IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

THE WILLS FAMILY TRUST	:	
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	:	
Plaintiff,	:	
	:	**Case No. 252430-V**
v.	:	
	:	
MARTIN K. ALLOY, et al.	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

I. Procedural Overview

After a jury trial, the plaintiff, The Wills Family Trust, was awarded one dollar in nominal damages against the defendants Martin K. Alloy and Fred Farshey, general partners of SMC-United Industrial Limited Partnership, for breaching their fiduciary duties by secretly acquiring and leasing competitive warehouse properties. Before the case went to the jury, the circuit court had granted the defendants' motion for judgment on the plaintiff's alternative fiduciary duty theory, which alleged a "freeze-out" scheme against the complaining limited partner through a variety of coercive financial tactics. In a reported opinion, the Court of Special Appeals affirmed the jury's verdict and award of nominal damages regarding the alleged usurpation of partnership opportunities. The intermediate appellate court reversed the circuit court's decision to preclude the jury from considering the freeze-out claim, concluding that sufficient evidence was adduced to

present the claim to the fact-finder, and remanded the case for further proceedings. *Alloy v. Wills Family Trust*, 179 Md. App. 255 (2008).[1]

On September 23, 2008, this complex limited partnership dispute was specially assigned to the undersigned circuit court judge (DE # 300) for a partial re-trial, consistent with the decision and mandate of the Court of Special Appeals. To that end, the court held a scheduling conference on October 16, 2008, and, after conferring with counsel, entered a scheduling order (DE # 309) to control future proceedings in the case.

Recognizing that the decision of the intermediate appellate court opened the door for a new trial on the freeze-out claim and, potentially, other claims not submitted to the jury in the first trial under the Third Amended Complaint, which had been stricken by the trial judge *Id*. at 314-16, the court inquired of plaintiff's counsel at the scheduling conference regarding any further amendments to its complaint. *Id*. at 314-16. Counsel for the plaintiff advised that one further amended complaint was contemplated, and it was agreed that any such amendment would be filed by October 24, 2008, in order to avoid any delay of the trial. The two-week jury trial in this case is scheduled to begin on May 26, 2009.

The plaintiff filed a Fourth Amended Complaint on October 24, 2008 (DE # 308) and cured a defect regarding its damages prayer by an amendment by interlineation on November 5, 2008. (DE # 317). The Fourth Amended Complaint named Alloy, Farshey and SMC-V Street Limited Partnership as defendants.

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[1] In this regard, the Court of Special Appeals concluded only that the evidence was legally sufficient to withstand a motion under Rule 2-519, not that the jury was required to find in the plaintiff's favor on the freeze-out claim. *Id.* at 313-14. Whether or not a general partner has breached his duty of loyalty to a limited partner is a fact dominated question. *See Weaver v. Zenimax Media, Inc.*, 175 Md. App. 16, 55 (2007).

Count One alleged the freeze-out scheme by Alloy and Farshey, which had not been submitted to the jury in the first trial. Count Two alleged that all defendants failed to fairly consider an offer by Sheridan Development Company, LLC, in August 2005, to buy partnership property for $48.9 million. Count Three alleged the improper consideration by the defendants of an $48 million offer to purchase partnership property from BECO Management, Inc. in September 2005. Count Four alleged that the defendants did not give good-faith consideration to the plaintiff's buy-sell offer in May 2006 to purchase their share for $15.8 million. Count Five alleged that Alloy and Farshey have continued to improperly compete with the limited partnership by owning certain warehouse properties despite the jury's finding in the first trial. Count Six sought dissolution of the limited partnership. Count Seven asked the court to judicially dissociate Alloy and Farshey from the limited partnership. The Fourth Amended Complaint, as amended by interlineation, sought $11.3 million in compensatory damages and a panoply of equitable relief. [2]

The defendants answered the Fourth Amended Complaint on November 10, 2008 (DE # 318). Along with their Answer, the defendants filed a Counterclaim. (DE # 319). The Counterclaim sought reimbursement for costs and attorneys' fees under a June 1994 Estoppel Certificate and Article XXII of the December 1985 Partnership Agreement. In addition to a declaratory judgment, the defendants seek $2 million in money damages.

On December 3, 2008, in response to the Counterclaim, the plaintiffs filed a Fifth Amended Complaint (DE # 329). The Fifth Amended Complaint added a new prayer for relief, a $20 million claim for punitive damages.

[2] The decision of the Court of Special Appeals held out the possibility that the circuit court could consider, on remand, equitable remedies in the event of a decision favorable to the plaintiff on its freeze-out claim. *Id*. at 317. These matters will be discussed *infra.*

The defendants have moved to dismiss Counts Six and Seven of the Fourth Amended Complaint, the dissolution and disassociation counts. (DE # 320). The plaintiff has moved to dismiss the defendants' Counterclaim. (DE # 344). The defendants have moved to dismiss the Fifth Amended Complaint asking, in essence, the court to strike the new prayer for punitive damages. (DE # 349).

The court held a hearing on all pending motions on January 16, 2009. No further hearing is necessary and the motions are ripe for decision.

II. The Fifth Amended Complaint

A. The Timing of The Fifth Amended Complaint

Under Rule 2-341(a),[3] leave of court to amend a pleading is not required if the amendment is filed no later than 30 days before a scheduled trial date. The filing of the Fifth Amended Complaint in this case did not violate Rule 2-341(a). Moreover, the court is mindful of language in appellate cases suggesting that virtually all amendments must be allowed – even late blooming amendments -- absent a showing of actual prejudice by the party against whom the amended pleading is offered. *See generally Prudential Securities, Inc. v. E-Net, Inc.*, 140 Md. App. 194, 230-34 (2001).

However, the plaintiff's Fifth Amended Complaint, filed on November 19, 2008, did violate the scheduling order in this case, which required that all further amendments of the complaint be filed by October 24, 2008, absent leave of court. Entered under Rule 2-504, the scheduling order stated quite clearly that any proposed modifications of the

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[3] Rule 2-341 replaced Rule 320 in 1984 during a major overhaul of the Maryland Rules. Rule 320, unlike Rule 2-341, expressly required leave of court to amend a pleading, but noted that "leave to amend shall be freely granted in order to promote justice." *Robertson v. Davis*, 271 Md. 708, 710 (1974). In the context of Rule 320, the Court of Appeals established "the well settled principle that whether to permit an amendment rests within the sound discretion of the trial judge, and this discretion is subject to review on appeal only for its abuse . . . ." *Id.*

order's time limits "must be submitted to the court for approval before the expiration of the compliance date." The court admonished that the failure to do so could result in, among other things, "the striking of a pleading."

Judge Thieme cogently commented that the purpose of scheduling orders "is two-fold: to maximize judicial efficiency and minimize judicial inefficiency." *Naugthton v. Bankier*, 114 Md. App. 641, 653 (1997). The Court of Appeals went on to explain that:

> Though such orders are generally not unyieldingly rigid as extraordinary circumstances which warrant modification do occur, they serve to light the way down the corridors which pending cases will proceed. Indeed, while absolute compliance with scheduling orders is not always feasible from a practical standpoint, we think it quite reasonable for Maryland courts to demand at least substantial compliance, or at the barest minimum, a good faith and earnest effort toward compliance.

Id. See also Lowrey v. Smithsburg EMS, 173 Md. App. 662, 678 (2007).

Although the plaintiff did not seek or obtain leave of court before filing the Fifth Amended Complaint, it offered a reason for the late filing: its claim for punitive damages did not "ripen" until the defendant filed their "frivolous" counterclaim on November 10, 2008.

Notwithstanding the seeming generosity of Rule 2-341(a), late blooming amendments which seek new forms of relief -- particularly those made in violation of a scheduling order -- bump up against the important rule that all parties should go to trial being fully informed of all of the operative facts, especially in a complex case, such as this, where the trial date has been fixed. *See generally Food Lion, Inc. v. McNeill*, 393 Md. 715, 718 (2006). The defendants were essentially ambushed, shortly before trial, with a $20 million dollar claim for punitive damages. This kind of practice is exactly what scheduling orders are designed to prevent. "This is not simply a matter of

unwarranted adherence to some technical rules. It is a matter of basic fairness and of assuring that litigation is pursued in an efficient and professional manner." *Marcantonio v. Moen*, 406 Md. 395, 419 (2008)(Wilner, J., concurring).

Nevertheless, this court will not strike the Fifth Amendment Complaint simply because it was filed in violation of the scheduling order. However, counsel in this case are put on notice, once again, that this member of the circuit court, going forward, will not allow late blooming amendments, or other violations of the scheduling order, particularly those which border on the eve of trial. Moreover, any further violations of the Maryland Rules or orders of this court may result in sanctions, including the dismissal of claims or defenses, the application of issue or claim preclusion, and a limitation on or exclusion of trial evidence. *See generally Rodriguez v. Clarke*, 400 Md. 39, 56-57 (2007); *North River Ins. Co. v. Mayor & City Council of Baltimore*, 343 Md. 34, 70 (1996). *See also General Motors Corp. v. Seay*, 388 Md. 341, 356 (2005) (the Court of Appeals has made it quite clear that the Rules "are 'precise rubrics,' which are to be strictly followed."); *Brown v. Fraley*, 222 Md. 480, 483 (1960) ("The Rules are established to promote the orderly and efficient administration of justice and are to be read and followed.").

B. The Substance of the Punitive Damages Claim

"When moving to dismiss, a defendant is asserting that, even if the allegations of the complaint are true, the plaintiff is not entitled to relief as a matter of law." *Heist v. Eastern Savings Bank, FSB*, 165 Md. App. 144, 148 (2005). In deciding whether to dismiss a claim under Rule 2-322(b), the circuit court "must assume the truth of all well-pleaded relevant and material facts as well as all inferences that reasonably can be drawn

therefrom. Dismissal is proper only if the facts alleged fail to state a cause of action." *A.J. Decoster Co. v. Westinghouse Electric Corp.*, 333 Md. 245, 249 (1994).

The reference by Chief Judge Robert Murphy in *A.J. Decoster* to "facts" is particularly important. The court credits facts and reasonable inferences from those facts, but not "conclusory charges that are not factual allegations." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995). Moreover, "any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Sharrow v. State Farm Mutual*, 306 Md. 754, 768-69 (1986). Although Maryland has abandoned code pleadings, it has not adopted the notice pleading standard of Federal Rule 8(a).[4] *See Ver Brycke v. Ver Brycke*, 379 Md. 669, 696-97 (2004). This is clear from the text of Rule 2-303(b) and Rule 2-305. P. NIEMEYER & L. SCHUETT, MARYLAND RULES COMMENTARY 176-77, 184 (3d ed. 2003).

Adherence to fact pleading has special importance in connection with claims for punitive damages in this court's view. According to the Court of Appeals: "[I]n order to properly plead a claim for punitive damages, a plaintiff must make a specific demand for that relief in addition to a claim for damages generally, as well as allege, in detail, facts that, if proven true, would support the conclusion that the act complained of was done with 'actual malice.' Nothing less will suffice." *Scott v. Jenkins*, 345 Md. 21, 37 (1997). The reason for this requirement is manifest in the context of a claim for punitive damages, which requires proof of actual malice by clear and convincing evidence. *See Owens-Illinois v. Zenobia*, 325 Md. 420, 460 (1992).

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[4] It remains to be seen whether the Supreme Court actually has retreated from the generous construction of Rule 8(a), Fed. R. Civ. P., formulated in *Conley v. Gibson*, 355 U.S. 41, 47 (1957). *See, e.g., Erickson v. Pardus*, 551 U.S. 89 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007).

The facts set forth in the complaint must be sufficient to establish, if true, not only that the defendant (1) acted and (2) acted improperly in committing the underlying tort but, as well, (3) acted with actual intent to harm or injure the plaintiff, as that phrase has been judicially defined in deciding whether there is actual malice. In other words, the facts simply showing the intent to do the tortuous act complained of generally is not sufficient. There must be facts showing that the actor engaged in the conduct in issue (conduct which is otherwise already tortious) with actual malice. *See Montgomery Ward v. Wilson,* 339 Md. 701, 733-36 (1995); *Ellerin v. Fairfax Savings*, F.S.B., 337 Md. 216, 240-41 (1995); *Alexander & Alexander Inc. v. B. Dixon Evander & Assoc.*, 336 Md. 635, 653, 652-58 (1994). Otherwise, nearly every garden variety breach of fiduciary duty claim (or other tort) would, without more, give rise to a claim for punitive damages, a result the common law surely does not contemplate. *See W. Prosser & W. Keaton on Torts*, § 2 at 9-11 (5th ed. 1984).[5]

The plaintiff contends that the factual allegations of the Fifth Amended Complaint adequately plead facts showing actual malice. The defendants contend that the factual allegations of the pleading are legally insufficient. Specifically, the defendants note that the only new factual allegation in the Fifth Amended Complaint (omitted from the Fourth Amended Complaint and earlier iterations) is the defendants' recently filed counterclaim seeking reimbursement for costs and attorneys' fees.

[5] The court is aware, in the context of a claim for fraud, that false statements of material fact made with the actual intent to deceive are sufficient to prove actual malice and thus support punitive damages, but there is no such fraud claim alleged in this case. *See Ellerin*, 337 Md. at 240; *Meritt v. Craig,* 130 Md. App. 350, 370 (2000). Hence, proof of the defendants' breach of fiduciary duties, absent a showing of actual malice, will not sustain a claim for punitive damages.

The gist of the plaintiff's underlying claim, as well as the basis for its prayer for punitive damages, is that the defendants have breached their fiduciary duties in attempting to freeze-out the plaintiff from its economic interest in the limited partnership. Implicitly, the plaintiff contends that the defendants have been and are continuing to pursue their own business interests to the economic disadvantage of the plaintiff.

The plaintiff's specific allegations regarding the nature and extent of the alleged freeze-out and related conduct are summarized in paragraph 59 of the Fifth Amended Complaint. The plaintiffs aver that: (1) the defendants are trying to force the plaintiff to sell its 38% interest in the partnership for only a fraction of its true value; (2) the defendants have subjected the plaintiff to "phantom" income tax liabilities;[6] (3) the defendants refused to provide tangible economic benefits to the plaintiff until the plaintiff complained; (4) defendant Alloy once stated (in September 2003) that the plaintiff would never receive an offer for its 38% interest of more than $1 million dollars; (d) defendant Alloy made a baseless demand in October 2005 for reimbursement of nearly $500,000 with respect to the June 1994 Estoppel Certificate; (5) the purpose of the defendants' filing the $2 million counterclaim is to oppress the plaintiff; (6) the defendants have refused to give good faith consideration to third party offers the plaintiff brought to the defendants to purchase partnership properties; (7) the defendants usurped partnership

[6] At oral argument, counsel for the plaintiff was unable to tell the court whether or not the income tax adjustments were or were not legally correct under the Internal Revenue Code, or any other applicable accounting principles. The court recognizes that the Court of Special Appeals commented that even a lawful act and one that is specifically authorized by the limited partnership agreement nonetheless may be oppressive and result in a finding of a breach of fiduciary duty. *Alloy*, 179 Md. App. at 304. But it is difficult to comprehend how a lawful act, especially one in compliance with an express contractual undertaking, may serve as the predicate for an award of punitive damages.

opportunities and have refused to disgorge them despite the jury's verdict after the first trial and award to the plaintiff of $1.00 in damages.

These facts, along with the reasonable inferences that may be drawn from these facts, even if true and proven at trial, do not support a claim for punitive damages and, moreover, do not sufficiently plead actual malice as that term has been judicially defined. *Scott v. Jenkins*, 345 Md. at 34, 37.

The plaintiff relies principally on *Darcars v. Borzym*, 379 Md. 249 (2004) and *Homa v. Friendly Mobile Manor*, 93 Md. App. 337 (1992) for their contention that the facts plead show actual malice. *Darcars* is readily distinguishable. In that case, the plaintiff sued for the tort of conversion after an automobile he contracted to purchase was repossessed. When the dealer refused to return the automobile, the plaintiff asked for the return of his down-payment, along with certain personal property that had been left in the car. The dealership simply refused, even though the car had been recovered. Several of the dealer's employees made derogatory statements about the plaintiff and his father. At trial, the jury concluded that the dealer had converted both the plaintiff's down-payment and the personal property located inside the vehicle when it was repossessed. The jury made a specific finding that Darcars had acted with actual malice and awarded punitive damages.

The Court of Appeals held that the evidence of actual malice was legally sufficient to support an award of punitive damages. Specifically, the Court of Appeals held that when, as in *Darcars*, "the defendant converts property with a consciousness of the wrongfulness of that conversion, he or she possesses the requisite improper motive to justify the imposition of punitive damages." 379 Md. at 266. The Court concluded that

the conduct of the dealership's employees in intentionally refusing to return the plaintiff's down-payment and his personal property *after* it had repossessed the car, coupled with numerous disparaging comments directed to the plaintiff and his father when they tried to reclaim the property, "was sufficient to support the jury's finding of actual malice." *Id*. at 267.

Homa too is distinguishable. In that case, a lawyer was found to have committed fraud when he failed to disclose to his client that he had an interest in certain realty that the client agreed to purchase and, in addition, that the lawyer knowingly made false statements to his client about assuming certain installment loans. On these facts, the intermediate appellate court had no difficulty concluding that the finding of fraud, coupled with the lawyer's breach of duty to his client, sufficed to show actual malice. *Homa*, 93 Md. App. at 357.

The factual allegations of the Fifth Amended Complaint show at best, if believed, no more than a breach of fiduciary duty by a general partner to a limited partner. *See Della Ratta v. Larkin*, 382 Md. 553, 577-80 (2004) (affirming circuit court's finding of breach of fiduciary by a general partner in making capital calls on withdrawing limited partners after assuring them that he would pursue alternate financing options).[7] But not every business disagreement among partners, general or limited, rises to the level of "actual malice" simply because the parties are at odds over the operation of the business, the application of the limited partnership agreement or the fair share of the pie. *Cf. Lerner v. Lerner Corp*., 132 Md. App. 32, 48-59 (2000) (holding that a reverse stock split

[7] In *Della Rata*, the Court of Appeals expressly declined to decide whether the business judgment rule applied to partnerships. *Id*. at 579.

that had the effect of eliminating the minority shareholder in a closely held corporation was proper).

The fact that a general partner wants to operate the enterprise in a certain way and, consistent with the contractual undertakings in the limited partnership agreement, generate less free cash flow than demanded or desired by limited partners, does not, without more, equate that conduct with an intent to injure sufficient to constitute actual malice. *See K & K Management v. Lee,* 316 Md. 137, 177 (1989). In *Clancy v. King*, 405 Md. 541 (2008), the Court of Appeals gave some deference to the terms of the limited partnership agreement in deciding whether there was a breach of duty, aptly noting: "Limited partnership agreements are more likely to be the result of extensive arm's-length negotiations and thus involve business venturers in a better position to bargain for various terms modifying fiduciary duties than the purchasers of mere stock in a corporation, especially a publically-traded one." *Id.* at 555. Although general partners have a duty to treat limited partners fairly and in accordance with the partnership agreement, they do not act with actual malice simply because they disagree with the limited partners' business suggestions or act in ways that do not maximize the limited partners' cash flow or other distributions. *See Della Rata*, 382 Md. at 578-79. *Cf. Hoffman v. United Iron*, 108 Md. App. 117, 148 (1996) ("Proof that a party acted to pursue his or her own selfish business interests at the expense of others is not, itself, sufficient proof of actual malice."). *See also Aeropesca, Ltd. v. Butler Aviation*, 44 Md. App. 610, 626-67, *cert. denied*, 287 Md. 749 (1980) (punitive damages not allowed absent actual malice).

A limited partner is not really a partner. Instead "he is an investor in the partnership venture, without authority to participate in the management of the business; his liability is limited to the amount of his stated capital contribution. The relationship between the general and limited partner is a fiduciary one – a relation of trust – similar to that existing between a corporate director and a shareholder." *Klein v. Weiss*, 284 Md. 36, 59 (1978). To allow the punitive damage claim in this case to go forward would mean, conceptually, that nearly every breach of fiduciary duty by a general partner to a limited partner would subject the wrongdoer to punitive damage liability, even in the absence of fraud.[8] Such a result is not consistent with the requirement in every case seeking punitive damages that a plaintiff plead and prove actual malice. *Zenobia*, 325 Md. at 460. If the plaintiff's evidence of actual malice is legally insufficient, a claim for punitive damages may not be submitted to a jury. *See United States Gypsum Co. v. Mayor & City Council of Baltimore*, 336 Md. 145, 188-94 (1994); *Schreiber v. Cherry Hill Const*. Co., Inc., 105 Md. App. 462, 492-93 (1995).

"A trial court has discretion to dismiss a claim with prejudice if it fails to state a claim that could afford relief." *Pulte v. Parex*, 174 Md. App. 681, 727 (2007). In other words, further amendment of a claim can be precluded if such would be futile. *Gaskins v. Marshall Craft Associates, Inc.,* 110 Md. App. 705, 715-16 (1996). This is consistent with federal practice under Rule 15 of the Federal Rules of Civil Procedure. *See e,g*., *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995); *Kandel v. Smoker*, 783 F. Supp. 948, 949 (D. Md. 1991). For example, in *Tomran, Inc. v. Passano*, 391 Md. 1, 21-

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[8] The Court of Appeals description of the plaintiff's freeze-put claim viewed in a light most favorable to the plaintiff on appeal for purposes of assessing the grant of a motion under Rule 2-529, does not abrogate this court's duty to examine the text of the Fifth Amended Complaint and test its averments under the *Scott* standard for pleading punitive damages.

22 (2006), in which the Court of Appeals, after affirming the merits of a dismissal, held that the circuit court did not err in denying the post-dismissal amendment of the complaint because the proffered amendment did not cure the underlying legal defect.

The Fifth Amended Complaint will be dismissed with prejudice and without leave to amend.[9]

III. Counts Six and Seven of the Fourth Amended Complaint

In view of the court's ruling on the Fifth Amended Complaint, the operative pleading is now the Fourth Amended Complaint. *See* P. NIEMEYER & L. SCHUETT, MARYLAND RULES COMMENTARY 251 (3d ed. 2003). The defendants seek dismissal of Counts Six and Seven of that complaint. The plaintiff objects, contending that this court may decree dissolution and disassociation, and that, in any event, the defendants have waived their objections to these counts.

Count Six of the Fourth Amended Complaint seeks the judicial dissolution of SMC-United Industrial Limited Partnership ("SMC") under D.C. Code § 33-108.01, a provision of the District of Columbia Revised Uniform Partnership Act.[10] Count Seven seeks the dissociation of Alloy and Farshey under D.C. Code § 33-106.01(5).

SMC is a limited partnership formed in 1995 under the law of the District of Columbia. The defendants contend that Count Six must be dismissed because venue for

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[9] To be clear, the court is not saying that a limited partner may never obtain punitive damages on account of a general partner's breach of either its contractual or statutory duty of loyalty. *See Gotham Partners, L.P. v. Hallwood Realty Partners*, *L.P.*, 817 A.2d 160, 175 (Del. 2002)(discussion of remedies available to the chancellor when it finds a breach of the duty of loyalty in the context of a limited partnership).

[10] Count Four of the Third Amended Complaint requested dissolution under the court's general equity powers, not some specific statutory grant of authority. That complaint was dismissed before the first trial.

such action lies solely with the Superior Court of the District of Columbia. The applicable provision of the District of Columbia's Revised Uniform Limited Partnership Act provides:

> On application by or for a partner, *the Superior Court of the District of Columbia* may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

D.C. Code § 33-208.02 (emphasis added). The comparable Maryland limited partnership provision similarly provides:

> On application by or for a partner, *the circuit court of the county in which the principal office of the limited partnership is located* may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

§ 10-802 of the Corporations & Associations Article (emphasis added).[11]

In contrast with general partnerships, corporations and limited partnerships are creatures of statute (or royal decree)[12] and did not exist as separate entities (apart from the members) at common law. *See Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-67 (1933). Consequently, corporations and limited partnerships may be created only upon compliance with certain statutory terms, and they are highly regulated in the state of their formation. D. Vagts, BASIC CORPORATION LAW 19-24 (2d ed. 1979). Importantly, like corporations, "[t]he limited partnership is a statutory creation." H. Henn, CORPORATIONS 77 (1974).

[11] In contrast, both the District of Columbia general partnership statute and Maryland's general partnership statute merely require resort to a court of competent jurisdiction, not any particular tribunal, for the dissolution of a general partnership. *See* D.C. Code §33-801.01(5); § 9A-801(5) of the Corporations & Associations Article.

[12] W. Blackstone, COMMENTARIES OF THE LAWS OF ENGLAND ch. 18 (6th ed. 1774).

General partnerships are easily dissolved and as such does not ordinarily require judicial intervention. *See* § 9A-801 of the Corporations & Associations Article. On the other hand, corporations, being purely creatures of statute, usually require judicial intervention in order to cease to exist. The same generally is true with limited partnerships, absent the consent of all partners or conformity with the terms of the limited partnership agreement. *See* § 10-801 of the Corporations & Associations Article.

The judicial dissolution of a corporation is an extraordinary event. *Lerner v. Lerne*r, 306 Md. 771, 789-90 (1986). Absent an enabling statute, "a court of chancery has no jurisdiction to decree the dissolution of a corporation on application of a shareholder." *Turner v. Flynn & Emrich Co*., 269 Md. 407, 410 (1973). Thus, the power to dissolve is granted solely by statute (absent some extraordinary circumstance), and the Court of Appeals has made it quite clear that the circumstances under which a court will dissolve a corporation are limited. *Renbaum v. Custom Holding, Inc*., 386 Md. 28, 47-51 (2005); *see also Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 254-61 (2005). So too are (or should be) the circumstances under which a court will dissolve a limited partnership.

This court recognizes that the Court of Special Appeals noted that judicial dissolution was a possible remedy if the plaintiff proved a breach of fiduciary duty by the general partner resulting in a "freeze-out" or other oppressive conduct. *See Alloy*, 179 Md. App. at 317. But in making this observation, the intermediate appellate court did not hold that a Maryland court was the appropriate forum for a dissolution proceeding. It simply noted the general availability of the remedy under D.C. Code § 33-108.01(5)(B), the District of Columbia statute dealing with general partnerships. The Court of Special

Appeals did not discuss the specific provision in the District of Columbia Code regarding the dissolution of limited partnerships. As a consequence, it did not rule on the precise question now before this court.

The applicable principles of statutory construction are well settled, including the concept that a "statute must be read so that no word, clause, sentence, or phrase is rendered superfluous or nugatory." *Comptroller v. Science Applications Int'l Corp.*, 405 Md. 185, 198 (2008). As Chief Judge Bell recently reiterated, "when the meaning of a word or phrase in a constitutional or statutory provision is clear and unambiguous, this Court will give that word or phrase its plain and ordinary meaning, not one that is different from how it is plainly understood." *Mayor & City Council of Baltimore v. Clark*, 404 Md. 13, 33-34 (2008). *See also Dodds v. Shamer*, 339 Md. 540, 554 (1995)(refusing to construe a statute, specifically applicable to only four counties, to apply to other counties).

A Maryland court may "intervene" in the affairs of a District of Columbia limited partnership, as long as it applies the law of the District of Columbia. S*ee Storetrax.com v. Gurland*, 397 Md. 37, 52 (2007). However, as the Court of Appeals held in the context of corporate dissolution, "when a statutory remedy is available, the complainant must bring himself within the express terms of the act." *Turner*, 269 Md. at 410. Given the clear language of the statute, the court holds that the specific statutory remedy of dissolution of a limited partnership has been remitted by the District of Columbia City Council (with the approval of Congress) solely to the Superior Court of the District of

Columbia. Any contrary conclusion would render the plain language of D.C. Code § 33-208.02 meaningless.[13]

Count Seven of the Fourth Amended Complaint, which seeks dissociation of Alloy and Farshey, is problematic.[14] The concept of disassociation of a partner did not exist at common law. The term was introduced in the model Revised Uniform Partnership Act. The term was used "to denote the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business," but not the dissolution of the entity. UPA 2001, Prefatory Note, 6 U.L.A. 164 (2001). Under the Revised Uniform Partnership Act, "the dissociation of a partner does not necessarily cause a dissolution and the winding up of the business of the partnership." *Id.* In contrast, at common law, and under the original model act, the withdrawal or removal of any partner of the partnership generally resulted in the termination of the entity. This new concept is based on the "entity theory of partnership" which, akin to that applicable to corporations, allows for the survival of the entity despite the removal or withdrawal of a partner. See D.C. Code § 33-102.01; § 9A-201, Corporations and Associations Article.[15]

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[13] The defendants did not waive any right to seek to dismiss Count Six or Count Seven of the Fourth Amended Complaint. The Fourth Amended Complaint asserts claims different from those asserted in either the Second Amended Complaint or the dismissed Third Amended Complaint. Hence, the waiver discussion in cases such as *Pacific Mortgage and Investment Group, Ltd. v. Horn*, 100 Md. App. 311, 323 (1994), is inapplicable. Moreover, D.C. Code §33-208.02 is more than simply a venue provision, added for the convenience of a party; it is a legislative directive regarding where a particular type of statutory proceeding must take place, *i.e.*, subject matter jurisdiction, which may be raised at any time. Rule 2-324(b).

[14] Disassociation of a partner is a matter sounding in equity and is to be decided by the court, not a jury. *See Jim Coleman Automotive of Frederick, LLC v. Oakes*, 2008 WL 2400866 (Md. Cir. Ct. 2008) (discussing when claims must be tried to a jury).

[15] The adoption of the entity theory, as opposed to the common law aggregate theory, has had several significant effects on the law of partnerships, including effects on personal jurisdiction,

There is no specific provision in the Revised Uniform Limited Partnership Act (1976) (which has been adopted by the District of Columbia) which provides for judicial dissociation of a partner from a limited partnership. The Court of Special Appeals commented in *Alloy*, 179 Md. App at 279 n.15, that the District of Columbia Revised Uniform Partnership Act applies to some extent to limited partnerships. The "linkage" provisions the Court mentioned provides: "[e]xcept as provided in this chapter or in the partnership agreement, a general partner of a limited partnership shall have the rights and powers and is subject to the restrictions and liabilities of a partner in a partnership without limited partners." D.C. Code § 33-204.03(a). Although this court is bound by the holdings of the intermediate appellate court in *Alloy*, it is not bound by *dicta*. There was no discussion by the Court of Special Appeals that a Maryland trial court could, or could not, judicially disassociate partners (general or limited) from a District of Columbia limited partnership. Nor did the intermediate appellate court hold that any trial court could disassociate a partner from any limited partnership, be it formed in Maryland or elsewhere. Nonetheless, this court agrees with the Court of Special Appeals' assertion that some portions of the law regarding general partnerships are applicable to limited partnerships. *See*, *Alloy*, 179 Md. App at 279 n. 15.

The Uniform Limited Partnership Act was originally drafted in 1916 and revised on multiple occasions. The District of Columbia has enacted the 1976 version of the Revised Uniform Limited Partnership Act which is relatively short and has multiple gaps

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termination and transfer of partnership property. *See, e.g., Wildwood Medical Center, L.L.C. v. Montgomery* County, 405 Md. 489, 501-03 (2008); *Republic Properties Corp. v. Mission West Properties, LP*., 391 Md. 732, 744 (2006); *Creel v. Lilly*, 354 Md. 77, 89-91 (1999). *Cf. First American Corp. v. Price Waterhouse, LLP*, 154 F.3d 16, 19 (2d Cir. 1998)(under aggregate theory, in-state service upon a general partner is sufficient to confer personal jurisdiction over the partnership).

in its application. The Revised Uniform Limited Partnership Act (1976) uses provisions from the Revised Uniform Partnership Act (RUPA) as a gap-fillers. This effectively "links" the Revised Uniform Limited Partnership Act (1976) to RUPA, thus allowing limited partnerships to borrow certain remedies found in RUPA which are not specifically enumerated in the Revised Uniform Limited Partnership Act (1976).

The linkage of the two statutes has created confusion and difficulty in their application prompting a revision of the Revised Uniform Limited Partnership Act (1976) in 2001 with the specific intent to "de-link" the two statutes.[16] According to the prefatory note to the RULPA (2001),

> The new Limited Partnership Act is a "stand alone" act, "de-linked" from both the original general partnership act ("UPA") and the Revised Uniform Partnership Act ("RUPA"). To be able to stand alone, the Limited Partnership incorporates many provisions from RUPA and some from the Uniform Limited Liability Company Act ("ULLCA"). As a result, the new Act is far longer and more complex than its immediate predecessor, the Revised Uniform Limited Partnership Act ("RULPA").

ULPA 2001, Prefatory Note, 6A U.L.A. 326 (2003). It seems clear that the 2001 revisions to the Revised Uniform Limited Partnership Act effectively de-linked it from the RUPA, but the District of Columbia has yet to enact the 2001 revisions. Therefore, in the District of Columbia, at least, the Revised Uniform Limited Partnership Act (1976) and the RUPA are still linked to some degree.

According to RUPA, a partner's dissociation may occur "by judicial determination." D.C. Code § 33-106.01(5). This court concludes that such a judicial

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[16] *See e.g.*, Elizabeth S. Miller, *Linkage and Delinkage: A Funny Thing Happened to Limited Partnerships When the Revised Uniform Partnership Act Came Along,* 37 SUFFOLK U. L. REV. 891 (2004); Larry E. Ribstein, *Linking Statutory Forms*, 58 LAW & CONTEMP. PROBS. 187 (1995); Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come,* 28 U.C. DAVIS L. REV. 1195, 1198-1202 (1995).

determination should occur, if at all, in the District of Columbia Superior Court. That tribunal is better suited to decide the complex legal issues surrounding the juxtaposition of District of Columbia limited partnerships and general partnerships and to interpret that jurisdiction's statutes. For example, it is possible that the dissociation provision of the general partnership statute does not even apply to general partners in a District of Columbia limited partnership through linkage because the Revised Uniform Limited Partnership Act (1976) has an express provision concerning assignment of all of a partner's (defined to mean either a limited or general partner) "partnership interest." *See* D.C. § 33-207.02.[17] Also, section 33-204.02 of the Revised Uniform Limited Partnership Act (1976), entitled "Ceasing to be a General Partner," provides a number of ways in which a general partner can be removed from his or her position, but this section does not include dissociation as a remedy.[18] In short, it is not all together clear that a general partner of a limited partnership can be dissociated except, of course, through the application of a contract provision in the limited partnership agreement,[19] but this is an issue for the District of Columbia Superior Court.[20]

Additionally, there is a substantial difference between dissociating a partner of a general partnership and dissociating a general partner of a limited partnership. In a

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[17] *See* Yong Wu & Thomas Earl Geu, *The New PRC Limited Partnership Enterprise Law and the Limited Partnership Law of the United States: A Selective Analytical Comparison*, 25 UCLA PAC. BASIN L.J. 133, 148-149 (2007).

[18] Section 603 of RULPA (2001) specifically provides for involuntary disassociation, whereas section 402 of RULPA (1976) does not mention disassociation.

[19] Lest the reader have any lingering doubt whether serious questions are raised about the interplay between the District of Columbia's versions of the model general and limited partnership statues, and the overlay of equity, see Vice Chancellor Strine's thoughtful discussion of Delaware partnership law in H*illman v. Hillman*, 910 A.2d 262 (Del. Ch. 2006).

[20] *See* D.C. Code § 33-204.02 (which includes no mention of dissociation as an option to "cease being a general partner").

general partnership, the removal of a partner can have little or no effect on the continuation of the partnership, but the dissociation of a general partner of a limited partnership likely could create terminal results, such as dissolution and liquidation. The District of Columbia is the more appropriate forum to decide if, how and when the RUPA should fill gaps in the District of Columbia's Revised Uniform Limited Partnership Act (1976) affecting the termination of a limited partnership. This intention is evidenced by the requirement that the District of Columbia be the tribunal for terminal issues regarding limited partnerships.

As detailed above, dissolution of a District of Columbia limited partnership should occur in the District of Columbia Superior Court and be subject to appellate review by the District of Columbia Court of Appeals. It only seems logical to conclude that any attempt to dissociate a general partner of a limited partnership should occur in the District of Columbia Superior Court because the resulting effect could be dissolution or, at the very least, a dramatic alteration of the rights among partners, including the right to operate and control the entity's business.

IV. The Defendants' Counterclaim

The plaintiff has moved to dismiss the defendants' counterclaim, filed on November 10, 2008, seeking a declaration that the plaintiff must indemnify the defendants for certain costs and requesting a money judgment of $2 million.

According to the plaintiff, the counterclaim must be dismissed because it is baseless. In addition, the plaintiff asserts that any claim founded upon the Estoppel Certificate is time-barred, as the claim was previously rejected by the plaintiff on October

10, 2005, which would mark the date of any alleged breach. The plaintiff does not contend that a claim under Article XXII of the Partnership Agreement is time-barred.

The defendants disagree, arguing that the plaintiff's breach of its obligations under the Estoppel Certificate is a continuing wrong and that its claims under both instruments are legally sufficient.

The defendants' claims under the Estoppel Certificate are not time barred to the extent that they arose after October 2005. Maryland recognizes the continuing wrong theory. Consequently, "where a contract provides for continuing performance over a period of time, each successive breach of that obligation begins the running of the statute of limitations anew, with the result being that accrual occurs continuously and a plaintiff may assert claims for damages occurring within the statutory period." *Singer Co. v. Baltimore Gas & Electric Co*., 79 Md. App. 461, 475 (1989). This rule applies to claims for money damages as well as requests for declaratory relief. *Commercial Union Ins. Co. v. Porter Hayden*, 116 Md. App. 605, 656-59 (1997).

The defendants' Counterclaim sets out detailed factual allegations which, if true, likely would entitle them to the monetary and declaratory relief they seek. The Counterclaim describes the contractual promises made in both Article XXII of the December 1985 Partnership Agreement and in paragraph 3 of the June 1994 Estoppel Certificate, as well as how the plaintiff allegedly failed to abide by its contractual obligations and promises to indemnify the defendants from certain losses. The indemnity provisions of the agreements at issue are sufficiently broad to cover the conduct alleged in the Counterclaim. *See Moses-Ecco Co. v. Roscoe-Ajax Corp.*, 320 F.2d 685 (D.C. Cir. 1963).

Moreover, D.C. Code § 33-201.09 specifically allows indemnification of partners, absent a finding of certain misconduct in respect of the partnership business, and there has been no finding of any conduct by the defendants that would clearly vitiate the indemnity obligations.[21] Although it may well be that the defendants cannot prove any or all of their contentions, that is not the test on a motion to dismiss. *Sharrow v. State Farm Mutual*, 306 Md. at 770,

For the reasons set forth above, it is this _____ day of January, 2009:

ORDERED, that Defendants' Motion to Dismiss the Fifth Amended Complaint is GRANTED with prejudice and without leave to amend; and it is further

ORDERED, that Defendants' Motion to Dismiss Count Six of the Fourth Amended Complaint is GRANTED; and it is further

ORDERED, that Defendants' Motion to Dismiss Count Seven of the Fourth Amended Complaint is GRANTED; and it is further

ORDERED, that Plaintiff's Motion to Dismiss the Counterclaim is DENIED.

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RONALD B. RUBIN, Judge

[21] The court cannot, under the guise of construction, either relieve one of the parties from disadvantageous contractual terms or rewrite the contract. *See C & H Plumbing and Heating Co. v. Employers Mutual Cas. Co*., 264 Md. 510, 512 (1972).