] Flynn disputed the validity of the buyback and Bala argued that good faith settlement negotiations between the parties necessitated that Bala delay execution of its buyback right until it was evident that the negotiations were stalled. The Pennsylvania litigation was settled, and as part of the agreement, Flynn signed an affidavit agreeing that Bala's July 31, 1997 buyback was valid and legally binding.[9] Consequently, both

---

[7] *Id.* § 2 ("Not later than 45 days after the Termination date, the general Partner shall purchase, and the Limited Partner . . . shall sell, the Limited Partner's Partnership Interest pursuant to the terms and condition of this Agreement.").

[8] ***Bachow v. Flynn***, E.D. Penn., C.A. No. 97-4926 .

[9] "Flynn no longer contests and therefore agrees that on July 31, 1997, each of Bala Equity, BCI and PSB/Bachtel properly purchased Flynn's limited partnership interests in Co-Investment, Development and Bala (collectively "the Limited Partnerships") pursuant to the MBSSAs for each Limited Partnership, and that as of that date, Flynn ceased to be a limited partner in any of those Limited Partnerships." Stipulation & Agreement of Settlement ¶ 5 (April 27, 1998). This same Agreement settled a pending defamation suit brought by Bachow against Flynn in Pennsylvania state court, ***Bachow v. Flynn***, Phil. Cnty. Ct. Common Pleas, No. 2195.

parties now agree that Bala extinguished Flynn's limited partnership interest two weeks before Flynn brought this suit. DRULPA § 17-1002 states that "the plaintiff must be a partner at the time of bringing the action." Flynn agrees that he was not, removing any question of a genuine dispute about this material fact. Because his suit on behalf of BIP, if allowed, would be in effect a double derivative suit brought on behalf of BIP by the general partner, Bala's buyback of Flynn's limited partner interest similarly deprives him of standing to bring claims on behalf of BIP or Bala.

I invoke my discretionary authority under Rule 12(b)(6) to convert Bachow's motion to dismiss to a Rule 56 motion for summary judgment.[10] Court of Chancery Rule 12(b) allows me to convert a motion to dismiss where, in my discretion, I deem it appropriate to consider documents or other evidence extrinsic to the pleadings. The danger inherent in consideration of pretrial dispositive motions is that the losing side will be prejudiced by the Court's

---

[10] Ch. Ct. R. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to stay a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.").

consideration of an incomplete factual record.[11] Often in the early stages of litigation, discovery will be incomplete and the sides will still be sifting through documents and other potential evidence. If the court renders summary judgment before both sides have had the opportunity present their complete evidentiary record, the result could be unjust. The losing side might be denied the Court's consideration of pertinent information not yet entered into the record. Here, however, that danger is not present. I have considered the settlement agreement and the Flynn Affidavit in which Flynn agrees that his Bala limited partnership interest terminated before the filing of this action. Consequently, I am reassured not only by the fact that the documents considered by the Court constitute a full and complete record as to Flynn's standing, but since Flynn signed the affidavit, I can reasonably infer that he has no rational basis to object to summary judgment on Bachow's motion. Flynn lacks standing as a matter of law and I grant summary judgment to defendants on that issue.

IV. MBTA's Motion to Intervene

MBTA moves to intervene and I accordingly note that MBTA as an intervenor may have the right to pursue the merits of Flynn's claims but may not

[11] *In re Santa Fe Pacific Corp.*, Del. Supr., 669 A.2d 59, 68-69 (1995) ("Before a motion for summary judgment is ripe for decision, the non-movant normally should have an opportunity for some discovery.").

argue Flynn's standing to bring them. Indeed, where an original plaintiff pleads a cognizable claim of wrongdoing, but is prevented from pursuing the claim because of a technical standing issue, a motion to intervene by a party who stands in a position to press the claim should be viewed favorably by a court of equity.[12] One of the analytical elements to be considered in evaluating a motion to intervene is the ability of the current plaintiff to represent adequately the proposed intervenor's interest in the litigation.[13] Where the original plaintiff has been disqualified from pursuing the claim, the necessity for the intervenor to step in becomes more apparent.[14]

It is perhaps inevitable that a party attacking a motion to intervene will look beyond the elements of Rule 24 and attack the intervenor's legal standing to

---

[12] *E.g.*, *In re MAXXAM, Inc./Federated Development*, Del. Ch., 698 A.2d 949 (1996) (allowing shareholder at time of transaction to step in and litigate derivative claim where original plaintiff was shown to lack standing from the inception of the suit and so allowing even though the shareholder intervened after the statute of limitations for the claim had expired). Bachow argues that Flynn already adequately represents MBTA's interest in this litigation, but my dismissal of Flynn from this action disposes of this argument.

[13] *Id.* (describing the elements for evaluating a motion to intervene as whether "(i) the applicant claims an interest relating to the property that is the subject of the action, (ii) interest is not adequately represented by existing parties, and (iii) the applicant is so situated that the disposition of the action will impair the applicant's ability to protect his or her interest unless intervention is allowed.").

[14] Ch. Ct. R. 24 ("Upon timely application anyone shall be permitted to intervene in action . . . *unless the applicant's interest is adequately represented by existing parties.*") (emphasis mine).

bring the claim.[15] This is the case here, where Bachow argues that MBTA, as well as Flynn before it, is susceptible to a motion to dismiss for lack of standing under DRULPA § 17-1002. I agree that, if under the standards applicable to a motion to dismiss, MBTA's proposed claims are legally deficient or MBTA has no standing to bring them, there is no reason to allow MBTA to intervene. Despite a generally liberal policy of allowing intervention, if the intervenor lacks standing to bring the claim or otherwise makes a claim that is inherently flawed as a matter of law, mere incantations of equitable principles will not stave off denial of the motion.

In MBTA's motion to intervene, MBTA seeks in part, as a BIP limited partner, to pursue the misappropriation claim against Bachow. MBTA owned its limited partner interest in BIP at the time that it filed its motion to intervene, meeting the initial prong of DRULPA § 17-1002. The parties disagree, however, that MBTA was a limited partner at the time that the alleged misappropriation took place. This issue may be dispositive of one claim in MBTA's motion to

[15] This is not to imply that the standing issue is separate from the motion-to-intervene analysis. It is subsumed within the court's analysis of whether "the applicant claims an interest relating to the property or transaction which is the subject of the action" required by Ch. Ct. R. 24(a). The interest that an intervenor claims must be one cognizable by law; therefore, if the intervenor lacks standing to assert the claim, *ipso facto*, the intervenor's interest cannot be recognized. Therefore, where the party attacks the legal validity of that interest by asserting a lack of standing, it only makes sense that the Court utilize the analytical framework of our motion-to-dismiss case law.

intervene because the second, alternative, predicates for standing found in DRULPA § 17-1002 require that a derivative plaintiff be a "partner" at the time of the transaction *or* obtain a partnership interest held by a "partner" at the time of the transaction (whether obtained by operation of law or pursuant to the terms of the limited partnership agreement).

A. The Misappropriation of a Limited Partnership Opportunity Claim

The facts relevant to MBTA's motion to intervene are straightforward. Bachow's wholly-owned company, Bachow Communications, Inc., applied for the FCC licenses on August 26, 1994. The application asks for the name of the applicant and specifically asked if any party other than the applicant had an ownership, control, management, or operation interest in the facilities being licensed.[16] The application states the name of Bachow Communications, Inc. as the applicant and denies that any other party has an interest in the facilities to be operated under the license. Bachow argues that under ***U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.***,[17] any action arising from Bachow's acquisition of the FCC licenses accrued when he applied to the FCC. In ***U.S. Cellular***, the

---

[16] *E.g.*, Federal Communication Commission Application for a New or Modified Microwave Radio Station License under Part 21 (Aug. 26, 1994) (applying for New York City license).

[17] Del. Ch., 677 A.2d 497 (1996).

Supreme Court affirmed the trial court's holding that the statute of limitations for a claim against the general partner for a misappropriation-based fiduciary breach claim accrued when the general partner applied for the FCC cellular operating licenses.[18] By analogy, Bachow urges, any alleged misappropriation of FCC licenses by Bachow arose when his company, Bachow Communications, Inc., applied to the FCC for its 38GHz licenses. That day, August 26, 1994, came four months before MBTA bought its limited partner interest in BIP on December 27, 1994. MBTA does not assert it bought that interest from one who was a limited partner "at the time of the transaction pursuant to the terms of the limited partnership agreement."

MBTA does allege that it acquired, under the terms of the BIP Limited Partnership Agreement,[19] a beneficial ownership right in BIP dating back to the creation of the limited partnership. MBTA points to a provision in the agreement requiring later-admitted limited partners to pay in capital in disproportionately large amounts to equalize the paid-in capital of all limited partners[20] and terms in

---

[18] *Id.* at 501 (ruling that first sign of breach occurred when the defendant submitted an "FCC filing on December 7, 1988 that did not list the Partnership as a real party in interest").

[19] Bachow Investment Partners III, L.P. Fourth Amended and Restated Agreement of Limited Partnership (hereinafter "BIP Limited Partnership Agreement").

[20] BIP Limited Partnership Agreement § 2.06(b) (stating "in the event Limited Partners are admitted to the Partnership upon subscription after one or more capital call(s) have been

the B&A management agreement requiring later-admitted limited partners to pay B&A management fees equal to an amount assessed against other limited partners in the past.[21] In essence, MBTA argues that these fees, which burden new limited partners with the obligation to make up for what the original limited partners invested in the past and to pay for B&A's past services, imply a beneficial "right" to bring a derivative suit based on transactions that occurred before joining the limited partnership. MBTA argues that since it assumed the obligation to pay for the transaction after the fact, it ought to be able to dispute any wrongdoing by the general partner arising from the transaction after the fact.

Even assuming as true the tortured interpretation of the BIP Limited Partnership Agreement required to accept MBTA's "beneficial status" argument, MBTA's reliance on the alleged language of the partnership agreement overlooks the limiting statutory parameters for standing. DRULPA § 17-1002 expressly limits standing to bring a derivative suit to a limited partner who acquired its

---

made, the next capital calls shall be made by the General Partner on such later admitted Limited Partners disproportionately to the extent necessary to equalize as soon as possible the Unreturned Capital Contribution of all Partners on the basis of their proportionate Capital Commitments to the Partnership.").

[21] Fourth Amended and Restated Management Agreement § 7(b) ("If a Partner is admitted to the Partnership after the initial closing, the entire Management Fee with respect to such Partner's commitment shall be paid by the Partnership to the Manager and as each such Partner is admitted to the Partnership as if such Partner had been admitted to the Partnership on the initial closing date for the Partnership.").

interest after the disputed transaction to a partner who acquired the status of partner "pursuant to terms of the partnership agreement *from a person who was a partner at the time of the transaction.*" That language describes the only way that a plaintiff can meet statutorily mandated prerequisites for standing to bring a derivative suit against a limited partnership where status is predicated upon the terms of the limited partnership agreement. MBTA fails to allege anywhere in its pleadings that it purchased a BIP limited partnership interest held by a person who was a partner at the time of the transaction. Instead, it argues that MBTA's interest in BIP can be extended retroactively to the original date of the creation of BIP based upon mere payment of the costs of acquiring partner status.[22] There is no language in DRULPA § 17-1002 that grants parties to a limited partnership the right to create conditions establishing standing to bring a derivative action by contract. The General Assembly prescribed the way in which parties acquire standing under DRULPA § 1001 to bring an action, and MBTA fails to plead facts showing it has met the requisite requirement for standing pursuant to

---

[22] MBTA merely states in its motion to intervene: "MBTA became a limited partner approximately four months after the applications were filed. However, *its attainment of this status was made retroactive to the opening of the BIP Fund, well before the License applications were submitted.*" Op. Br. Mot. Intervene at 6 (emphasis in original).

statute.[23] MBTA has no standing to intervene for the purpose of pursuing Flynn's claim arising from the alleged misappropriation of the FCC license opportunity.

B. The "Advisory Committee" Claim

MBTA then argues that Bachow's FCC license investment crossed the BIP Limited Partnership Agreement's $500,000 investment threshold for an investment in a single operating company and that this triggered Bachow's obligation to seek approval for the investment from the BIP investment advisory committee.[24] Bachow opposes MBTA's intervention on this theory because, he asserts, (1) the evidence shows conclusively that Bachow spent less than $500,000,[25] (2) the efforts of B&A personnel in acquiring the licenses were expressly permitted by the BIP Limited Partnership Agreement,[26] and (3) Bachow

---

[23] The right to bring a derivative suit is a right created by statute within the limited partnership statutory scheme. Limited partnerships are statutory creatures not existing at common law.

[24] BIP Limited Partnership Agreement § 3.03(c) ("Bachow and his Affiliates will not directly or indirectly make aggregate investments in excess of $500,000 in operating companies without the approval of the Advisory Committee.").

[25] Bachow claims that he invested $95,000 in Bachow Communications and that Bachow Communications raised debt to cover the $430,000 or so it spent on the licenses.

[26] BIP Limited Partnership Agreement § 3.03 (authorizing the B&A associates to devote "such time and effort as is necessary to the [outside] activities permitted by Section 3.03," which Bachow alleges, includes the FCC license applications).

Communications Inc. did not fall within the meaning of "operating companies" as this undefined term is used in the same agreement.[27] MBTA argues that the efforts of B&A personnel, while permitted, must be counted as "investments" in Bachow Communications Inc. towards the $500,000 cap and that the issue of whether Bachow Communications Inc. falls within the definition of "operating companies" implicates two reasonable, but incompatible interpretations that cannot be resolved without a fuller record. Therefore, MBTA counters that, as with a motion to dismiss, it would be improper for this Court to either resolve factual disputes or make inferences against the intervenor at this stage. MBTA urges the Court to allow MBTA to intervene and to permit discovery on these disputed factual issues.[28]

I note that Bachow's argument against MBTA's motion to intervene is tantamount to a motion to dismiss MBTA's claims on the theory that granting the motion would be futile because the claims are subject to dismissal as a matter of law. I find it appropriate, therefore, to apply the standard for a motion to dismiss to MBTA's second proposed claim. If it survives that analysis, MBTA's

---

[27] *See*, *supra*, note 26.

[28] There is no contention, as to this claim, that MBTA did not hold a limited partnership interest at the time of the alleged wrongful omission.

right to intervene in this matter to assert the BIP limited partners' opportunity to approve or disapprove Bachow's investment in the FCC 38GHz licenses is unquestionable.

In a motion to dismiss, all facts alleged by the non-movant are assumed to be true and all inferences are made in the non-movant's favor. Here, MBTA asserts that Bachow Communications falls within the meaning of "operating companies" as used in the BIP Limited Partnership Agreement and that Bachow invested more than $500,000 in Bachow Communications. MBTA concludes that Bachow's investment crossed the $500,000 threshold after MBTA acquired its BIP limited partnership interest and that MBTA has standing to pursue the claim that Bachow failed to seek approval for this investment from BIP's investment advisory committee under the terms of the BIP Limited Partnership Agreement. Bachow's argument to the contrary amounts to no more than factual jousting. Whether a complaint filed by MBTA as an intervenor or an amendment to the Flynn complaint pursued by it flushes out sufficient facts to survive a later motion for summary judgment is not an issue for me today. I must conclude that MBTA has sufficiently plead each of the elements of its above claim, has asserted sufficient facts in support of its legal theory and that it may, therefore, pursue that claim. I cannot conclude granting its motion to intervene would be futile.

Therefore, I allow MBTA to intervene in this matter to pursue its "advisory committee claim."

V. Conclusions

I conclude Flynn lacks standing to bring this suit. MBTA also lacks standing to bring its FCC-license misappropriation claim because the alleged misappropriation occurred before MBTA became a BIP limited partner. The basis for MBTA's advisory committee claim, the $500,000 investment trigger, may have occurred after MBTA acquired its interest in BIP; MBTA has sufficiently plead the elements of this claim and has standing to pursue it derivatively on behalf of BIP. Bachow's motion to dismiss is *granted* in the form of summary judgment as to Flynn. MBTA's motion to intervene is *denied in part and granted in part.*

IT IS SO ORDERED.

Vice Chancellor