IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM BREN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 19902-NC
	)	
CAPITAL REALTY GROUP SENIOR HOUSING, INC. and NHP RETIREMENT HOUSING PARTNERS I LIMITED PARTNERSHIP,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: November 21, 2003
Decided: February 27, 2004

Ronald A. Brown, Jr., of PRICKETT JONES & ELLIOT, P.A., Wilmington, Delaware, Attorney for Plaintiff

Allen M. Terrell, Jr. and Brock E. Czeschin, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware, Attorneys for Defendants

PARSONS, Vice Chancellor.

This is an action by William Bren ("Bren"), a creditor of an insolvent limited partnership, for breach of fiduciary duties and for a judgment on certain notes. Bren alleges that Defendants, the limited partnership and its general partner, breached a fiduciary duty to their creditors by failing to timely pursue a valuable claim and made false and misleading statements while soliciting a release of those claims from creditors. Bren also claims that the Partnership has an unconditional obligation to satisfy the notes. Defendants filed a motion to dismiss or for summary judgment. For the reasons discussed below, Defendants' motion will be granted as to Count I, denied as to Counts II, III and V, and granted in part and denied in part as to Count IV.

I. BACKGROUND

A. The Parties

Bren is the owner of fifteen non-recourse pension notes (the "Notes") issued by Defendant NHP Retirement Housing Partners I Limited Partnership (the "Partnership") having a total stated value of $15,000.[1] The Partnership is a Delaware limited liability partnership formed in 1986 to acquire, develop and operate residential retirement rental properties.

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[1] The facts recited herein are drawn from the well-pleaded allegations of the operative amended complaint filed December 3, 2002 (D.I. 12) (the "Complaint"), as is required on a Rule 12(b)(6) motion to dismiss. *Solomon v. Pathe Communications Corp.*, 672 A.2d 35, 38 (Del. 1996). To the extent the Court relies on information outside the Complaint, the source of the evidence is indicated. Unless otherwise noted, the facts recited in the text are not disputed for the limited purpose of the pending motion.

The other Defendant, Capital Realty Group Senior Housing, Inc. (the "General Partner"), was an entity owned by Capital Realty Group Corporation ("Capital Realty") prior to June 10, 1998. James A. Stroud ("Stroud") and Jeffrey L. Beck ("Beck") owned Capital Realty. On June 10, 1998, the General Partner was sold to Retirement Associates, Inc. ("Retirement Associates"), an entity owned by Robert L. Lankford ("Lankford"). From 1988 through 1997, Lankford was a non-employee broker for another company owned by Stroud and Beck, Capital Realty Group Brokerage, Inc. ("Capital Brokerage"). Bren alleges that Lankford is beholden to Stroud and Beck.

B. The Notes

The Partnership issued more than 40,000 Notes at $1,000 each. The Notes were subject to a Trust Indenture dated September 17, 1986 between the Partnership and the National Bank of Washington, Trustee (the "Indenture").[2] The Notes bear interest at a rate of 13% per annum, but a significant portion of the interest was subject to deferral.[3] Although the Notes were non-recourse, they did include a lien on certain property of the Partnership.[4] The Notes were sold to qualified profit sharing, pension and retirement trusts and other entities entitled to exemption from federal taxation. All principal and

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[2] A copy of the Indenture is attached to the Affidavit of Robert L. Lankford, filed February 10, 2003 (D.I. 17), as Exhibit O.

[3] Indenture §§ 3.01 (Title and Terms); 13.01 (Indenture and Notes Solely Partnership Obligations).

[4] *Id.* §§ 13.01, 5.01 (Creation of the Lien of this Indenture; Possession and Use of the Trust Estate).

deferred interest on the Notes was due on December 31, 2001. The Partnership, however, failed to pay approximately $19 million of principal and deferred interest due on that date.

C. The 1998 Transaction

According to Bren, in 1998 the Partnership engaged in a sham transaction to avoid a restriction in the Partnership Agreement that precluded it from selling any property to an entity affiliated with the General Partner, including Capital Senior Living Corporation ("CSLC") which was founded and co-chaired by Stroud and Beck. To circumvent this requirement, Capital Realty sold the shares of the General Partner to Retirement Associates on June 10, 1998. Retirement Associates was owned by Lankford, a friend and business associate of Stroud and Beck.[5] The Partnership, with the General Partner now controlled by Retirement Associates, sold four of its five properties to a subsidiary of CSLC on September 30, 1998. In addition, the Partnership paid Capital Brokerage, also owned by Stroud and Beck, a brokerage fee of $1,219,500 for the sale. Bren characterizes the entire 1998 transaction, including Stroud and Beck paying themselves a brokerage fee for selling the properties to an affiliate, as an "elaborate sham."[6]

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[5] From 1988 through 1997, Lankford was a non-employee broker for Capital Brokerage, which was owned by Stroud and Beck, earning income of $13,609 in 1995, $203,505 in 1996, and $18,750 in 1997.

[6] Plaintiff's Answering Brief in Opposition to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (D.I. 20) ("PAB"), at 7. Defendants note that Bren does not challenge the fairness of the price received for the four properties. Opening Brief in Support of Defendants' Motion to Dismiss or Alternatively, for Summary Judgment ("DOB") at 16 n.9. Bren criticizes the

On October 23, 1998, one of the Partnership's Assignee Interest Holders, an equity holder under the Partnership Agreement (hereinafter "Limited Partner"), filed suit in this Court challenging the sale of the four properties to an affiliate of Stroud and Beck.[7] The Partnership disclosed this suit in the public filings and reports it mailed to Noteholders.[8] The General Partner moved to dismiss on the ground that the complaint stated a derivative claim, and demand had not been made on the General Partner. A Noteholder sought to intervene in the Lewis Action, conditioned upon the Court finding that the action was derivative.[9] Before the Court addressed that issue, the parties filed a Stipulation of Settlement that former Vice Chancellor Jacobs approved on October 20, 2002.[10] The Settlement noted, "defendants believe that [the] motion to intervene is moot in view of the proposed settlement of the Action."[11] The Settlement and the Order approving it released all claims by Limited Partners arising out of the transaction, but did not expressly release claims brought on behalf of the Partnership or the Noteholders.[12]

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transaction in general as a sham and aspects of the procedure used, including the brokerage fee. *See* PAB at 8. Bren's papers, however, do not specifically challenge the price the General Partner received for the four properties.

7 *Lewis v. Capital Realty Group Senior Housing, Inc.*, C.A. No. 16725 (the "Lewis Action").

8 Affidavit of Robert L. Lankford ("Lankford Aff.") (D.I. 17) Ex. A.

9 *Lewis,* C.A. No. 16725 (D.I. 19).

10 *Id.* (D.I. 26 and 34).

11 *Id.* (D.I. 26 at p. 6).

12 *See id.* (D.I. 26 and 34).

D. Correspondence Seeking Consents of Noteholders

On February 12, 2001, the General Partner sent a memorandum to the Noteholders explaining that the "Partnership is not expected to have sufficient funds to fully repay the Notes at maturity."[13] The General Partner disclosed that it planned to dissolve the Partnership as of May 20, 2001 and "[u]pon dissolution, the Partnership will liquidate its assets in an orderly fashion and pay off its creditors including the Note Holders from the proceeds."[14] On June 10, 2001, the General Partner sent another memorandum to the Noteholders confirming the dissolution of May 21, 2001 and indicating that sale of the remaining property would not yield sufficient funds to pay the amount due on the Notes.

On July 5, 2001, the Partnership contracted to sell its last property to a third party for approximately $20 million. Because it still owed $37 million on the Notes, the Partnership was insolvent by that time. At the initial oral argument in this action on Defendants' motion for summary judgment, Bren's counsel stated that the Partnership's insolvency occurred at some earlier point between February and May 2001.[15] For purposes of the instant motion, Defendants do not dispute that allegation.

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13 Lankford Aff. Ex. F.

14 *Id.*

15 Apr. 11, 2003 Tr. at 35-36, 41.

The General Partner, by letter dated September 24, 2001, solicited written consents from the Noteholders for the removal of a lien on the final property, so that it could be sold.[16] The letter stated:

> WE ARE ASKING YOU TO APPROVE THE SALE OF THE LAST PROPERTY OWNED BY NHP. IF YOU APPROVE, THE NET PROCEEDS FROM THIS SALE WILL BE DISTRIBUTED TO NOTEHOLDERS IN AN ESTIMATED AMOUNT OF APPROXIMATELY $18,000,000.00 OR APPROXIMATELY $420.00 PER PENSION NOTE.[17]

The General Partner sent a second letter on October 12, 2001 to the Noteholders who had not yet consented. This letter again stated that if the Noteholders approved the sale, the net proceeds "will be distributed to note holders."

The Partnership sold the final property on December 31, 2001 for $18 million in cash and $2 million in contingent consideration.

The General Partner wrote to the Noteholders on January 9, 2002 and informed them that a distribution of approximately $17 million ($398.39 per Note) would be made if they signed a document (the "Waiver") agreeing to "accept this Consideration as full and final settlement and a release of any and all claims related to my Pension Notes."[18] Bren contends that this letter added a condition to the distribution of funds, *i.e.*, the Waiver, that was not disclosed when the Partnership sought and obtained consents to the

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[16] Lankford Aff. para. 7.

[17] Lankford Aff. Ex. I (emphasis in original).

[18] *Id.* Ex. K.

sale of the final property. Bren's broker, the record owner, signed the Waiver, but Bren denies that he personally signed it or authorized his broker to do so. Because a disputed issue of fact exists as to this issue, the Court will assume for purposes of the pending motion that Bren did not authorize his broker's signature.[19]

Defendants advised the Court in a supplemental affidavit filed March 11, 2003 that the General Partner had determined to distribute to the Noteholders that did not sign the Waiver their pro-rata share of the proceeds.[20] In that sense, those Noteholders were treated in the same way as the Noteholders that did sign the Waiver.

II. STAGE OF PROCEEDINGS

Bren filed a complaint against the General Partner and the Partnership (collectively "Defendants") on September 17, 2002. Defendants filed a motion for summary judgment on Counts II and III of the complaint on October 15, 2002. Bren then filed an amended complaint on December 3, 2002 (the "Complaint") seeking class action certification, alleging breaches of fiduciary duty and contract, and seeking recovery on the Notes. Defendants moved to dismiss, or alternatively, for summary judgment on all counts on February 7, 2003. After hearing oral argument on April 11, 2003, former Vice Chancellor Jacobs requested additional briefing on Defendants' laches defense to

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[19] *Compare* Lankford Aff. para. 10 *with* Compl. para. 14.

[20] Supplemental Affidavit of Robert L. Lankford ("Supp. Lankford Aff.") (D.I. 23) para. 5.

Count I. The supplemental briefing was completed on May 2, 2003. The case was later reassigned, and this Court heard oral argument on November 21, 2003.

III. STANDARD OF REVIEW

In evaluating a motion to dismiss, the Court is required to assume the truthfulness of all non-conclusory allegations of the complaint and draw all inferences or conclusions of fact that may reasonably be drawn from the specific facts alleged in favor of the non-moving party.[21] Conclusions asserted in the complaint, however, will only be accepted as true if there are specific allegations of fact to support them.[22] The Court may only dismiss a claim if it is clear that Bren will not be entitled to relief under any set of facts that could be proven based on the allegations in his Complaint.[23] When a motion under Rule 12(b)(6) relies on matters outside the pleadings, it may be converted to a motion for summary judgment pursuant to Rule 56.[24]

IV. ARGUMENTS AND ANALYSIS

A. Count I -- Failure to Pursue Claim Based on the 1998 Transaction

Bren alleges that when the Partnership became insolvent, between February and July of 2001, the General Partner owed a fiduciary duty to the Noteholders to "preserve

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[21] Ch. Ct. R. 12(b)(6); *e.g.*, *In re Dean Witter*, 1998 WL 442446, at *4 (Del. Ch. July 17, 1998).

[22] *E.g., In re Dean Witter*, 1998 WL 442456, at *4.

[23] Ch. Ct. R. 12(b)(6); *e.g., In re Dean Witter*, 1998 WL 442456, at *4.

[24] Ch. Ct. R. 12(b)(6); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995).

and pursue whatever non-operating assets the Partnership possessed in an effort to ensure the maximum return to the creditors."[25] Bren alleges that the Partnership had a valuable non-operating asset in the form of a claim against Stroud and Beck and their affiliated entities for breach of fiduciary duty in connection with the September 30, 1998 transaction. Bren argues that the General Partner breached its fiduciary duty to the Noteholders by failing to bring a claim challenging that transaction before the statute of limitations expired on September 30, 2001.

Defendants contend that Count I is barred by the statute of limitations.[26] Bren emphasizes that the wrong alleged in Count I is not the 1998 transaction itself.[27] Rather, it is the failure of the General Partner of the insolvent Partnership to bring a claim challenging the 1998 sale of assets to an entity controlled by Stroud and Beck within the applicable three year statute of limitations. In Bren's view, this failure to bring an action did not constitute a wrong to the Noteholders until the limitations period expired on September 30, 2001. He argues, therefore, that his cause of action did not accrue until that time. Defendants counter that Count I is a creative attempt to bring a time barred

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[25] PAB at 10.

[26] Defendants also contend that Count I is barred by the doctrine of laches. If the claim is time barred under the statute of limitations, the Court need not engage in a traditional laches analysis. *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989)("[W]here the analogous statute of limitations at law period has run, a plaintiff will be barred from bringing a suit without the necessity for the Court to engage in traditional laches analysis.").

[27] PAB at 11.

claim by identifying the wrong as the failure to bring a claim within the statute of limitations rather than the improper conduct itself -- the September 30, 1998 transaction.

When reviewing a complaint, the Court looks to the actual nature of the purported wrong according to the facts alleged and is not bound by the plaintiff's theory of the alleged wrong.[28] When considered in light of the facts pled in the Complaint, the wrong to the Partnership, and thus the Noteholders, occurred on September 30, 1998 -- when the General Partner sold four Partnership properties to an entity controlled by Stroud and Beck.

Bren, relying on *Dofflemyer v. W.F. Hall Printing Co.*[29] and his novel theory in Count I, argues that a breach of fiduciary duty cannot accrue before a fiduciary duty is owed. Bren reads too much into the *Dofflemyer* holding and limits his own claim too narrowly. In *Dofflemyer*, plaintiffs could not sue for damages until the merger was consummated. Prior to that time, plaintiffs had suffered no injury from the defendants' acts.[30] The court in *Dofflemyer* focused on when the injury occurred, not when a fiduciary duty arose, for purposes of determining the limitations period. The only comment the court made related to when a fiduciary duty arose was to note that a

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28 *See Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 352 (Del. 1988); *Lipton v. News Int'l, PLC*, 514 A.2d 1075, 1078 (Del. 1986); *Colonial Sec. Corp. v. Allen*, 1983 WL 19788, at *3 (Del. Ch. Apr. 18, 1983).

29 558 F. Supp. 372, 379 (D. Del. 1983).

30 *Id*. at 379.

shareholder that did not own stock at the time of a merger would have no standing to challenge it.[31]

In the case at bar, fiduciary duties were owed to the Partnership and its Limited Partners at the time of the 1998 transaction. Any cause of action arising out of that transaction accrued at that time.[32] The Limited Partners had standing to, and promptly did, challenge the 1998 transaction. The Noteholders, like Bren, could not have pursued a claim for breach of fiduciary duty at that time, but they could have pursued contractual and other remedies to redress the harm caused by the allegedly wrongful 1998 transaction.[33] If the Court were to accept Bren's argument that the statute of limitations runs from the time that a fiduciary duty is owed to a particular plaintiff rather than from the time of the harm to the entity, creditors of insolvent entities could, upon insolvency, assert transactional challenges that otherwise would be time barred. Additionally, if the Court were to accept Bren's further argument that his cause of action did not arise until the expiration of the statute of limitations, it would effectively double the statute of limitations for breaches of fiduciary duty to creditors from three years to six.

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[31] *Id.* at 379-80 n.5.

[32] *Fike v. Ruger*, 754 A.2d 254, 261 (Del. Ch. 1999), *aff'd*, 752 A.2d 112 (Del. 2000) ("A cause of action accrues at the moment of the wrongful act.")

[33] *See infra*, pp. 16-17.

Any cause of action arising out of the 1998 transaction accrued on September 30, 1998. A new cause of action against the General Partner did not arise when the statute of limitations for challenging that transaction expired.

A court of equity is not bound by the legal statute of limitations.[34] Because equity follows the law, however, the Court of Chancery generally applies the legal statute of limitations by analogy.[35] The time fixed by an analogous statute of limitation is deemed to create a presumptive time period for application of laches to bar a claim in the absence of circumstances that would make the imposition of the limitations period unjust.[36] The limitations period generally applied by analogy to claims for breach of fiduciary duty is three years.[37]

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[34] *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del.1982).

[35] *See, e.g., U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *In re Dean Witter*, 1998 WL 442446, at *3; *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993). Generally, the statute of limitations is an affirmative defense. Where the complaint itself alleges facts that show that the complaint is filed too late, a time bar may be raised on defendants' motion to dismiss. *Kahn*, 625 A.2d at 277 (citing *Mayer v. Adams,* 174 A.2d 313 (Del. Ch. 1961)); *Boeing Co. v. Shrontz*, 1992 WL 81228, at *2 (Del. Ch. Apr. 20, 1992); *Brooks v. Savitch*, 576 A.2d 1329, 1330 (Del. Super. 1989).

Summary judgment is inappropriate when material factual disputes exist. *E.g., In re Asbestos Litig.*, 673 A.2d 159, 163 (Del. 1996). Summary judgment may be appropriate, however, in the absence of record facts showing that the limitations period should not run by analogy or should be tolled. *See Kahn*, 625 A.2d at 277 (bar of limitations can be raised on motion to dismiss); *U.S. Cellular*, 677 A.2d at 502.

[36] *U.S. Cellular*, 677 A.2d at 502.

[37] 10 *Del. C.* § 8106; *Halpern v. Barran*, 313 A.2d 139, 141-43 (Del. Ch. 1973).

Bren did not file his Complaint until September 17, 2002, almost four years after the allegedly wrongful September 30, 1998 transaction. Thus, unless the statute of limitations was tolled or equity precludes this Court from applying the limitations period, Count I is time barred.

Bren did not plead facts that would justify tolling the statute of limitations at law. Bren does not allege, for example, that the Noteholders lacked notice of the wrong to the Partnership or that the wrong was fraudulently concealed. In fact, the record indicates that Bren and the other Noteholders had timely notice.[38] Defendants point to several public filings that were sent directly to the Noteholders more than three years before this action was filed that state that a Limited Partner filed a claim against the Partnership for breach of fiduciary duty arising out of the 1998 transaction.[39] For example, the Partnership's Form 10Q for the quarter ended September 30, 1998, disclosed the 1998 transaction in comparable detail to Bren's Complaint, including the brokerage fees paid to Capital Brokerage.[40] Thus, the statute of limitations was not tolled.

Equity does not require that this Court permit the claim in Count I. The Limited Partners had standing in 1998 to challenge the transaction as a breach of fiduciary duty.

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[38] Lankford Aff. para. 4, Ex. A.

[39] *Id*. para. 4, Exs. A-E.

[40] *Id*. Ex. A at 7-8. The same 10Q described the Lewis Action and states, "The Partnership believes the complaint is without merit and intends to vigorously contest the complaint." *Id*. at 12.

In fact, a Limited Partner did so.[41] That case later settled. Because there is no allegation that the Partnership was in the "vicinity of insolvency" before 2001, the Noteholders did not have standing earlier to challenge the 1998 transaction for breach of fiduciary duty.[42] That fact, however, does not prevent a claim based on the 1998 transaction from accruing for purposes of the limitations period or its equitable analog.

The Delaware Supreme Court has affirmed the application of the statute of limitations to bar a claim where the claimant suffered an injury but did not meet the statutory requirements for seeking compensation until after the statute of limitations had run. In *Geroski v. Playtex Family Products*, the Court held the claim time barred even though the claimant did not meet the statutory prerequisites for seeking compensation for his injury until after the limitations period expired.[43] As in *Geroski*, Bren's claim is time barred even though he might not have had standing to pursue the claim during the limitations period. Notably, the hardship to Bren is less perplexing than in *Geroski*, because Bren actually was owed a fiduciary duty by the General Partner in mid-2001, before the statute of limitations expired.

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41 *See Lewis v. Capital Realty Senior Housing, Inc., et al.*, C.A. No. 16725 (Del. Ch.).

42 *See Simons v. Cogan*, 549 A.2d 300, 303 (Del. 1988) ("[A] convertible debenture represents a contractual entitlement to the repayment of a debt and does not represent an equitable interest in the issuing corporation necessary for the imposition of a trust relationship with concomitant fiduciary duties.").

43 1995 WL 656814 (Del. Super. Sept. 19, 1995), *aff'd*, 1996 WL 69770 (Del. Jan. 24, 1996) (Walsh, J.).

Furthermore, Bren and other Noteholders could have challenged the 1998 transaction as early as 1998, albeit under a different theory. The Noteholders had a contractual basis under the Indenture for challenging the 1998 transaction. Bren criticizes that transaction as a sham to circumvent the limitation in the Partnership Agreement on the ability to sell properties to affiliates of the General Partner. Section 8.04 of the Indenture requires that the Partnership and General Partner comply with the terms and provisions of the Partnership Agreement. Section 6.09 provides a procedure for Noteholders to assert claims against the Partnership if the Partnership violates the Indenture. A Noteholder must first give written notice of the violation to the Trustee under the Indenture. If the holders of 25% of the outstanding Notes make a demand on the Trustee and if the Trustee fails to bring an action, the Noteholders may then bring it themselves pursuant to the Indenture. Bren did not pursue this contractual right.

There was also a window of opportunity after the Partnership became insolvent, sometime during or after February 2001 and before the expiration of the statute of limitations in late September 2001, during which fiduciary duties were owed to creditors. Consistent with Bren's claim in this action that the General Partner should have pursued "the Partnership's underlying claim against Beck and Stroud,"[44] the Noteholders could have urged the General Partner to bring suit challenging the 1998 transaction within the

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[44] Plaintiff's Response in Opposition to Defendants' Supplemental Submission in Support of Their Motion to Dismiss or, Alternatively, for Summary Judgment ("PSR"), filed April 25, 2003 (D.I. 28), at 1-2.

three year statutory period.[45] Because the Noteholders never raised this issue with the General Partner, the Court can only speculate as to how the General Partner would have responded to the Noteholders' request. "Equity aids the vigilant, not those who slumber on their rights."[46]

Bren's claim in Count I is time barred based on the equitable analog to the three year statute of limitations of 10 *Del. C.* **?** 8106. The claim accrued on September 30, 1998. Bren did not file his initial Complaint in this action until September 17, 2002.

B. Counts II and III -- Breach of Duty of Disclosure and Unilateral Contract

Counts II and III both stem from the letters the General Partner sent to Noteholders soliciting consents for the sale of the final property on September 24 and October 12, 2001. The September 24 letter stated in bold and capitalized letters:

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[45] The Court need not address Defendants' argument that the Noteholders themselves may not maintain a claim for breach of fiduciary duty arising out of a transaction prior to the time that fiduciary duties were owed to creditors, because Bren has stated that he is not making such a claim. *See, e.g.,* PAB at 11. Since Bren never addressed the point, the Court assumes without deciding that the Noteholders themselves would not have had standing to bring suit in their own name for a breach of fiduciary duty based directly on the 1998 transaction, because they were not owed any fiduciary duties at that time. *See Simons*, 549 A.2d at 305 (dismissing fiduciary duty claim brought by debenture holder for lack of standing but noting that although plaintiff had no standing to bring fiduciary claim as holder of a convertible debenture until the debenture was converted into an equity interest, the plaintiff did have contract remedies under the debenture); *Anadarko Petroleum Corp. v. Panhandle E. Corp.,* 521 A.2d 624, 630 (Del. Ch. 1987), *aff'd*, 545 A.2d 1171 (Del.1987).

[46] *Adams*, 452 A.2d at 157.

WE ARE ASKING YOU TO APPROVE THE SALE OF THE LAST PROPERTY OWNED BY NHP. IF YOU APPROVE, THE NET PROCEEDS FROM THIS SALE WILL BE DISTRIBUTED TO NOTE HOLDERS IN AN ESTIMATED AMOUNT OF APPROXIMATELY $18,000,000.00 OR APPROXIMATELY $420.00 PER PENSION NOTE.[47]

Count II alleges that the General Partner breached its fiduciary duty to the Noteholders to disclose all of the material facts relevant to the requested approval. Count III alleges that the language quoted above and the Noteholders' approval created a contract that the General Partner later breached.

Count II alleges that the General Partner's solicitations of Noteholder approval of the sale of the Partnership's fifth and final property were materially misleading in that they failed to disclose: (1) that distribution of the net proceeds to the Noteholders would be conditioned upon receipt of a Waiver from them -- *i.e.*, a release of "any and all claims related to [their] Pension Notes"; and (2) the nature of the contingent consideration and related performance requirements.[48] Defendants deny that the letters were solicitations or purported to explain how, when, or pursuant to what terms the proceeds would be distributed to the Noteholders. The excerpts of the letters in the Complaint and the copies attached as exhibits to the Lankford Affidavit support Bren's allegations.

At this preliminary stage, the Court cannot hold that there is no set of facts that could be proven under Count II of Bren's Complaint that would entitle him to relief.

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[47] Compl. para. 11.

[48] Compl. paras. 14, 35-36.

Defendants only weakly dispute Bren's assertion that the General Partner owed a duty of full disclosure to the Noteholders in connection with the requested consents.[49] In the present circumstance, where the General Partner communicated with Noteholders when the Partnership was insolvent for the purpose of obtaining their approval of Partnership action, the existence of a duty to disclose is sufficiently plausible to survive Defendants' motion to dismiss.

Defendants also rely on material outside the Complaint to support their motion as to Count II, thereby making it subject to the standard of Rule 56. At the initial argument on April 11, 2003, Defendants' counsel conceded that its motion to dismiss as to Counts II and IV, prior to Bren having the opportunity to take discovery, was premature.[50] Former Vice Chancellor Jacobs's questioning and the parties briefing also demonstrated that Count II turns, in part, on what the General Partner knew at the time it sent the fall 2001 letters to the Noteholders in terms of the later-requested Waiver and the contingent consideration.[51] Thus, there are factual issues that cannot be resolved prior to Bren

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[49] In the briefing on the pending motion, Defendants "assumed arguendo" the existence of such a duty. DOB at 20; Defendants' Reply Brief ("DRB") at 15 n.10. In a footnote in their reply brief, Defendants cite to a brief they filed in response to an earlier motion by Bren for the proposition that "creditors are not normally owed a fiduciary duty of full disclosure." DRB at 15 n.10; D.I. 9 at 22-23. The only case Defendants cited, however, was *Simons*, 549 A.2d at 304, which did not involve a "vicinity of insolvency" situation.

[50] *See* Apr. 11, 2003 Tr. at 55.

[51] *See id*. at 60-69.

having the opportunity to take discovery on Count II. Those issues preclude summary judgment.

In some respects, Count III is the flip side of Count II. Taking the September 24 and October 12, 2001 solicitation letters at face value, without regard to the alleged omissions, Bren contends that those letters and the Noteholder's responsive approval of the sale and consent to removal of the lien on the final property formed a binding contract. The contract gave the Noteholders the right to receive the net proceeds of the sale without first having to provide a Waiver. Defendants argue that no contract was formed by the representations in the correspondence and the Noteholders' acceptance because the terms were not sufficiently definite and there was no new consideration.

The letters state that upon Noteholder approval of the sale of the final property, the net proceeds will be distributed to the Noteholders. When viewed in the light most favorable to Bren, this correspondence is sufficiently definite to constitute an offer. Likewise, the Noteholders' approval of the sale can be construed as an acceptance. Even if "new consideration"[52] were required to create a binding contract, the release of the lien on the final property could satisfy that requirement. Thus, Bren has presented prima facie evidence that the correspondence of the General Partner with the Noteholders in September and October gave rise to an enforceable contract.[53]

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[52] DOB at 20.

[53] Defendants also argue that Count III is moot because the Partnership in fact distributed the proceeds of the sale of the final property to all Noteholders, including those that refused to sign the Waiver. The distribution may moot Bren's

Defendants' motion for summary judgment on Counts II and III relies extensively on exhibits attached to the Lankford Affidavit to demonstrate the Noteholders' knowledge of the surrounding circumstances and the General Partner's knowledge and intent in September and October 2001.[54] Bren has not had any discovery on these issues. For this reason, Defendants' motion is premature.[55] Prior to granting a motion for summary judgment, discovery, even if limited to the issues presented on the motion for summary judgment, must be permitted.[56] On the present state of the record, there are genuine issues of material fact regarding whether the solicitations of Noteholder approval were misleading and whether a unilateral contract was formed. Counts II and III will not be dismissed.

C. Count IV -- Breach of Duty of Disclosure

Count IV, in five separate claims, alleges that the General Partner breached its fiduciary duty of disclosure to the Noteholders. Bren claims that, while insolvent, the

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claim in Count IV that Defendants failed to disclose the intended treatment of Noteholders who did not tender a release. *See infra,* p. 24. The distribution does not, however, moot Bren's attempt on behalf of himself and the class of Noteholders to invalidate the release of all *claims for the remainder* of the amount due on the Notes. Defendants' counsel conceded this point at oral argument before Vice Chancellor Jacobs. *See* Apr. 11, 2003 Tr. at 53-54.

54 *E.g.*, Supp. Lankford Aff. para. 4.

55 *See Mann v. Oppenheimer & Co.*, 517 A.2d 1056, 1059-60 (Del. 1986).

56 *Vanderbilt Income Growth Assoc., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 610 (Del. 1996).

General Partner failed to disclose material information when soliciting the Noteholders' waiver or release of all claims in the January 9, 2002 letter, including:

(a) the nature and extent of the Partnership's non-operating assets, particularly the alleged cause of action from the 1998 transaction;

(b) a full and fair summary of the General Partner's activities on behalf of the Partnership;

(c) how the General Partner planned to treat Noteholders that did not sign the requested release;

(d) current (through December 31, 2001) and historical financial statements of the Partnership; and

(e) the terms of the contingent consideration in connection with the sale of the final property.

Defendants contend that either these alleged omissions were immaterial or the information was fully disclosed.

The Supreme Court described the test for materiality as follows:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[57]

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[57] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)(quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). *Accord*, *e.g.*, *Klang v. Smith's Food & Drug Centers, Inc.*, 702 A.2d 150, 156 (Del. 1997); *Brody v. Zaucha*, 697 A.2d 749, 753 (Del. 1997).

The decision for the Noteholders in this case was whether to "accept the Consideration [for the sale of the last property] as full and final settlement and a release of any and all claims related to [their] Pension Notes."[58]

As discussed in Section IV.A., by January 9, 2002, when the General Partner sent the letter requesting the Waiver, claims arising out of the 1998 transaction were time barred.[59] For this reason, a description of the alleged cause of action based on the 1998 transaction would not have been material to the Noteholders' decision on the Waiver issue. Bren has not identified any other information regarding the Partnership's non-operating assets that a reasonable Noteholder would have been substantially likely to have viewed as having significantly altered the "total mix" of information made available to it. Thus, Bren has failed to state a claim that more information about the Partnership's "non-operating assets" should have been disclosed.

Bren claims that the General Partner failed to disclose a "fair summary" of its activities. Bren failed to adequately plead or explain, however, why a detailed disclosure of the "activities of the General Partner" would have been material to the Noteholder's decision on the Waiver. "Non-disclosure claims must provide some basis for a court to

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[58] Lankford Aff. Ex. K.

[59] Bren's disclosure claim is premised on his assertion that a claim arising out of the 1998 transaction was a "non-operating asset." The Partnership had disclosed its belief that the Lewis action challenging the 1998 transaction was "without merit." Lankford Aff. Ex. M. at p. 9. At the time of the correspondence in 2002, any claim arising out of the 1998 transaction was time barred, *supra* section IV.A. Thus it was of *de minimus*, if any, value.

infer that the alleged omissions were material."[60] Without a factual basis for the materiality of the nondisclosure claim, the record is insufficient to sustain this aspect of Count IV.

Bren claims that Defendants breached their duty of disclosure by failing to disclose the anticipated treatment of the Noteholders who failed to tender a Waiver. The Complaint, however, fails to plead facts sufficient to show why, as a matter of law, the disclosure of the Noteholders' legal rights would be required under the circumstances. Failure to tender the Waiver would not change a Noteholders' position as a creditor of an insolvent entity. The Noteholders would remain creditors of the Partnership, with rights under the Indenture, and potential claims for distributions under the prior correspondence from the Partnership. Defendants did not have a duty to provide the Noteholders with legal advice.[61] Hence, there was no material omission with regard to this claim. Furthermore, the eventual distribution of the proceeds of the sale of the final property to all Noteholders regardless of whether they tendered a Waiver rendered this aspect of Count IV moot.

Bren claims that the General Partner failed to provide current and historical financial statements in correspondence with the Noteholders. The General Partner presumably was obligated to act with complete candor when seeking Noteholder action

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[60] *See In re Santa Fe Pac.*, 699 A.2d at 66; *In re Wheelabrator Tech., Inc. S'holders Litig.*, 1992 WL 212595, at *3 n.7 (Del. Ch. Sept. 1, 1992).

[61] *Kahn v. Caporella*, 1994 WL 89016, at *7 (Del. Ch. Mar. 10, 1994).

while insolvent.[62] All facts material to the action must be disclosed.[63] This does not require, however, that all material information that was previously disclosed be disclosed again with the specific correspondence requesting action.[64] Defendants contend that the information publicly available or previously supplied to the Noteholders in the context of the sale of the final property satisfied the General Partner's fiduciary duties. Bren, however, has not yet taken discovery. The available information is insufficient to support a conclusion that there is no genuine issue of material fact that remains to be tried in connection with this alleged disclosure violation. Accordingly, Defendants' motion for summary judgment will be denied as to this aspect of Count IV.

Bren claims that the General Partner failed to disclose the nature of the contingent consideration when it solicited Noteholder consent to the sale of the final Partnership property. The amount of money to be received in the distribution is important to the decision of a reasonable Noteholder. Defendants' motion for summary judgment relies

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62 *See, e.g., Arnold v. Society for Savings Bancorp., Inc.*, 650 A.2d 1270, 1276 (Del. 1994) *quoting Lynch v. Vickers Energy Corp.*, 351 A.2d 570, 573 (Del. Ch. 1976) (requiring full disclosure of all known facts that are material to stockholder action). Defendants only weakly and unconvincingly argue that the General Partner did not have a fiduciary duty to disclose all known material facts while the Partnership was insolvent and seeking Noteholder action. *See supra*, n.45.

63 *Id.*

64 *See, e.g., Wolf v. Assaf*, 1998 WL 326662 (Del. Ch. June 16, 1998); *Ash v. LFE Corp.*, 525 F.2d 215, 219 (3d Cir. 1975); *Paperworks Int'l Union v. International Paper Co.*, 985 F.2d 1190, 1198 (2d Cir. 1993).

on the Lankford Affidavit.[65] Discovery may show that, when it solicited the release, the General Partner did disclose all material information in its possession regarding the "contingent consideration." However, Bren has not yet had discovery on this issue. Thus, the Court declines to dismiss this claim in Count IV.[66]

D. Count V -- Breach of the Indenture

Count V asserts that the Noteholders had an "absolute and unconditional" right to payment of the principal and interest under the Notes pursuant to section 6.10 of the Indenture. Bren seeks a judgment against the Partnership based on its failure to pay at least $19 million of the amount due.[67]

Defendants argue that Bren and most of the other Noteholders cannot recover under the Notes, because they released the Partnership of liability. This defense rests on the Waiver Defendants obtained through the January 9, 2002 letter. As noted above, there are genuine issues of disputed fact as to whether the correspondence between the parties in September and October of 2001 was materially misleading and/or formed a contract that potentially invalidates any Waiver later obtained by the Partnership. There

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[65] DOB at 22.

[66] With respect to Count IV, the Court also notes that in view of Defendants' decision to distribute the proceeds of the final sale to all the Noteholders, including those who did not agree to the Waiver, it is not clear whether Defendants still intend to attempt to enforce the Waivers. If not and Defendants file a stipulation to that effect, Count IV might well be dismissed as moot.

[67] Count V only seeks a judgment against the Partnership; it is not directed against the General Partner. PAB at 31 n.5.

also are disputed issues of fact regarding the sufficiency of the disclosures related to the January 9, 2002 solicitation of the Waivers. For these reasons, and because the motion to dismiss or for summary judgment has been denied as to Counts II, III and part of IV, the Court will deny Defendants' motion to dismiss Count V as well.

V. Appointment of a Receiver

Defendants' motion to strike the request for the appointment of a receiver on the basis of the Limitation on Suits clause of section 6.09 of the Indenture will be denied. Section 6.10 applies "notwithstanding any other provisions of this Indenture." This includes the "Limitations on Suits" clause of section 6.09. Thus, if Bren did not release his rights to seek full payment on the Notes, he may pursue all available remedies permitted by section 6.10, including the appointment of a receiver.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss Count I will be granted. Defendants' motion for summary judgment on Counts II and III will be denied. Defendants' motion to dismiss or for summary judgment on Count IV will be granted in part and denied in part. Defendants' motion to dismiss Count V will be denied. Defendants' motion to strike Bren's request for appointment of a receiver will be denied.

An appropriate Order will be entered.