IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JAMES FORSYTHE and ALAN TESCHE, Individually and derivatively on behalf of CIBC EMPLOYEE PRIVATE EQUITY FUND (U.S.) I, L.P.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 1091-VCL
ESC FUND MANAGEMENT CO. (U.S.), INC., PETER H. SORENSEN, DEAN A. CHRISTIANSEN, VERNON L. OUTLAW, ORLANDO FIGUEROA, ALBERT FIORAVANTI, CIBC ESC ADVISORS, LLC, CIBC ESC SLP, LLC; and CANADIAN IMPERIAL BANK OF COMMERCE,	)	
Defendants,	)	
and	)	
CIBC EMPLOYEE PRIVATE EQUITY FUND (U.S.) I, L.P.,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION AND ORDER

Submitted: June 12, 2007
Decided: October 9, 2007

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LAMB, Vice Chancellor.

A major bank offered to its most highly paid employees partnership interests in a fund intended to co-invest with the bank in its proprietary investments. In accordance with the partnership agreement, the corporate general partner, owned by its three unaffiliated directors, delegated the responsibility for the fund's management to affiliates of the bank. After the fund suffered extreme losses, a group of limited partners brought suit against, the bank, the general partner, its directors and the bank's affiliates for breach of fiduciary duty and breach of the partnership agreement.

The defendants have moved to dismiss on various grounds, including failure to make pre-suit demand on the general partner. The issue raised by this aspect of the motion is whether the general partner's oversight duty is governed by the familiar standard of *Caremark* or by a higher standard rooted in the partnership agreement itself.

The court concludes the partnership agreement provides the relevant standard. Particularly in light of the general partner's full delegation of its managerial duties to conflicted persons, the residual duty of oversight found in the agreement imposes a duty upon the general partner to take active steps to satisfy itself that the conflicted delegates actually discharge their powers loyally to the fund and in conformity with the partnership agreement. Because the complaint adequately alleges facts which, if true, show that the general partner did not fulfill that duty, demand will be excused.

I.

Litigation before this court began on August 23, 2004, when the plaintiffs filed a complaint seeking access to the defendants' books and records. On February 11, 2005, the plaintiffs filed their first derivative complaint in the present fiduciary duty action. The parties mutually agreed to stay proceedings pending the outcome of the books and records action. The court held a one-day trial on April 1, 2005 and issued an opinion on July 7, 2005 granting the plaintiffs limited access to the defendants' books and records.

The plaintiffs filed an amended derivative complaint in the fiduciary duty action on November 6, 2006.[1] The complaint seeks damages in connection with mismanagement of CIBC Employee Private Equity Fund (U.S.) I, LP (the "Fund").[2] The defendants now move to dismiss the complaint on the grounds that: (1) the plaintiffs did not make demand and demand is not excused; (2) the plaintiffs have failed to state a claim upon which relief can be granted; (3) the plaintiffs' claims are barred by laches and/or the statute of limitations; and (4) the plaintiffs have waived their right to bring suit.

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[1] The second amended complaint is the operative complaint referred to herein.
[2] The complaint also seeks dissolution of the Fund. The plaintiffs, however, have since indicated that they "are not pursuing their claims for dissolution at this time." *See* Pls.' Br. 45.

II.

A. The Parties

The plaintiffs in this matter are limited partners in the Fund. The plaintiffs name as defendants ESC Fund Management Co. (U.S.), Inc., a Delaware corporation and the Fund's general partner (the "General Partner"); Peter H. Sorensen, Dean A. Christiansen, Vernon L. Outlaw, Orlando Figueroa, and Albert Fioravanti, the General Partner's current and former individual directors (the "Individual Defendants"); CIBC ESC Advisors, LLC, a Delaware corporation and the Fund's investment advisor (the "Investment Advisor"); CIBC ESC SLP, LLC, a Delaware corporation and the Fund's special limited partner (the "Special Limited Partner"); and Canadian Imperial Bank of Commerce, a Canadian banking operation ("CIBC").

B. Creation And Terms Of The Fund

According to the complaint, CIBC made a strategic decision to expand its United States investment banking operations in the late 1990s. The plaintiffs allege that by late 2000, CIBC's U.S. operations were under pressure from the "dramatic softening" in market conditions and "commenced a number of schemes" to combat these market conditions.[3] One of those schemes, the plaintiffs allege, involved creation of the Fund. To this end, the plaintiffs describe the Fund as a

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[3] Compl. ¶¶ 36, 39, 42.

vehicle created by CIBC to "continue to fund high risk, high yield ventures," "free[] up [CIBC's] capital from underperforming and low return investment, decreasing its market risk exposure and removing large sources of credit risk from its balance sheet," while at the same time allowing CIBC "an additional way to earn management and other fees including interest on leverage."[4]

The Fund was sold in November 1999 through a Confidential Private Placement Memorandum (the "PPM"),[5] which was supplemented in early 2000 with the Supplement to Private Placement Memoranda (collectively the "Offering Documents"). The Offering Documents provide a more benign explanation for CIBC's creation of the Fund–CIBC created the Fund in late 1999 to enable a select group of the bank's employees to invest alongside CIBC.[6]

The PPM states that the goal of the Fund is to achieve long-term capital appreciation for investors through investments in three categories: (1) the Trimaran Fund; (2) the Fund of Funds; and (3) Merchant Banking. The Trimaran Fund is a private equity fund run by three senior members of CIBC's high yield investment banking unit. According to the PPM, Trimaran investments are

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[4] Compl. ¶¶ 43, 44.
[5] The court may consider documents referred to in the complaint when ruling on motions to dismiss when, as here, those documents are integral to a plaintiff's claim. *See, e.g., In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995); *In re General Motors (Hughes) S'holder Litig.*, No. 20269, 2005 WL 1089021, at *6-7 (Del. Ch. May 4, 2005); *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 909 n.1 (Del. Ch. 1999).
[6] PPM 1.

intended to represent between 33% and 50% of the Fund's total capital commitment. The Fund of Funds is a diversified portfolio of primarily private equity investment funds that invest in equity securities. The Fund of Funds is intended to represent between 40% and 57% of the Fund's total capital commitment. Merchant Banking invests in equity securities, typically on a side-by-side basis with CIBC. These investments are intended to represent 10% of the Fund's total commitment. Limited partners are allowed to leverage their investment by taking out loans offered by CIBC. The decision to take out loans is completely voluntary.[7] In addition, CIBC earns a 7% finder's fee for every investment it transfers to the Fund.

In March 2000, the Fund closed with total investor commitments of $561 million and approximately 490 investors.

C. Governance Of The Fund

The governing document of the Fund is the Amended and Restated Agreement of Limited Partnership, dated March 10, 2000 (the "Partnership Agreement"). Under the Partnership Agreement, the General Partner has the "sole right and power to manage and administer the affairs of the Fund."[8] As outlined in the Partnership Agreement and the PPM, the General Partner is 100% owned by

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[7] *Forsythe v. CIBC Employee Private Equity Fund (U.S.) I, L.P.*, No. 657, 2005 WL 1653963, at *1 (Del. Ch. July 7, 2005).
[8] P'ship Agmt. § 4.1(a).

three individuals who make up the General Partner's board of directors (the "Independent Board"). According to the Partnership Agreement and the PPM, each director receives $15,000 per year for serving on the Independent Board. Lord Securities Corporation, which is in the business of providing director services for corporate clients, selected the initial members of the Independent Board. From its inception until October 2004, Sorensen, Christiansen, and Outlaw were the three directors. In October 2004, Sorensen and Christiansen resigned, and Figueroa and Fioravanti replaced them.

Under the terms of section 4.1(a) of the Partnership Agreement, the General Partner must delegate certain of its responsibilities. Pursuant to this section, the General Partner delegated its authority to select and dispose of the Fund's investments to the Special Limited Partner. The General Partner also delegated other investment management and related powers, such as exercising the Fund's voting rights in its investments, to the Investment Advisor, pursuant to the terms of an investment advisory services agreement between the Fund and the Investment Advisor (the "Investment Advisory Agreement"). Under the Investment Advisory Agreement, the Investment Advisor also has authority to develop investment policies and strategies and to recommend particular investments for the Fund. The Investment Advisor delegated much of this investment decision authority to CIBC's Investment Committee, which consists of upper level CIBC executives.

The Investment Advisor can also buy investments for the Fund, but only with approval of the Special Limited Partner.

According to the Partnership Agreement, the General Partner retains at least one important duty–the delegatees exercise their powers and "perform their duties subject to the oversight of the General Partner."[9] The Partnership Agreement also provides that the General Partner, Investment Advisor, Special Limited Partner, Independent Board, directors, sub-advisors, and employees of the Independent Board are liable only for actions or omissions resulting from bad faith, willful misconduct, gross negligence, or a material breach of the Partnership Agreement.

D. The Plaintiffs' Allegations

As noted in this court's earlier order, "the Fund did not prosper. This is something of an understatement, as the Fund lost over 75% of its initial value, and over half of its investments have been written down or written off."[10] The complaint alleges that these losses resulted from the defendants' breaches of fiduciary duties.

Generally, the plaintiffs allege that the Fund is designed so that it can "co-invest" with CIBC. Under this design, CIBC's Investment Committee decides on CIBC's behalf to make a particular investment. The Investment Advisor or Special

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[9] P'ship Agmt. § 4.1(a); *see also* Inv. Adv. Agmt. ¶ 2(a) (stating that the Investment Advisor provides its services "[s]ubject to the oversight of the General Partner").
[10] *Forsythe*, 2005 WL 1653963 at *5.

Limited Partner then decides if the investment meets the Fund's eligibility requirements. If the investment meets the Fund's eligibility requirements, the Investment Advisor or Special Limited Partner invests alongside CIBC on behalf of the Fund.

According to the complaint, however, since late 2000 and continuing to the present, the individuals serving as the Investment Advisor and Special Limited Partner have caused the Fund to make worthless investments. Specifically, the plaintiffs allege that the CIBC senior executives serving on CIBC's Investment Committee are the same individuals who make up the Investment Advisor and Special Limited Partner. According to the complaint, these CIBC senior executives, sitting as the CIBC Investment Committee, make and continue to make investment decisions for CIBC. When investments lose significant value, these same executives change hats and, sitting as the Special Limited Partner or the Investment Advisor, allegedly approve the Fund's purchase of the same investments from CIBC. The plaintiffs allege the Fund is forced to buy these investments from CIBC at prices equal to CIBC's original cost of investment and pay CIBC a 7% finder's fee. The complaint alleges that CIBC, the Special Limited Partner, and the Investment Advisor have violated and continue to violate their fiduciary duties to the Fund through this activity.

At the same time, the plaintiffs allege that the General Partner and the Individual Defendants have violated their fiduciary duties to the Fund by abdicating their oversight responsibilities, "[n]ever once question[ing] either the Special Limited Partner, the Investment Advisor, or any other person or entity regarding the investments being made or transferred to the Fund."[11] The plaintiffs further allege that the Investment Advisor, Special Limited Partner, and CIBC have aided and abetted the General Partner's and the Individual Defendants' violations of their fiduciary duties.

1. Merchant Banking

The plaintiffs contend that CIBC initially chose to transfer to the Fund high risk, losing merchant banking investments it purchased in 1999.[12] CIBC's supposed motivation was to move these underperforming investments off its balance sheets and "free up capital" so it could invest that money in "other lucrative" investments,[13] and collect a 7% finder's fee from each transfer. Not only were these investments losing money at the time of the transfers, they allegedly violated the six-year time horizon established for the Fund, which required that any investments transferred to the Fund be purchased between 2000 and 2006. According to the complaint, the Investment Advisor ratified these transfers

[11] Compl. ¶¶ 76, 182(b-c), (k), (l).
[12] Compl. ¶¶ 99, 102.
[13] Compl. ¶ 104.

"without even a question as to their value," and in violation of its fiduciary duties to the Fund.[14] The plaintiffs similarly allege that the Special Limited Partner ratified other transfers of worthless investments to the Fund. In support, the plaintiffs cite to, among other things, the minutes of the first meeting of the "Co-Invest Advisory Board," which allegedly show that the members of the Special Limited Partner and Investment Advisor approved, without discussion, the transfer of investments to Merchant Banking.[15] Finally, the plaintiffs allege the Fund has not divested side by side with CIBC, in violation of the Offering Documents.

2. The Fund Of Funds

The plaintiffs allege that CIBC has, through the General Partner and Special Limited Partner, caused the Fund to purchase investments "worth significantly less than the consideration paid by the Fund to CIBC,"[16] invested in the same companies as Merchant Banking, thus violating the restriction that only 10% of the Fund be in Merchant Banking, and made an investment with a 20-year time horizon, even though the Fund has a time horizon of only six years. In support, the plaintiffs again point to, among other things, the minutes of the first meeting of the "Co-Invest Advisory Board," which allegedly show that the members of the Special Limited Partner and Investment Advisor approved, without discussion, the

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[14] Compl. ¶ 100.
[15] Compl. ¶ 79.
[16] Compl. ¶¶ 143, 151.

transfer of investments to the Fund of Funds.[17] The plaintiffs also allege that the Fund has not divested alongside CIBC, in violation of the Offering Documents.

The plaintiffs allege CIBC has made these investment decisions in order to secure fees from the underlying portfolio companies, and to obtain finder's fees from the Fund.

3. The Trimaran Fund

Turning to the Trimaran Fund, the plaintiffs allege that in 2001, the Trimaran principals, who earned CIBC millions of dollars in profit with their investment in Global Crossing, threatened to leave CIBC if they were not provided with additional seed money for the establishment of a new fund. Confusingly, the complaint states that CIBC decided to appease these demands in 2000, a full year before the threats were even made, by providing the Fund with the opportunity to invest in Trimaran. Regardless of CIBC's motive, the plaintiffs allege that CIBC and the General Partner allowed the Fund to invest in the Trimaran Fund, as well as worthless telecommunications investments, even as CIBC divested itself of them. The complaint, in somewhat conclusory language, alleges that the Fund

[17] Compl. ¶ 79. Oddly, the plaintiffs raise no claims against the Investment Advisor with regard to the Fund of Funds, even though the Investment Advisory Agreement provides that "[t]he Investment Advisor shall be responsible for choosing Portfolio Funds and all activities relating to holding such Investments." *Compare* Compl. ¶¶ 63-64, 143 (alleging the Investment Advisor delegated its investment authority to CIBC's merchant banking investments and the Trimaran Fund, and that the General Partner and Special Limited Partner made Fund of Funds investments) *with* Inv. Adv. Agmt. ¶ 2(c)(ii).

would not have made these "worthless" telecommunications investments had the General Partner and the Individual Defendants "properly exercised" their supervisory obligations.[18]

In addition, the plaintiffs allege that in early 2002, CIBC cut Trimaran off from CIBC's deal flow, in violation of the terms of the PPM. The General Partner, in violation of its fiduciary duties, allegedly did nothing to change the level of the Fund's capital committed to Trimaran.

III.

The plaintiffs sue derivatively, but did not make pre-suit demand. Title 6, section 17-1003 of the Delaware Code therefore requires that the complaint "set forth with particularity . . . the reasons for not making" demand. Delaware courts look to pleading standards developed in the corporate context to determine whether a limited partner has alleged particularized facts satisfying section 17-1003 requirements.[19] The requirement of particularized facts means a "[p]laintiff's pleading burden [in the demand excused context] is more onerous than that required to withstand a Rule 12(b)(6) motion."[20] At this stage in the proceedings,

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[18] Compl. ¶ 127.
[19] *Gotham Partners v. Hallwood Realty Partners, L.P.*, No. 15754, 1998 WL 832631, at *4 (Del. Ch. Nov. 10, 1998) (noting that the limited partner demand futility pleading standard is "substantially the same as the pleading standard for shareholder plaintiffs") (citing *Littman v. Prudential-Bache Prop., Inc.,* No. 12137, 1993 Del. Ch. LEXIS 13, at *7 (Del. Ch. Jan. 4, 1993)); *Seaford Fund L.P. v. M&M Assoc. II, L.P.*, 672 A.2d 66, 69 (Del. Ch. 1995).
[20] *Levine v. Smith*, 591 A.2d 194, 207 (Del. 1991).

"only well-pleaded allegations of fact must be accepted as true; conclusory allegations of fact or law not supported by allegations of specific facts may not be taken as true."[21]

The Delaware Supreme Court has articulated a two-part test, first developed in *Aronson v. Lewis*, for determining whether demand is excused in a given case.[22] The first step is to determine "whether under the particularized facts alleged, a reasonable doubt is created that . . . the directors are disinterested and independent."[23] The second step is to determine whether the pleading creates a reasonable doubt that "the challenged transaction was otherwise the product of a valid exercise of business judgment."[24]

As the court in *Rales v. Blasband* held, however, where the complaint challenges a board's failure to exercise business judgment, the business judgment rule has no application and it is impossible to perform the second inquiry.[25] In that situation, "a court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could . . . properly exercise[] its independent and disinterested business judgment in responding to a

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[21] *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988).
[22] *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (citing *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984)).
[23] *Id.*
[24] *Id.*
[25] 634 A.2d 929, 933 (Del. 1993).

demand."[26] Importantly for this case, allegations of specific facts establishing that "the potential for liability is not 'a mere threat' but instead may rise to 'a substantial likelihood'" create a reasonable doubt as to the board's disinterestedness.[27] The same test will be applied in the context of a demand on the general partner of a limited partnership.[28]

Here, the parties agree that the plaintiffs do not challenge any business judgment made by the General Partner. Rather, the plaintiffs allege that the General Partner failed to act when necessary, and by that failure to act violated its duties to the Fund.[29] Therefore, the *Rales* test applies, and demand will be excused because the particularized facts alleged in the complaint establish that the potential for the General Partner's liability is not a mere threat, but instead rises to a substantial likelihood.

To determine whether the allegations contained in the complaint establish a substantial likelihood of liability, it is essential to first determine the standard of liability governing the General Partner's duty of oversight. The defendants argue

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[26] *Id*. at 934.
[27] *Id*. at 936.
[28] *Cf. In re Cencom Cable Income Partners*, No. 14634, 2000 WL 130629, at *4 (Del. Ch. Jan. 27, 2000) (applying the *Aronson* test in a partnership context); *Dean v. Dick*, No. 16566, 1999 WL 413400, at *2 (Del. Ch. June 10, 1999) (same); *Katell v. Morgan Stanley Group Inc.*, No. 12343, 1993 WL 10871, at *5 (Del. Ch. Jan. 14, 1993) (applying "the demand excused analysis in our corporation law" to a claim brought against a partnership).
[29] Defs.' Br. 20; Pls.' Br. 21-22.

that *In re Caremark International Derivative Litigation*[30] provides the applicable standard of liability in this case. As the court in *Stone v. Ritter* stated, *Caremark* "articulates the necessary conditions predicate for *director* oversight liability."[31] "[I]mposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations."[32]

The plaintiffs argue that *Davenport Group MG, L.P. v. Strategic Investment Partners, Inc.*[33] governs, and imposes a lower standard of oversight liability in the partnership context. According to the plaintiffs, *Davenport* establishes that general partners are "always ultimately responsible for the proper administration of their limited partnerships and their limited partnership agreements, even where they have delegated certain responsibilities."[34] Therefore, the plaintiffs argue, the complaint need not allege that the defendants had knowledge of wrongdoing in order to establish a substantial likelihood of liability. Rather, the plaintiffs rely on *Davenport* and agency law for the proposition that "the misconduct of a general partner's delegatees is imputed to the general partner, even when notice of such acts is never actually communicated to the general partner."[35]

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[30] 698 A.2d 959 (Del. Ch. 1996).
[31] 911 A.2d 362, 370 (Del. 2006) (emphasis added).
[32] *Id*.
[33] 685 A.2d 715, 721 (Del. Ch. 1996).
[34] June 12, 2007 Letter from Plaintiffs at 6.
[35] *Id*. at 7.

The defendants respond that *Davenport* is consistent with *Caremark*, and does not create a new standard of oversight liability applicable to the partnership context.[36] Rather, the defendants argue, the court in *Davenport* merely assumed the general partner's knowledge of wrongdoing, and proceeded to the second prong of *Caremark*, finding that the general partner took no steps to prevent or remedy the situation.[37] As such, they argue, *Davenport* did nothing more than apply the *Caremark* test, even if it did not explicitly say it was doing so (if only because *Davenport* preceded *Caremark* by approximately eight months).

Neither *Caremark* nor *Davenport*, however, is determinative. In this case, the Partnership Agreement, not the common law, provides the proper standard of liability. "[W]here the parties have a more or less elaborated statement of their respective rights and duties, absent fraud, those rights and duties, where they apply by their terms, and not the vague language of a default fiduciary duty, will be the metric for determining breach of duty."[38]

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[36] June 7, 2007 Letter from Defendants at 3.
[37] *Id.*
[38] *Cantor Fitzgerald, L.P. v. Cantor*, No. 18101, 2001 Del. Ch. LEXIS 137, at *17 (Del. Ch. Nov. 5, 2001) (citing *In re Marriott Hotel Prop. II L.P. Unitholders Litig.*, No. 14961, 1996 Del. Ch. LEXIS 60, at *16 (Del. Ch. June 12, 1996)); *see also Gotham Partners*, 2000 WL 1476663 at *10 ("Where the Partnership Agreement provides the standard that will govern the duty owed by a General Partner to his partners in self-dealing transactions, it is the contractual standard and not the default fiduciary duty of loyalty's fairness standard that exclusively controls."); *Wilmington Leasing, Inc. v. Parrish Leasing Co., L.P.*, No. 15202, 1996 Del. Ch. LEXIS 155, at *44 (Del. Ch. Dec. 23, 1996) ("Where, as here, a Partnership Agreement specifically addresses the rights and duties of the partners, any fiduciary duty that might be owed by the Limited Partners is satisfied by compliance with the applicable provisions of the partnership agreement.").

Here, the structure contemplated by the Partnership Agreement and the PPM leave the General Partner with only one substantive duty, *i.e.* the duty to oversee the activities of the CIBC-related entities that actually manage the affairs of the partnership. Section 4.1 of the Partnership Agreement states that the Investment Advisor and Special Limited Partner, *inter alia*, "exercise [their] powers and perform [their] duties subject to the oversight of the General Partner." Similarly, paragraph 2 of the Investment Advisory Agreement states that the Investment Advisor performs its duties "[s]ubject to the oversight of the General Partner." The Partnership Agreement also outlines the standard that governs the General Partner's discharge of its duty of oversight. Specifically, section 12.1 states the General Partner is liable for acts or omissions resulting from bad faith, willful misconduct, gross negligence, or a material breach of the Partnership Agreement.

The defendants argue that the complaint does not adequately allege that the General Partner breached its duty of oversight. They urge the court to adopt a *Caremark*-based standard requiring well-pleaded allegations of fact reasonably supporting an inference that the General Partner knowingly failed to discharge its fiduciary obligations. *Caremark* requires such a showing in the context of a board of directors generally involved in the management of the business and affairs of a corporate enterprise. But there is less reason to insist on such a showing of knowing misconduct in the case of a general partner whose only substantial duty is

to monitor the faithful performance of third parties who themselves occupy inherently conflicted positions.

Caremark rests importantly on the observation that corporate boards sit atop command-style management structures in which those to whom management duties are delegated generally owe their loyalty to the corporation.[39] In that context, boards of directors are presumed to discharge their oversight responsibilities by adopting internal reporting and compliance systems that function to bring problems to the attention of senior managers and the directors themselves.[40] As the Delaware Supreme Court recently held, where such a system is implemented, directors will be potentially liable for breach of their oversight duty only if they ignore "red flags" that actually come to their attention, warning of compliance problems.[41] That is to say that, with an effective compliance system in place, corporate directors are entitled to believe that, unless red flags surface,

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[39] As Chancellor Allen observed in *Caremark*, "[m]ost of the decisions that a corporation, acting through its human agents, makes are, of course, not the subject of directors' attention. Legally, the board will be required only to authorize the most significant corporate acts or transactions: mergers, changes in capital structure, fundamental changes in business, appointment and compensation of the CEO, etc." 698 A.2d at 968.

[40] *See Caremark,* 698 A.2d at 970 (expressing the view that corporate boards cannot be properly informed "without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each in its own scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance").

[41] *Stone*, 911 A.2d at 370.

corporate officers and employees are exercising their delegated corporate powers in the best interest of the corporation.

In the context presented in this case, the *Caremark* duty of oversight analysis is missing one or more major premise. Instead of a board of directors sitting atop a command-style management structure of persons legally required to act loyally to the corporation, there is a nominally independent general partner that has delegated nearly all of its managerial responsibilities to conflicted entities who act through persons employed by and loyal to a third party. There is no command-style system of management reporting up to the General Partner, and the General Partner had no reason to believe that the Special Limited Partner or the Investment Advisor, entities made up of persons whose primary loyalty was and is to CIBC, would likely exercise their delegated duties in a manner that was loyal to the partnership. In the circumstances, the duty of oversight created by the Partnership Agreement is better understood as imposing on the General Partner an active obligation, at a minimum, to take steps to satisfy itself that the Special Limited Partner and the Investment Advisor actually discharge their delegated duties in compliance with the Partnership Agreement and in a manner loyal to the partnership.

Albert v. Alex Brown Management Services is instructive in this regard.[42] In *Alex Brown*, this court denied the defendants' motion to dismiss two complaints

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[42] *See* No. 762, No. 763, 2005 Del. Ch. LEXIS 133, at *19-20 (Del. Ch. Aug. 26, 2005).

that alleged the general partners of two funds had failed to discharge their supervision and oversight duties. Those complaints alleged that both funds were faced with "exceptional challenges, first by the sharply rising value of the securities that made up the Funds, and second by the rapid fall in value of those same securities."[43] Those complaints alleged that the general partners met less than once a year during this time of turmoil, and took no action to protect the unitholders' investments. At the same time, the complaints alleged, the general partners received millions of dollars in fees for "doing almost nothing."[44] The partnership agreements in *Alex Brown* made the general partners liable for, among other things, gross negligence. This court, while recognizing that "whether the [general partners of a partnership] exercised the requisite amount of due care in managing the Funds is, of course, a fact sensitive inquiry," found that those alleged facts raised a duty of care claim sufficient to survive a motion to dismiss.[45]

Here, the allegations in the complaint paint a more particular and detailed picture of possible gross negligence or material breach of the Partnership Agreement than the allegations in *Alex Brown*. The facts alleged in the complaint indicate that the General Partner knew of its duty to oversee its delegatees–that duty is clearly stated in the Offering Documents and the Partnership Agreement.

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[43] *Alex Brown*, 2005 Del. Ch. LEXIS 133 at *19-20.
[44] *Id.* at *20.
[45] *Id.* at *19.

Further, as in *Alex Brown*, the complaint alleges that, despite a precipitous drop in the Fund's value and annual compensation of $15,000 to each Individual Defendant, the General Partner took no steps to inquire into the investment decisions of the Investment Advisor and Special Limited Partner.[46] The defendants' argument that the plaintiffs "have no basis for alleging that the General Partner 'did nothing' other than the fact that there were no documents demonstrating otherwise produced in the Books and Records Action"[47] is incorrect. Rather, the plaintiffs allege that the General Partner has "[n]ever once questioned either the Special Limited Partner, the Investment Advisor, or any other person or entity regarding the investments being made or transferred to the Fund" and "[n]ever once asked for any of the underlying material to determine whether the investments in effect being sold to the Fund were being transferred at a fair and reasonable price, or [took] any steps to determine whether the Investment Advisor was fulfilling its duty of ensuring that any transactions with CIBC were transferred at a fair and reasonable price . . . ."[48] The plaintiffs also allege that the General Partner allowed the Fund to continue investing in Trimaran even after CIBC cut Trimaran off from CIBC's deal flow, in violation of the PPM.

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[46] Compl. ¶ 182(b).
[47] Defs.' Reply 14; Defs.' Br. 20 n.8. The defendants rightly point out that the reason the plaintiffs have no such documents is simply because the plaintiffs did not ask for them in the Books and Records Action. *Id.*
[48] Compl. ¶¶ 76, 182(b-c), (k), (l).

Additionally, the plaintiffs allege that the General Partner at most had only annual meetings at which its directors signed off on the Fund's tax returns, and otherwise took action only in one instance of a defaulting limited partner. Moreover, the complaint alleges that the General Partner allowed the Investment Advisor and Special Limited Partner to be composed of high level CIBC officers without, until February 4, 2004, implementing formal policies governing conflict management. And the plaintiffs allege that the General Partner, as a creation of Lord Securities and partially owned by Lord Securities' president, had a motive to abdicate its duties, namely, to curry more business from its regular client, CIBC.[49]

Finally, contrary to the defendants' argument that the plaintiffs have failed to identify a single overvalued investment sold to the Fund, or a proposed investment that did not meet the Fund's criteria, the plaintiffs identify at least two investments the defendants approved even though the investments were clearly outside the Fund's time horizon. The plaintiffs also allege the Fund lost 75% of its value quickly after its inception. While in general the decrease in value of a fund is, without more, insufficient on its own to support an inference of mismanagement, the decline in this case, when considered with the rest of the plaintiffs' allegations, supports such an inference.

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[49] Pls.' Br. 32 n.32; *Guttman v. Huang*, 823 A.2d 492, 498, 503 (Del. Ch. 2003) (finding that plaintiff was required to make demand because complaint failed to allege, among other things, how often or when the audit committee met, how often and how long it met, who advised the committee, or a reasonable motive for the allegedly wrongful behavior).

The General Partner was required to make at least some effort to oversee the Fund in order to properly discharge its duties. The facts alleged in the complaint are sufficient to support an inference that the General Partner exercised no oversight, and create a substantial likelihood of the General Partner's liability for gross negligence in discharging its oversight duty, or material breach of the Partnership Agreement. For these reasons, demand will be excused.

IV.

The defendants argue that the facts of the complaint do not state a claim for which relief can be granted. In order to dismiss a claim under Court of Chancery Rule 12(b)(6), a court "'must determine with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiffs would not be entitled to relief.'"[50] "When making its decision, a court must accept as true all well pleaded factual allegations in the complaint and all reasonable inferences to be drawn from those facts."[51] Still, a court need not "'blindly accept as true all allegations, nor must it draw all inferences from them in plaintiff's favor unless they are reasonable inferences.'"[52]

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[50] *Orloff v. Shulman*, No. 852, 2005 WL 3272355, at *7 (Del. Ch. Nov. 23, 2005) (quoting *Grobow*, 539 A.2d at 187 n.6).
[51] *Id.*
[52] *Id.* (quoting *Grobow*, 539 A.2d at 187).

A. Claims Against The Investment Advisor And The Special Limited Partner

The defendants argue that the plaintiffs have failed to state a claim for breach of fiduciary duty against the Special Limited Partner because the plaintiffs have not identified a single individual investment that was overvalued at the time of its transfer to the Fund. Therefore, the defendants conclude, the plaintiffs have not alleged facts with sufficient particularity to support an inference that they are entitled to relief.

As noted above, the Partnership Agreement, not the common law, provides the proper standard of liability in this case.[53] Section 12.1 of the Partnership Agreement makes the Special Limited Partner liable for acts or omission resulting from bad faith, willful misconduct, gross negligence, or in material breach of the Partnership Agreement or the Investment Advisory Agreement. In order to survive a motion to dismiss, the complaint must contain facts that, if taken as true, support an inference that the Special Limited Partner acted with gross negligence or in material breach of the Partnership Agreement.

The plaintiffs have alleged such facts. For instance, the plaintiffs have alleged, with some specificity, that the Special Limited Partner ratified investments without independent discussion or consideration.[54] The plaintiffs also allege that

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[53] *Cantor Fitzgerald,* 2001 Del. Ch. LEXIS 137 at *17.
[54] *See* Compl. ¶¶ 72, 79 (referring to testimony of Tanya Carmichael, a CIBC employee, that the Special Limited Partner and Investment Advisor relied on the CIBC Investment Committee's initial approval when making investment decisions for the Fund).

the Special Limited Partner has not divested the Fund's assets alongside CIBC, as the Offering Documents contemplate.[55] Additionally, the plaintiffs have identified two investments in which the Special Limited Partner allowed the Fund to invest even though the investments did not fit the time horizon of the Fund. These facts, taken as true, support a reasonable inference that the Special Limited Partner acted grossly negligently or in contravention of the Partnership Agreement. The plaintiffs need not, at least at the pleading stage, also identify a specific overvalued investment in order to survive a motion to dismiss. For these reasons, the motion to dismiss Count I against the Special Limited Partner will be denied.

The defendants also argue that the Investment Advisor does not owe fiduciary duties to the Fund. A fiduciary relationship arises in a situation where one person reposes special trust in, and reliance on, the judgment of another, or where a special duty exists on the part of one person to protect the interests of another.[56] In contrast, a straightforward, arm's-length commercial relationship arising from contract does not give rise to fiduciary duties.[57] The defendants argue

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[55] Although the Offering Documents do say that the Fund may divest and invest apart from CIBC and may make investments with no operating history, a fair reading of those provisions show these situations are to be the exception, not the rule.

[56] *Prestancia Mgt. Group, Inc. v. Virginia Heart Found., II L.L.C.*, No. 1032-S, 2005 WL 1364616, at *6 (Del. Ch. May 27, 2005) (citing *Metro Ambulance Inc. v. E. Med. Billing, Inc.*, No. 13929, 1995 WL 409015, at *2-3 (Del. Ch. July 5, 1995)).

[57] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113-114 (Del. 2006) (discussing difference between duties owed by a broker that can bind its principal and duties arising from a "normal, arm's-length business relationship"); *McMahon v. New Castle Assoc.*, 532 A.2d 601, 605 (Del. Ch. 1987).

that, likewise, Delaware fiduciary duties are not implicated where "there is an express agreement that one party is acting in the capacity of 'independent contractor.'"[58] Because the Investment Advisor is identified in the Investment Advisory Agreement as an independent contractor, the defendants argue, it cannot owe fiduciary duties to the Fund.

Neither case cited by the defendants, however, creates such a *per se* rule. Indeed, the court in *Total Care Physicians v. O'Hara* imposed fiduciary duties on a defendant even though he was an independent contractor.[59] The plaintiffs allege in the complaint, and the Offering Documents show, that the Investment Advisor, as a delegatee of the General Partner, ratified investment decisions, and had authority to purchase and sell investments for the Fund. This case is analogous, then, to *Goodrich v. E.F. Hutton Group, Inc.*, which held that "a broker with the authority to buy and sell securities" is a fiduciary.[60] The plaintiffs have therefore adequately alleged that the Investment Advisor owes a fiduciary duty to the Fund.[61]

Defendants make no other arguments as to Count I against the Investment Advisor, and the facts alleged, if true, support a reasonable inference that the Investment Advisor breached its fiduciary duty. Specifically, as in the allegations

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[58] Defs.' Reply 16.
[59] 798 A.2d 1043, 1058-59 (Del. Super. 2001).
[60] No. 8279, 1991 WL 101367, at *2 (Del. Ch. June 7, 1991) (citing *Warwick v. Addicks*, 157 A. 205 (Del. Super. 1931)).
[61] *Id.*

against the Special Limited Partner, the plaintiffs allege with some specificity that the Investment Advisor ratified investments without independent discussion or consideration.[62] It is alleged that the Investment Advisor has not divested the Fund's assets alongside CIBC, as the Offering Documents contemplate. And the plaintiffs have identified two investments in which the Investment Advisor allowed the Fund to invest even though the investments did not fit the time horizon of the Fund. For these reasons, the motion to dismiss Count I against the Investment Advisor will be denied.

Finally, the defendants point out that the plaintiffs failed to brief their claims that the Investment Advisor and Special Limited Partner aided and abetted the General Partner's breach of its oversight duties.[63] The plaintiffs have waived these claims by failing to brief them in their opposition to the motion to dismiss.[64] For these reasons, the motion to dismiss these claims will be granted.

B. Claims Against The General Partner And Individual Defendants

The defendants argue that the claims against Individual Defendants Figueroa and Fioravanti must be dismissed because all of the alleged wrongdoing, namely, making investments at the time around the Fund's inception, occurred before they

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[62] Compl. ¶¶ 64-66, 79.
[63] Defs.' Reply 19 n.9; Pls.' Br. 40-41.
[64] *See Emerald Partners v. Berlin*, No. 9700, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) (stating "[i]t is settled Delaware law that a party waives an argument by not including it in its brief").

became Independent Directors. Therefore, the defendants argue, there are no allegations that they committed any wrongdoing. The court agrees. Nothing in the complaint supports an inference of wrongdoing after 2004. In fact, the only specific allegation identified in the complaint that post-dates 2004 is that the Fund developed policies governing conflict management in February 2004, an allegation running counter to Figueroa and Fioravanti's liability. Count I against them will be dismissed.

The motion to dismiss Count I against the General Partner, however, will be denied. As noted previously, a "[p]laintiff's pleading burden [in the demand excused context] is more onerous than that required to withstand a Rule 12(b)(6) motion."[65] Having pled allegations with regard to the General Partner's gross negligence or material breach of the Partnership Agreement in overseeing the Fund sufficient to excuse demand, the complaint also withstands a Rule 12(b)(6) attack. Further, for the same reasons discussed earlier with regard to demand, the facts alleged in the complaint support a reasonable inference that the remaining Individual Defendants (Sorensen, Christiansen, and Outlaw) breached their duties, and the motion to dismiss Count I against them will be denied.

Finally, the plaintiffs failed to brief their claim that the Individual Defendants aided and abetted the General Partner's breach of its oversight duties.[66]

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[65] *Levine*, 591 A.2d at 207.
[66] Defs.' Reply 19 n.9; Pls.' Br. 40-41.

The plaintiffs have waived this claim by failing to brief it in their opposition to the motion to dismiss, and the claim will be dismissed.[67]

C. Claims Against CIBC

The plaintiffs assert that CIBC acts as the Fund's investment advisor, and therefore owes fiduciary duties to the Fund. Their lone allegation supporting this position is that the Special Limited Partner's decisions are "subject to approval by CIBC's Investment Committee."[68] The defendants are correct that the plaintiffs' assertion is at odds with the language of the Offering Documents.[69] The Offering Documents require only that the CIBC Investment Committee invest in an investment before the Special Limited Partner does the same. Nothing in the Offering Documents subjects the Special Limited Partner's decisions to the CIBC Investment Committee's approval. Therefore, the plaintiffs' allegation does not support an inference that CIBC functioned as an investment advisor, or in any other relationship of trust, to the Fund.

The plaintiffs also allege that CIBC is the *de facto* general partner of the Fund and owes the Fund fiduciary duties because CIBC controls the Investment Advisor and the Special Limited Partner.[70] The plaintiffs point to *Tapps of Nassau*

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[67] *See Emerald Partners*, 2003 WL 21003437 at *43.
[68] Pls.' Br. 38.
[69] Pls.' Br. 38; Defs.' Reply 17.
[70] Compl. ¶¶ 169-173.

Supermarkets, Inc. v. Linden Boulevard L.P.[71] in support of their assertion that a party not named as a general partner nonetheless assumes the liabilities of the general partner if it controls the limited partner's activities. *Tapps*, however, is inapposite.

Tapps involved a limited partnership that sub-leased real estate. There, the limited partner was not only the sole stockholder of the general partner, but also conducted business for the limited partnership on behalf of the general partner. Specifically, the limited partner negotiated leases for the partnership, acted as the partnership's attorney, collected rent on behalf of the partnership, referred to herself in negotiations with sub-lessees as the "landlord," and arranged for repairs of the limited partnership's properties.[72] Because she conducted all the partnership's activities, she could not shield herself from liability by claiming status as a limited partner.

In this case, however, CIBC is not a stockholder of the General Partner. In fact, as this court has previously found, the General Partner is independent of CIBC.[73] Most importantly, in contrast to *Tapps*, there are no allegations that CIBC conducts all of the Fund's activities. Specifically, the General Partner has the duty to monitor and oversee the Fund. Also, the General Partner can remove the

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[71] 242 A.2d 235 (N.Y. App. Div. 1997) (applying Delaware law).
[72] *Id*. at 237.
[73] *Forsythe*, 2005 WL 1653963 at *7.

Investment Advisor on 120 days notice. Although the plaintiffs claim that CIBC has used the Fund to off-load non-performing investments, the plaintiffs have made no allegations sufficient to infer that there was a "pervasive disregard of corporate formalities" such that the court should pierce the corporate veil between the Fund and CIBC.[74] Therefore, the plaintiffs have not established that CIBC is the Fund's *de facto* general partner, or that CIBC owes the Fund fiduciary duties. For these reasons, Count I against CIBC for breach of fiduciary duty will be dismissed.

Finally, the plaintiffs allege that CIBC aided and abetted the breaches of the General Partner, the Investment Advisor, and the Special Limited Partner.[75] In order to establish aiding and abetting liability, the plaintiffs must allege: (1) a fiduciary relationship; (2) the fiduciary breached its duty; (3) knowing participation in a breach; and (4) damages.[76] The defendants argue that the plaintiffs have failed to establish that CIBC knowingly participated in the breaches

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[74] *Id.* (citing *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989)).
[75] In fairness, the plaintiffs allege in the complaint that CIBC aided and abetted only the General Partner's breach of fiduciary duty, not the Individual Defendants', Investment Advisor's or Special Limited Partner's breach of fiduciary duty. However, the parties have briefed the claim that CIBC aided and abetted the Special Limited Partner's and Investment Advisor's breaches of fiduciary duty. *See* Pls.' Br. 40. As there is no prejudice to the defendants, and because "the facts pled in the complaint clearly support such a theory of relief," the court treats Count II of the complaint as implicitly raising such a claim. *RGC Int'l Invest., LDC v. Greka Energy Corp.*, No. 17674, 2000 WL 1706728, at *1 n.1 (Del. Ch. Nov. 8, 2000) (citing *Brehm*, 746 A.2d at 267). The parties have not, however, briefed whether CIBC aided and abetted the Individual Defendants' breaches, and therefore this claim is not considered.
[76] *In re General Motors (Hughes)*, 2005 WL 1089021 at *23.

of the General Partner, the Investment Advisor, and the Special Limited Partner. The plaintiffs respond that the court in *In re Nantucket Island Associates L.P. Unitholders Litigation* found "knowing participation" in even more attenuated circumstances than these.[77]

Knowing participation in a fiduciary's breach of its duties "requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach."[78] A court can infer a non-fiduciary's knowing participation if "a fiduciary breaches its duty in an inherently wrongful manner, and the plaintiff alleges specific facts from which that court could reasonably infer knowledge of the breach."[79]

In *Nantucket*, limited partners brought suit against the limited partnership's general partner. The limited partnership owned a portfolio of properties on Nantucket Island, Massachusetts, but was struggling under $25 million of debt. To raise cash and eliminate debt, the general partner decided to offer the limited partners the opportunity to purchase "preferred units" in the limited partnership. These preferred units received priority in distributions from the limited partnership, and sold for $13,333 each. The general partner then purchased 83% of the preferred units through an entity it owned called "Zero Main."

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[77] 810 A.2d 351 (Del. Ch. 2002).
[78] *Malpiede v. Townson*, 780 A.2d 1075, 1097-98 (Del. 2001).
[79] *Nebenzahl v. Miller*, No. 13206, 1996 WL 494913, at *7 (Del. Ch. Aug. 29, 1996).

When the limited partnership sold its property, the general partner received an overwhelming percentage of the sale price because it owned, through Zero Main, 83% of the preferred shares. The limited partners sued the general partner for, *inter alia*, self-dealing, and sued Zero Main for knowing participation in the general partner's breaches. The court found it could infer Zero Main's knowledge of the general partner's breaches because: (1) the general partner created Zero Main to purchase the preferred units; and (2) the general partner was the primary investor in Zero Main.[80] In other words, the persons who made Zero Main's decision to purchase the preferred units were the same persons who caused the general partner to breach its duty to disclose. Therefore, the court could infer Zero Main's knowledge of the general partner's breaches of fiduciary duty.

This is analogous to the relationship between the Special Limited Partner, the Investment Advisor, and CIBC. CIBC created the Fund and populated the Fund's decision-making entities with CIBC's own employees. Thus, the same individuals who have made the Fund's investment decisions are also high-level CIBC executives. These investment decisions form the basis of the plaintiffs' breach of fiduciary duty claims. Therefore, the court may infer CIBC's knowledge of the Special Limited Partner's and Investment Advisor's breaches of fiduciary duty. The court may not, however, infer CIBC's knowledge of the General

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[80] *In re Nantucket*, 810 A.2d at 376.

Partner's breaches because, as already discussed, the General Partner is independent of CIBC.[81] For these reasons, the motion to dismiss Count II as to CIBC will be denied in part, and granted in part.

V.

The defendants next argue that the plaintiffs' claims are barred by the statute of limitations, or by laches. The plaintiffs, however, advance two bases on which the court should toll the statute of limitations: equitable tolling and fraudulent concealment.

As the plaintiffs point out, the Court of Chancery, a court of equity, "does not strictly apply statutes of limitations."[82] The court instead applies the doctrine of laches and "uses analogous statutes of limitations as a presumptive time period for application of laches to bar a claim."[83] A three-year statute of limitations applies to breach of fiduciary duty claims.[84] However, the court avoids inflexible or arbitrary application of a statute of limitations.[85] Therefore, the limitations period will be tolled where "the facts of the underlying claim [are] so hidden that a reasonable plaintiff could not timely discover them."[86]

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[81] For the same reason, a claim against CIBC for aiding and abetting the Individual Defendants' breaches of fiduciary duty, had it been briefed or considered in this motion, would fail.
[82] *Franklin Balance Sheet Inv. Fund v. Crowley*, No. 888, 2006 WL 3095952, at *6 (Del. Ch. Oct. 19, 2006) (citing *U.S. Cellular Inc. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996)).
[83] *Id*. (citing *Orloff*, 2005 WL 3272355 at *10).
[84] *In re Tyson Foods, Inc. Consl. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007).
[85] *Franklin Balance Sheet*, 2006 WL 3095952 at *6 (citing *Orloff*, 2005 WL 3272355 at *10).
[86] *In re Dean Witter P'ship Litig.*, No. 14816, 1998 WL 442456, at *5 (Del. Ch. July 17, 1998).

The doctrine of equitable tolling "stops the statute from running while a plaintiff has reasonably relied upon the competence and good faith of a fiduciary."[87] No evidence of actual concealment is necessary, "but the statute is only tolled until the investor 'knew or had reason to know of the facts constituting the wrong.'"[88] Reasonable reliance on the competence and good faith of fiduciaries can toll the running of the statute of limitations, but "the trusting plaintiff must still be *reasonably attentive* to his interests."[89] Thus, a plaintiff is on inquiry notice "when the information underlying [the] plaintiff's claim is readily available."[90]

Fraudulent concealment exists where a defendant "knowingly acted to prevent a plaintiff from learning facts or otherwise made misrepresentations intended to 'put the plaintiff off the trail of inquiry.'"[91] This requires an "affirmative act of concealment by a defendant."[92]

"A court considering timeliness as a basis for a motion to dismiss must draw the same plaintiff-friendly inferences required in a [Rule] 12(b)(6) analysis."[93] This, however, "does not govern [the] assertion of tolling exceptions to the

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[87] *In re Tyson Foods,* 919 A.2d at 586.
[88] *Id*. (citing *In re Dean Witter*, 1998 WL 442456 at *6).
[89] *In re Dean Witter*, 1998 WL 442456 at *8.
[90] *Id*.
[91] *Brady v. Pettinaro Enter.*, 870 A.2d 513, 531 (Del. Ch. 2005).
[92] *In re Dean Witter*, 1998 WL 442456 at *5.
[93] *Pettinaro Enter.*, 870 A.2d at 524-25.

operation of a statute of limitations (or the running of the analogous period for purposes of a laches analysis) . . . ."[94] Rather, "[a] plaintiff asserting a tolling exception must plead facts supporting the applicability of that exception."[95] Further, on a motion to dismiss an action as untimely, the court may consider two types of evidence outside the complaint without converting the motion to dismiss into a motion for summary judgment: "(a) documents expressly referred to and relied upon in the complaint itself, and (b) documents that are required by law to be filed, and are actually filed, with federal or state officials."[96]

In this case, the plaintiffs have shown that, for the purposes of this motion, the statute of limitations was tolled until April 2002. The plaintiffs allege they had no knowledge or reason to know that the Fund purchased worthless or improper investments at its inception because the Offering Documents provided names of the Fund's investments, but did not include valuation or time horizon information for these investments. Indeed, the plaintiffs allege they could not obtain this valuation and time horizon information from the Offering Documents or elsewhere because of the unique nature of the investments.[97] Instead, the plaintiffs allege they reasonably relied upon the Offering Documents' promises that the Fund's

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[94] *Id*. at 525; *In re Dean Witter*, 1998 WL 442456 at *6 n.44.
[95] *Id*. at 525 (citing *In re Dean Witter*, 1998 WL 44256 at *6).
[96] *In re Tyson Foods,*919 A.2d at 585.
[97] Compl. ¶ 237; *see also Forsythe*, 2005 WL 1653963 at *5 (stating "the Fund is comprised of several non-typical investments which make valuing the plaintiffs' interest in the Fund difficult").

fiduciaries would make investments competently and in good faith. As indicated earlier, the plaintiffs were entitled to rely on their fiduciaries in this respect.[98] Therefore, the plaintiffs were not on inquiry notice at the inception of the Fund.

The defendants contend, however, that the General Partner's quarterly reports put the plaintiffs' on notice of their claims as early as May 2001.[99] In support, the defendants note that the General Partner made all the disclosures it was obligated to make under the Partnership Agreement, and the reports showed that the Fund was losing money. The defendants' argument that equitable tolling cannot apply because the General Partner made all the disclosures the Partnership Agreement obligated it to make, however, misses the mark. The issue is not whether the General Partner improperly failed to make some disclosure. Indeed, the court is reluctant to find that the General Partner acted improperly simply by making disclosures consistent with the Partnership Agreement's mandates. Rather, the question is when were the plaintiffs on notice that the Fund was making worthless and improper investments.

In this case, the disclosures the defendants point to were made on an income tax basis and did not put the plaintiffs on inquiry notice. Those disclosures did not tell the plaintiffs what they needed to know–the real value of the investments.[100]

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[98] *In re Dean Witter*, 1998 WL 442456 at *8.
[99] Defs.' Br. 44.
[100] The disclosures on the website did not put plaintiffs on notice for the same reason. *See* Compl. ¶¶ 197-198, 217.

The defendants do not argue otherwise. Thus, prior to the substantial write-offs reported in April 2002, the plaintiffs knew only what the Fund had paid for its investments, not what those investments were worth on a GAAP basis. Moreover, to the extent these quarterly reports disclosed that the Fund was losing money, the plaintiffs point out that the markets were generally depressed and the reports explicitly blamed the losses on this fact. The quarterly reports, therefore, only put the plaintiffs on notice that the Fund's investments were suffering losses because of market conditions, not because the Fund had overpaid for improper or worthless investments. Nor is this a case, as in *Dean Witter*, where the Fund's valuation information was public information, or was alleged to be properly disclosed but then contradicted elsewhere by the fiduciary.

The plaintiffs have alleged facts supporting the conclusion that it was not until April 2002, when they received the first annual report indicating the Fund had taken substantial write-offs of the investments (meaning the investments had been sold at a loss, thereby revealing the true value of those investments), that they had facts sufficient to put them on notice of wrongdoing with regard to management of the Fund. Only at this point should the plaintiffs have known to inquire whether the Special Limited Partner and Investment Advisor had breached their duties by recommending improper or worthless investments for the Fund, and whether the General Partner and Individual Defendants had allowed them to do so by

abdicating their duties of oversight. Therefore, for purposes of this motion, the statute of limitations in this case was equitably tolled until April 2002 and the plaintiffs' February 11, 2005 filing was timely. "At trial, [the] defendants will have the opportunity to present evidence to show that [the] plaintiffs were, in fact, on inquiry notice."[101]

Having found that the claims were equitably tolled, this court need not address the fraudulent concealment issue. The court points out, however, its reluctance to hold, as the plaintiffs request, that the defendants committed affirmative acts of concealment simply by making disclosures on an income tax basis as the Partnership Agreement mandated.

VI.

Finally, the defendants argue that the Offering Documents and Partnership Agreement disclosed the investments the Fund intended to make, the terms of the loans and management fees, that certain transactions would involve conflicts of interest, and that the Fund might not invest and divest alongside CIBC in every instance. Therefore, the defendants conclude, the plaintiffs have waived their right to object to alleged wrongdoing in connection with these issues because they had "complete" knowledge prior to investing.

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[101] *In re Tyson Foods*, 919 A.2d at 591.

"Waiver is the voluntary and intentional relinquishment of a known right."[102] As the court in *Werner, M.D. v. Miller Technology Management, L.P.* explained, "in some instances, disclosure . . . may preclude a claim for breach of the duty of loyalty [or care]."[103] The disclosure, however, must be specific. "It is well established that a stockholder cannot complain of corporate action in which, *with full knowledge of all the facts*, he or she has concurred."[104] "[I]t cannot be said . . . that the boiler plate disclosures . . . convey full knowledge of all the facts."[105]

The defendants' arguments that the plaintiffs have waived their rights are unpersuasive. Here, as in *Werner*, it cannot be said that the disclosures conveyed full knowledge of all the facts. Specifically, the plaintiffs have not waived their right to challenge that the investments were improper or worthless when made because, as the plaintiffs point out, they lacked knowledge as to the investments' propriety or worth. As noted previously, the plaintiffs saw only a list of investments, not values or time horizons, prior to investing in the Fund. The court declines to accept the defendants' invitation to impose upon the plaintiffs a duty to investigate, absent some indication of wrongdoing, whether the investments the Fund chose were proper. Rather, the limited partners were entitled to rely on the

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[102] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982).
[103] 831 A.2d 318, 334 (Del. Ch. 2003).
[104] *Id.* (citing *Boxer v. Husky Oil Co.*, No. 6261, 1983 WL 17937 (Del. Ch. June 28, 1983), *aff'd*, 483 A.2d 633 (Del. 1984)).
[105] *Id.*

good faith and competence of the Fund's fiduciaries in selecting investments, as the Offering Documents contemplate.[106] This is especially so where, as here, the nature of the investments makes it particularly difficult for the limited partners to obtain valuation and time horizon information on their own. The plaintiffs did not waive their right to challenge the investments, then, because they lacked full knowledge of the right allegedly waived.

Moreover, although the Offering Documents disclosed the existence of conflicts, the Offering Documents, as plaintiffs note, did not disclose that CIBC would cause the Fund to make inappropriate investments or violate the Fund's investment criteria because of these conflicts. It cannot be said that the disclosures in the Partnership Agreement and the Offering Documents conveyed full knowledge of all the facts. The defendants' arguments that the plaintiffs have waived their right to challenge the management fees and loans fail for the same reason. The Offering Documents did not disclose that CIBC would receive management fees and interest on loans in return for making worthless or improper investments. The defendants' motion as to waiver will be denied.

VII.

For the foregoing reasons, the defendants' motion to dismiss is GRANTED as to Count I against CIBC, Figueroa, and Fioravanti, and Count II against the

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[106] *In re Tyson Foods*, 919 A.2d at 588; *In re Healthsouth Corp. S'holders Litig.*, 845 A.2d 1096, 1106 (Del. Ch. 2003).

Individual Defendants, Investment Advisor, and Special Limited Partner. The defendants' motion to dismiss is DENIED as to Count I against Sorensen, Christiansen, and Outlaw, the General Partner, the Special Limited Partner, and the Investment Advisor. The defendants' motion to dismiss is DENIED as to Count II against CIBC for aiding and abetting the Special Limited Partner's and Investment Advisor's breaches of fiduciary duty, and is GRANTED as to Count II against CIBC for aiding and abetting the General Partner's breach of fiduciary duty. IT IS SO ORDERED.