

2006

GLFP, LTD., a former Utah limited partnership v.
CL MANAGEMENT, LTD, a Utah limited
partnership; CLARK LEAMING PROPERTIES,
LTD, a Utah limited partnership; HOWARD S.
CLARK and H. SCOTT CLARK, individuals, :
Brief of Appellee

Utah Court of Appeals

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Brent E. Johnson, Katherine Norman; A. Bruce Jones; Holland & Hart; attorneys for appellant.
Jeffery S. Williams; Nelson, Christensen, Helsten, Hollingworth & Williams; attorneys for appellees.

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IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellant,

vs.

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PROPERTIES, LTD., a Utah limited
partnership; HOWARD S. CLARK and
H. SCOTT CLARK, individuals,

Defendants/Appellees.

BRIEF OF APPELLEE

Court of Appeals No. 20060440-CA
Trial Court No. 050902498

Appeal From The Final Judgment of The Third Judicial District Court,
Salt Lake County, Utah, Honorable Glenn K. Iwasaki Presiding

Brent E. Johnson
Katherine Norman
HOLLAND & HART LLP
60 East South Temple, Suite 200
Salt Lake City, Utah 84111

A. Bruce Jones
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201
Attorneys for Plaintiff-Appellant

Jeffery S. Williams, Esq. (6054)
NELSON CHRISTENSEN HELSTEN
HOLLINGWORTH & WILLIAMS
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
Telephone: (801) 531-8400
Attorneys for Defendants/Appellees

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED-LLATE COURTS

OCT 05 2006

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HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201
Attorneys for Plaintiff-Appellant

Jeffery S. Williams, Esq. (6054)
NELSON CHRISTENSEN HELSTEN
HOLLINGWORTH & WILLIAMS
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
Telephone: (801) 531-8400
Attorneys for Defendants/Appellees

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

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JURISDICTION

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j). This appeal was transferred to this Court by the Utah Supreme Court.

ISSUES PRESENTED

1. Did the trial court correctly conclude that the plaintiff's damage claims were derivative as a matter of law when the undisputed evidence established that the plaintiff, as a limited partner, was attempting to directly recover fees that had been paid by the limited partnership entity, and the plaintiff had not established any individual injury separately suffered apart from the partnership itself?
2. Did the trial court correctly conclude that the plaintiff failed to present evidence in opposition to the defendants' summary judgment motion as required by Utah Rule of Civil Procedure 56(e)?
3. Did the trial court correctly deny the plaintiff's motion for reconsideration of the summary judgment order when no procedure authorizes a motion for reconsideration, and the plaintiff failed to present any evidence justifying its effort to directly pursue claims that are necessarily possessed by the limited partnership entity?
4. Did the trial court correctly determine that the plaintiff's motion to amend its complaint was moot when the plaintiff failed to present any justification, either legal, procedural, or evidentiary, excusing its failure to comply with applicable

statutory and procedural law regarding the proper assertion of derivative claims for relief?

STANDARD OF REVIEW AND RECORD PRESERVATION

The trial court's judgment was the result of a summary judgment motion, and thus this Court accords the trial court's legal conclusions no deference, and reviews the same for correctness. Arnold Industries, Inc. v. Love, 63 P.3d 721, 725 (Utah 2002) ("We grant the trial court's legal conclusions no deference, reviewing them for correctness.") (Citations omitted). The issues set forth above were addressed by the trial court on summary judgment, and are thus preserved for review. R. at 432-36, 575-82.

APPLICABLE STATUTES AND RULES

1. Utah Code Ann. § 48-2a-1001:

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action and the general partners' decision not to sue constitutes an abuse of discretion or involves a conflict of interest that prevents an unprejudiced exercise of judgment, or if an effort to cause those general partners to bring the action is not likely to succeed.

2. Utah Code Ann. § 48-2a-1003:

In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.

3. Utah Rule of Civil Procedure 23.1:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interest of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without approval of the court,

and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

4. Utah Rule of Civil Procedure 56(c):

The [summary judgment] motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

5. Utah Rule of Civil Procedure 56(e):

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answer to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in

this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

6. Utah Rule of Civil Procedure 7(c)(3)(A):

A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

7. Utah Rule of Civil Procedure 7(c)(3)(B):

A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

1. Nature of the Case:

This case arises from the operation and management of Clark Leaming Properties. CL Management serves as general partner of Clark Leaming Properties. See R. at 1-6. Clark Leaming Properties and CL Management are both valid and existing Utah limited partnerships. R. at 207-8.

Clark Leaming Properties is a holding company for certain real property investments, and CL Management as general partner manages those investments for the benefit of Clark Leaming Properties. Id. In exchange for the various management services provided by CL Management, Clark Leaming Properties pays certain fees to CL Management for that work. Id. The payment of fees to CL Management is authorized under the partnership agreement for Clark Leaming Properties. R. at 209, 386.

The plaintiff, GLFP, claims to be a limited partner of Clark Leaming Properties.¹ R. at 2. On February 8, 2005, GLFP filed this lawsuit alleging that

¹ CL Management disputes that GLFP possesses standing to pursue this litigation under Utah Code Ann. § 48-2a-1002 (“In a derivative action, the plaintiff must be a partner at the time of bringing the action and . . . must have been a partner at the time of the transaction of which he complains; . . .”). In 2002, documents were signed that state GLFP assigned its limited partnership interests in CL Management and Clark Leaming Properties to the separate entities of Ming, Ltd and Sumerlea, Ltd. R. at 288-90, 302-305. These assignments have been

Cont’d.

CL Management had collected excessive fees from Clark Leaming Properties in breach of its fiduciary duties, and that CL Management used the excessive fees to support Clark-only businesses. R. at 1-6. GLFP, in addition, claimed that CL Management mismanaged Clark Leaming Properties, and the property investments held by Clark Leaming Properties. Id. The breach of fiduciary duty claim is the lone damage claim set forth in GLFP's complaint. R. at 5-6. GLFP combined the breach of fiduciary duty claim with claims for dissolution of CL Management and Clark Leaming Properties, and an accounting. Id. The accounting claim is not pled as a separate claim, but rather GLFP requested an accounting "as part of the dissolution" claim. R. at 6.

2. Course of Relevant Proceedings Below:

On July 20, 2005, CL Management filed a motion for summary judgment. R. at 191-92. This motion sought an order holding that GLFP had illegally asserted derivative claims for relief contrary to applicable statutory and procedural law. Id. On August 15, 2005, CL Management filed an additional summary judgment motion. R. at 279-80. This motion requested summary judgment on the ground that GLFP had assigned its limited partnership interests in Clark Leaming Properties and CL Management to the separate entities of Ming, Ltd and Sumerlea,

recognized and implemented by CL Management and Clark Leaming Properties. R. at 367-68, 371-72. Ming, Ltd and Sumerlea Ltd are not parties to this litigation. See R. at 1.

Ltd in 2002, and therefore GLFP was divested of standing to pursue the litigation.

Id.

GLFP opposed the summary judgment motions. With respect to the derivative motion, GLFP argued that its complaint did not set forth derivative theories of recovery, and even if it did, GLFP should be excused from complying with otherwise applicable law and procedure. R. at 252-61. As for the motion directed to the assignments, GLFP claimed that the assignments should not be enforced because they had not been intentionally delivered, and the assignments were unenforceable under certain equitable principles. R. at 311-21.

The trial court heard argument on October 31, 2005. R. at 421. On November 7, 2005, the trial court issued a memorandum decision, wherein summary judgment was granted in favor of CL Management. R. at 432-36. The trial court found that GLFP had improperly brought a derivative-based complaint in violation of Utah statutory law and procedure:

After, again, reviewing the record in this matter, the Court agrees that GLFP is seeking to assert, directly, claims that are, as a matter of law, derivative. Indeed, although GLFP may ultimately experience the indirect effect of the alleged wrongdoing, the undisputed evidence indicates that the only direct claims are held by the Partnership. Moreover, since this action has not been brought as a derivative one, Plaintiff's claims with respect to an accounting and for dissolution lack any basis. Finally, although Plaintiff argued it should be excepted from the derivative requirement, given the closely held nature of corporation, the evidence in the record simply does not

support such an exception and, further, no proper Rule 56(f) motion for continuance has been filed.

R. at 436. The trial court denied summary judgment based on the assignments. R. at 434. The trial court, with respect to that motion, held: “After reviewing the record in this matter, the Court finds disputed issues of fact with respect to whether the Consents were properly executed and whether or not delivery of any acceptance of consent occurred, preclude summary judgment on this basis at this time.” Id.

GLFP filed a motion for reconsideration, and a motion for leave to amend its complaint. R. at 439-68. These motions were filed on November 15, 2005. Id. In the reconsideration motion, GLFP argued that it was improper for the trial court to dismiss the dissolution claim: “While Plaintiff believes that the Court erred in finding that the claims in question are derivative, this motion for reconsideration is limited to the Court’s extension of that finding to Plaintiff’s second claim for relief, which seeks dissolution of CL Management and Clark Leaming Properties.” R. at 464. GLFP further sought leave to amend its complaint, stating that if leave were granted, a yet undisclosed amended complaint “will contain allegations” setting forth why GLFP failed to comply with applicable law and procedure. R. at 439. No draft amended complaint is attached to the motion, but a series of letters

discussing settlement proposals between GLFP's counsel and CL Management are attached. See R. at 439-63.

CL Management opposed the post-judgment motions, and filed a separate motion to strike GLFP's submission of settlement correspondence to the trial court. R. at 469-80, 500-38. In the motion to strike, CL Management pointed out the impropriety of GLFP's wholesale submission of settlement correspondence to the trial court in violation of Utah Rule of Evidence 408. R. at 472-79. CL Management, with respect to the reconsideration motion, argued that GLFP's dissolution claim was founded upon the core derivative theories pled in the complaint, and that GLFP should not be permitted to mask derivative damage claims under the guise of a claim for dissolution. R. at 534-38. As for the motion for leave, CL Management argued that the settlement correspondence between the parties, if considered by the trial court, proved that CL Management did not possess a conflict of interest justifying GLFP's admitted failure to comply with applicable law and procedure. R. at 500-9.

On April 5, 2006, the trial court issued a minute entry, wherein the motion for reconsideration was denied. R. at 575. The trial court stated:

Turning to the merits of the motions, after reviewing the record in this matter and although a claim for dissolution is not typically derivative, it is clear GLFP's claim is based upon the premise that CL Management, as general partner, charged and collected improper fees from Clark Leaming Properties, Ltd. No independent and direct basis

for recovery has been alleged by GLFP. Accordingly, while characterized as a dissolution claim, the Complaint, nonetheless, is founded upon a derivative theory of recovery (fee mismanagement).

Id. Based on this ruling, the trial court denied as moot GLFP's motion for leave to amend its complaint, and CL Management's motion to strike. Id. The trial court signed a separate order and judgment granting summary judgment in favor of the defendants on April 5, 2006. R. at 578-82. The judgment preserves GLFP's ability, if otherwise appropriate, to file "proper derivative claims consistent with Utah law." R. at 582. GLFP filed a notice of appeal on May 5, 2006. R. at 590.

3. Statement of Facts:

Clark Leaming Properties is a Utah limited partnership organized in 1988. R. at 2, 207-8. CL Management, formed in 1983, serves as general partner of Clark Leaming Properties. Id.; see also Appellant Br. Exs. 1-2. Mr. Howard Clark and MB Management, Inc. are the general partners of CL Management. R. at 207-8; Appellant Br. Ex. 1.

GLFP claims to be a limited partner of Clark Leaming Properties and CL Management. R. at 2. GLFP was organized as a limited partnership, but in July of 2004, GLFP converted to a limited liability company. R. at 297-301. This organizational conversion was completed without notification to the general partners per the partnership agreements for CL Management and Clark Leaming Properties. See R. at 208, 398. The other limited partners of CL Management are

HCFP, Ltd and the GAL Marital Deduction Trust. R. at 207-8, 388; Appellant Br. Ex. 1. HCFP, Ltd is also a limited partner of Clark Leaming Properties. Id. The GAL Marital Deduction Trust, MB Management, Inc. and HCFP, Ltd are not party to this litigation. See R. at 1.

On January 1, 2002, documents were signed entitled “ASSIGNMENT OF INTEREST IN CL MANAGEMENT, LTD” and “ASSIGNMENT OF INTEREST IN CL PROPERTIES, LTD.” R. at 302-5. These documents each state that “GLFP hereby quit claims and assigns, without warranty one-half to Sumerlea and Ming all of . . . its right, title, and interest in and to the Partnership Interest.” Id. The assignment documents indicate that Ming, Ltd and Sumerlea, Ltd are separate Utah limited partnerships. Id.; see also R. at 369-70. The assignments have been recognized and implemented by the CL Management and Clark Leaming Properties. R. at 367-68, 371-72. GLFP, through certain but not all members, disputes the validity of the assignments. R. at 317-321, 413-16. However, no claim exists in GLFP’s complaint attacking the assignments, and Ming, Ltd and Sumerlea, Ltd are not party to the action. See R. at 1-6.

The alleged factual bases for GLFP’s complaint are that CL Management, as general partner: 1) mismanaged the real property investments owned by Clark Leaming Properties, and 2) collected excessive fees from Clark Leaming Properties for the management and operational services it provided as general

partner. R. at 1-6, 207-9, 211-215, 224-5, 264-66, 272-73; Appellant Br. Exs. 1 - 2. These are the only factual theories set forth in GLFP's complaint alleged in support of the solitary damage claim for breach of fiduciary duty. See R. at 1-6.

GLFP does not and never did own any of the properties it claims were mismanaged, and GLFP has never paid any of the fees it claims were excessive, commingled or misappropriated. R. at 1-6, 207-9, 211-215, 224-5, 264-66, 272-73; Appellant Br. Exs. 1 - 2. CL Management, through Mr. Howard Clark, provided admissible evidence establishing as an undisputed fact that all fees charged and collected by CL Management from Clark Leaming Properties were properly imposed pursuant to the applicable partnership agreements, and that the "burden of such expenses has been appropriately paid consistent with the terms of such partnership agreements" R. at 209.² GLFP failed to properly controvert this and all other undisputed facts set forth in CL Management's motions for summary judgment as required by Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure. See R. at 253-56, 345-46.

² GLFP failed to separately controvert the undisputed facts set forth in the summary judgment motions filed by CL Management as mandated by Utah Rule of Civil Procedure 7(c)(3)(B). R. 253-56, 312-16, 345-46. Thus, CL Management's statement of undisputed facts is deemed admitted for purposes of the trial court's summary judgment ruling. Utah R. Civ. P. 7(c)(3)(A) ("Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.").

GLFP admittedly failed to comply with the procedural and legal requirements necessary to properly file derivative claims on behalf of Clark Leaming Properties. Appellant Br. at 15-17; see also R. at 1-6, 439-63. Among other things, GLFP failed to specify the nature of the purported derivative claims to the general partner prior to the filing of its complaint. Id. GLFP's complaint is not verified as required by the Utah Rules of Civil Procedure, and there are no allegations in the complaint setting forth with particularity the efforts that were made to secure the resolution of the derivative claims prior to the initiation of its lawsuit. Id. Moreover, the complaint does not contain any justification whatsoever for GLFP's failure to comply with applicable law and procedure. Id.

SUMMARY OF THE ARGUMENTS

The gravamen of GLFP's complaint is that CL Management, as general partner, mismanaged properties owned by Clark Leaming Properties, and that CL Management collected excessive fees for its service as general partner. GLFP further alleges that CL Management misappropriated the excessive fees by "commingling" those funds so as to support "Clark-only" businesses. These are the predominate factual themes upon which GLFP's complaint is constructed, and they are the only factual theories supporting GLFP's effort to recover damages.

CL Management denies these allegations. In its summary judgment motion, CL Management put forth evidence stating that all fees were properly determined, allocated and assessed in accordance with the applicable partnership agreements.

From a legal and factual standpoint, however, GLFP's complaint is founded and inextricably based on derivative theories of recovery. If real property investments owned by Clark Leaming Properties were mismanaged by CL Management, then Clark Leaming Properties alone possesses that claim. The same holds true for the fee claim. If CL Management, as general partner, collected excessive fees from Clark Leaming Properties and misappropriated those fees, then Clark Leaming Properties necessarily possesses that claim too. GLFP does not own and has never owned any of the real property investments it alleges were mismanaged. GLFP never paid a single fee it claims was commingled, excessive and misappropriated.

GLFP attempts to avoid this straightforward legal reality by claiming that its fee claim is direct because the purported excessive fees were "commingled" to support Clark-only businesses. This argument may be successful in confusing the point, but it does not transform the fee claim from derivative to direct.

The purported manner of misappropriation cannot, as a legal matter, transform a derivative claim into a direct claim. The manner of the alleged misappropriation is legally irrelevant. This is so because GLFP never paid any of

the disputed fees - - they were paid exclusively by Clark Leaming Properties. It does not matter, from a legal standpoint, whether the alleged misappropriation related to Clark-only businesses, or some other form of alleged misappropriation or waste. Only the entity to have paid the fees, namely Clark Leaming Properties, possesses the right to contest the validity and subsequent use of the fees it paid to CL Management for services rendered as general partner. GLFP cannot, for its individual benefit, directly recover fees paid by Clark Leaming Properties to the detriment of the other limited partner, HCFP, Ltd (and the limited partners of that entity), particularly given that HCFP, Ltd is not a party to this action.

As a fall-back, GLFP alternatively contends that the trial court erred in refusing to excuse its failure to comply with applicable law and procedure. GLFP argues that it should be permitted to directly pursue the derivative claims because Clark Leaming Properties is closely held, and the general partner of CL Management, Mr. Howard Clark, possesses a conflict of interest. These arguments, as noted by the trial court, lack evidentiary support, and in any event are not applicable to the undisputed facts of this case as a matter of law.

The closely held exception applies only if GLFP can establish, among other things, that third parties will not be prejudiced by its direct assertion of claims possessed by Clark Leaming Properties. GLFP argues that CL Management was required to prove that the closely held exception does not apply. However, the

Utah Supreme Court has held that it was GLFP's burden to substantiate the closely held exception, which it failed to do.

Moreover, the undisputed evidence indicates that prejudice will indeed result if GLFP is allowed to directly assert the alleged derivative theories of recovery. MB Management is a general partner of CL Management, but MB Management is not a party to this litigation. The GAL Marital Deduction Trust is a limited partner of CL Management; however, the GAL Marital Deduction Trust is not before the court either. HCFP, Ltd is a 45% owner of Clark Leaming Properties, and surprisingly HCFP, Ltd is not a party to this litigation. Prejudice certainly will result if GLFP is permitted to directly pursue derivative theories of recover and seek to dissolve CL Management and Clark Leaming Properties when all these parties are absent from this litigation. Utah law and procedure deserve respect. GLFP cannot individually and for its own benefit pursue damage claims that are necessarily possessed by the partnership entity of Clark Leaming Properties, to the prejudice and detriment of all other affected individuals and entities.

GLFP's final argument is that Mr. Howard Clark, the general partner of CL Management, possesses a conflict of interest. GLFP contends that this alleged conflict of interest rendered futile its compliance with applicable law and procedure. This argument too is unsupported by evidence, and it also runs counter to the Utah Supreme Court's recent decision in Dansie v. City of Herriman, 134

P.3d 1139, 1147 (Utah 2006) (“Courts must not leave such determinations of futility to the subjective determination of the party [in this case GLFP] upon which the law requires action; to do so unnecessarily risks stripping the corporation [or limited partnership] of its rights.”). GLFP, under the Dansie decision, is precluded from claiming futility based on a one-sided post hoc effort to save its complaint.

GLFP’s complaint is based on derivative theories of recovery. GLFP failed to comply with the law and procedure necessary to properly assert those claims. Even the dissolution claim is largely, if not exclusively, based on the derivative theories of recovery set forth in the complaint - - those being property mismanagement and fee misappropriation. GLFP’s inclusion of a dissolution claim does not excuse or justify its failure to comply with Utah statutory law and procedure. The trial court correctly granted summary judgment, and that judgment should be affirmed.

ARGUMENT

1. GLFP’S COMPLAINT IS BASED ON DERIVATIVE THEORIES OF RECOVERY, AND GLFP FAILED TO COMPLY WITH APPLICABLE LAW AND PROCEDURE.

In its complaint, discovery responses and by affidavit, GLFP identifies two primary factual theories that support all of its claims. These theories are that CL Management, as general partner: 1) mismanaged certain real property investments owned by Clark Leaming Properties, and 2) charged Clark Leaming Properties

excessive fees, and then misappropriated those fees to support Clark-only businesses. R. at 1-6, 207-9, 211-215, 224-5, 255, 264-66, 272-73; Appellant Br. Ex. 2. These theories are derivative as a matter of law, and GLFP failed to comply with applicable law and procedure in filing its complaint.

GLFP never owned any of the properties it claims were mismanaged, and GLFP never paid any of the fees it claims were excessive and misappropriated. *Id.* Clark Leaming Properties, not GLFP, owned the real property investments, and paid the fees to CL Management for its service as general partner. *Id.* Given these undisputed facts, GLFP's complaint contains derivative theories of recovery. Aurora Credit Services, Inc. v. Liberty West Dev. Inc., 970 P.2d 1273, 1280 (Utah 1998) ("Actions alleging mismanagement, breach of fiduciary duties, and appropriation or waste of . . . [limited partnership] opportunities and assets generally belong to the . . . [limited partnership], and therefore a . . . [partner] must bring such actions on its behalf.") (Citations omitted); Phillips v. Kula 200 II, 667 P.2d 261, 265 (Haw. App. 1983) ("The resulting question is whether a limited partner can maintain an individual action against the general partner for breach of the fiduciary duty owed by the general partner to the limited partnership. * * * Consequently, we hold that a limited partner may not bring a suit for himself and in his own right on a cause of action belonging to the limited partnership.").

CL Management disputes the mismanagement and misappropriation allegations. R. at 27-37, 207-9. But even if these allegations had merit, CL Management's duties as general partner, under the circumstances at-issue here, were owed in the first instance to Clark Leaming Properties, not GLFP directly. Thus, as a matter of well established law, GLFP cannot sue directly for damages arising from purported breaches relating to property mismanagement or fee charge issues as alleged in its complaint:

The injuries for which plaintiffs' claim seeks redress are injuries that defendants' alleged misconduct did not inflict directly on plaintiffs. Rather, the alleged misconduct directly injured the Partnership. Therefore, plaintiffs' injuries solely result from their proportionate interest in the Partnership. *Injuries that do not exist independently of the Partnership or that are not directly inflicted on the limited partners are derivative claims.* Since plaintiffs have not complied with the requirements of bringing a valid derivative claim, they lack standing.

Litman v. Prudential-Bache Properties, Inc., 611 A.2d 12, 17 (Del. Ch. 1992); Arndt v. First Interstate Bank of Utah, 991 P.2d 584, 590 (Utah 1999) ("The plaintiffs were therefore required to pursue the partnership claims in derivative proceedings."); Utah Code Ann. § 48-2a-403(1) ("[A] general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.").

GLFP nevertheless contends that the fee misappropriation claim is direct because it is based on a "commingling" allegation. GLFP argues:

If GLFP's claim was only that CL Mgmt had charged CLP excessive fees, to the equal detriment of the Clarks/HCFP and Leamings/GLFP as owners of CLP, the resulting legal claims could be classified as derivative and belonging to CLP. But excessive fees were merely a starting point, and not the lynchpin, of the Complaint. As noted, the wrongful conduct at issue was the commingling and misdirection of the excessive fees by CL Mgmt for the benefit of other Clark entities and properties, with the result that GLFP received less distributions than would otherwise have been true, and the Clarks received a benefit that GLFP did not. The district court's summary judgment order did nothing to analyze this issue, but merely held in a conclusory fashion that the claims were derivative. Indeed the district court does nothing to explain why commingling and misdirection of assets by a general partner is not direct harm to a limited partner.

Appellant Br. at 9-10. This is GLFP's best effort to articulate a direct claim, and even taking every portion of the statement into account, it admits to only a derivative theory of recovery.³

The manner by which fees were allegedly misappropriated does not convert a claim that is otherwise admittedly derivative into a direct theory of recovery. The undisputed factual reality is that Clark Leaming Properties paid the fees GLFP is seeking to dispute. R. at 1-6, 207-9, 211-215, 224-5, 255, 264-66, 272-73; Appellant Br. Exs. 1 - 2. The funds that were used to pay the disputed fees were

³ GLFP offers no defense for its property mismanagement claim, thereby conceding that it constitutes a derivative claim possessed by Clark Leaming Properties. However, if the property mismanagement claim is derivative, the fee claim necessarily is too. The allegedly misappropriated fees were paid to CL Management for certain management services provided with respect to the real property investments owned by Clark Leaming Properties. The two theories therefore are factually and legally linked; if the property mismanagement claim is derivative, so too is the fee misappropriation claim.

owned exclusively by Clark Leaming Properties, not GLFP. Id. GLFP never paid a single fee it claims was excessive, or misappropriated to support Clark-only businesses. Id. Based on these facts, the law is unequivocal: GLFP lacks standing to sue directly for the purported misappropriation of fees paid by Clark Leaming Properties to CL Management for its service as general partner, regardless of the alleged manner of misappropriation, be it commingling or some other form of waste:

[T]he initial injury for which the plaintiffs seek redress was to the Partnership. That is, plaintiffs complain that the Partnership received a lower amount of income because of the alleged misconduct. In other words, the defendants inflicted the alleged injury directly upon the Partnership. Therefore, defendants' misconduct damaged plaintiffs only to the extent of their proportionate interest in the Partnership. Clearly, this was not a direct injury to the limited partners or one that existed independently of the Partnership.

Litman v. Prudential-Bache Properties, Inc., 661 A.2d 12, 16 (Del. Ch. 1992); see also (“Golden Tee, Inc. v. Venture Golf Schools, Inc., 969 S.W.2d 625, 629 (Ark. 1998) (“Looking to the federal court for guidance, when the individual limited partner alleges wrong to the . . . Partnership that indirectly damage him by ‘rendering his contribution or interest in the limited partnership valueless, the limited partner is required to bring his claim derivatively on behalf of the partnership.’”) (Citation omitted).

GLFP cannot separate the property mismanagement and fee misappropriation claims from Clark Leaming Properties. These factual theories are necessarily derivative because GLFP has not suffered, according to its own allegations and the undisputed facts, any harm distinct and independent of the partnership entity itself.⁴ Under such circumstances, the law of Utah and elsewhere is clear - - these claims are derivative, and to find otherwise will directly contradict the Utah Supreme Court's recent decision in Dansie v. City of Herriman, 134 P.2d 1139, 1144 (Utah 2006) ("A shareholder does not sustain an individual injury because a corporate act results in disparate treatment among shareholders. Rather, the shareholder must examine his injury in relation to the

⁴ All of the evidence before the trial court supported its summary judgment holding. The affidavit by Ms. Merline Leaming confirms that: "CL Mgmt manages the real estate holdings of CLP. CL Mgmt is funded by various fees charged by CL Mgmt, . . ." R. at 265. The draft expert report submitted by GLFP, to extent it should be considered at all, states: "94% of the income in 2003 was contributed exclusively by the various Clark Leaming Properties." R. at 272; see also R. at 211-15, 225-25. Finally, Exhibit 2 to GLFP's appeal brief confirms the derivative origin of its complaint. GLFP, in that Exhibit, admits that the harm allegedly suffered by GLFP was in the form of "reduced or non-existent distributions." Appellant Br. Ex. 2. A reduction in distributions to a limited partner, based on an alleged harm suffered by the partnership, is the very definition of a derivative claim. New York Life Insurance Company v. Ramco Holding Corporation, 938 F. Supp. 754, 756 (N.D. Okla. 1996) ("Thus, when a limited partner alleges wrongs to the limited partnership that indirectly damaged a limited partner by rendering his or her interest in the partnership of lesser value, the partner is required to bring the claim derivatively.") (quoting Mallia v. PaineWebber, Inc., 889 F. Supp. 277, 282 (S.D. Tex. 1995)). The property mismanagement and fee misappropriation claims are derivative, and no fact to the contrary exists in the record.

corporation and demonstrate that the injury was visited upon him and not the corporation.”); see also See Energy Investors Fund, L.P. v. Metric Constructors, Inc., 525 S.E.2d 441, 444 (N.C. 2000) (An injury ““is peculiar or personal to the . . . [limited partner] if “a legal basis exists to support plaintiffs’ allegations of an individual loss, separate and distinct from the damage suffered by the . . . [limited partnership].””).

GLFP failed to comply with the laws and procedures applicable to the proper filing of derivative claims. No allegations are included in GLFP’s complaint that satisfy the mandatory requirements of Utah Code Ann. § 48-2a-1003 (“In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.”); Seaford Funding Limited Partnership v. M & M Associates II, L.P., 672 A.2d 66, 69 (Del. Ch. 1995) (“[L]imited partners in a derivative complaint must allege with particularity the effort, if any, made to secure the action desired from the general partner and the reasons the effort failed or why they chose not to make the effort.”); see R. at 1-6. Moreover, GLFP’s complaint is not verified, and does not set forth the information mandated by Rule 23.1 of Utah Rules of Civil Procedure. Utah R. Civ. P. 23.1 (“In a derivative action . . . the complaint shall be verified and shall allege . . . with particularity the efforts, if any, made by the plaintiff to obtain the action he desires . . . and the

reasons for his failure to obtain that action or for not making the effort.”); see R. at 1-6.⁵

The trial court correctly granted summary judgment. GLFP’s property mismanagement and fee misappropriation claims are derivative as a matter of law. These derivative theories represent the core of GLFP’s complaint, and every claim in the complaint rests in material part on these derivative claims. GLFP failed to comply with the statutory law and procedure applicable to the proper assertion of derivative claims. As such, GLFP’s complaint was correctly dismissed pursuant to summary judgment by the trial court. CL Management respectfully requests that this Court affirm the trial court’s judgment consistent with the Utah Supreme Court’s decisions in Arndt v. First Interstate Bank of Utah, 991 P.2d 584 (Utah

⁵ Utah Rule of Civil Procedure 23.1, among other things, requires the plaintiff in a derivative action to set forth in a verified complaint that the plaintiff was a limited partner “at the time of the transaction of which he complains” It will be difficult, if not impossible, for GLFP to verify its standing to pursue the alleged derivative claims. Executed assignments exist in the record, whereby GLFP appears to have transferred its limited partnership interests in CL Management and Clark Leaming Properties to the separate entities of Ming, Ltd and Sumerlea, Ltd. R. at 302-5. GLFP, through certain members, disputes the validity of its own assignments. However, this is not true for all the members of GLFP. R. at 317-338. Apparently a dispute exists internally within GLFP as to the validity of the assignments. R. at 413-16. The assignments have been recognized and implemented by CL Management and Clark Leaming Properties. R. at 367-68, 371-72. GLFP’s complaint makes no mention of the assignments, and Ming, Ltd and Sumerlea, Ltd are not party to the litigation. R. at 1-6. The validity and enforceability of the assignments must therefore first be resolved internally within GLFP prior to the institution of any litigation, direct or otherwise, through GLFP.

1999) and Dansie v. City of Herriman, 134 P.3d 1139 (Utah 2006), and in accordance with Utah Code Ann. §§ 48-2a-1001 through 1006 and Utah Rule of Civil Procedure 23.1.

2. GLFP CANNOT JUSTIFY ITS FAILURE TO COMPLY WITH APPLICABLE LAW AND PROCEDURE, AND THE ENTIRE COMPLAINT WAS PROPERLY DISMISSED BECAUSE IT IS INEXTRICABLY FOUNDED ON DERIVATIVE THEORIES OF RECOVERY.

GLFP argues that its failure to comply with applicable law and procedure should be excused. GLFP contends that Clark Leaming Properties is closely held, and therefore the trial court should have permitted GLFP to directly assert the derivative claims set forth in the complaint. Appellant Br. at 14-17. GLFP further argues that the dissolution and accounting claims are not derivative, and the trial court thus erred in dismissing the entire complaint. Appellant Br. at 10-14. GLFP's arguments are unavailing, and contrary to established Utah law.

The "closely held" exception does not apply as a matter of law, and GLFP failed to present evidence in support of this argument. The closely held exception only applies if it is established that the direct assertion of derivative claims will not: "(i) unfairly expose the corporation or defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons."

Aurora Credit Services, Inc. v. Liberty West Dev., Inc., 970 P.2d 1273, 1280 (Utah

1998). GLFP, however, failed to present evidence in support of the closely held exception, and the undisputed evidence proves the contrary, that being prejudice will indeed result if GLFP is permitted to directly pursue the derivative theories of recovery set forth in its complaint.

GLFP concedes that insufficient evidence exists to substantiate the application of the closely held exception, but argues that it was CL Management's responsibility to prove that the exception does not apply. GLFP contends that CL Management, as general partner: "should be required to demonstrate that an exception – *e.g.*, prejudice to creditors – requires the claim to be pursued derivatively, rather than directly." Appellant Br. at 16. This argument is contrary to Utah law and procedure, and the Utah Supreme Court has already held that it was GLFP's burden to establish the application of the closely held exception, which GLFP failed to do.

Under Utah Code Ann. § 48-2a-1003 and Rule 23.1 of the Utah Rules of Civil Procedure, GLFP, not CL Management, was required to plead "with particularity" in a verified complaint "the reasons" for its direct assertion of derivative claims possessed by Clark Leaming Properties. Moreover, pursuant to the Utah Supreme Court's Aurora decision, GLFP alone was obligated to submit evidence in support of the closely held exception. See Aurora, 970 P.2d at 1281

("[A] minority . . . shareholder may proceed directly for corporate wrongdoing if the shareholder can show that one of the exceptions applies.").

If GLFP's argument were accepted, the law regarding derivative actions would be turned upside down. No authority exists to support the idea that GLFP can directly sue for derivative claims in violation of Utah law and procedure unless CL Management proves that the closely held exception does not apply. The closely held exception is not presumed to apply. Rather, it was GLFP's obligation to substantiate with evidence that the closely held exception applied, and GLFP failed to do so. The trial court therefore correctly ruled: "[A]lthough Plaintiff argued it should be excepted from the derivative requirement, given the closely held nature of the corporation, the evidence in the record simply does not support such an exception and, further, no proper Rule 56(f) motion for continuance has been filed." R. at 436; see also Utah R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the responses by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.").

The undisputed evidence, moreover, establishes that prejudice will result if GLFP is permitted to directly pursue the derivative claims set forth in its

complaint. GLFP claims that all of the “key parties” are before the court. But this is not true. MB Management, Inc., a general partner and owner of CL Management, is a separate corporate entity and it is not party to this litigation. See R. at 1, 207-9, 211-15, 265, 388; Appellant Br. Exs. 1-2. The GAL Marital Deduction Trust is a limited partner of CL Management, and it too is not before the court. Id. HCFP, Ltd, yet another separate limited partnership, is a 45% limited partner of Clark Leaming Properties, and it is noticeably absent from the litigation. Id. Moreover, GLFP fails to address the third party obligations Clark Leaming Properties has with respect to its real property investments in Phoenix, Sacramento, Santa Monica and Monterey. Id.

The closely held exception cannot apply as a matter of law. GLFP has failed to name all of the relevant parties, including one of the general partners of CL Management, that being MB Management, and a limited partner that owns 45% of Clark Leaming Properties, that being HCFP, Ltd. Kemp v. Murray, 680 P.2d 758, 761 (Utah 1984) (“Allowing plaintiff to go forward individually could subject defendants to multiple liability and could spawn multiple litigation among the partnership, the individual partners, and defendants. This would be unfair to absent partners, unfair to defendants, and contrary to judicial economy. That is undoubtedly why Rules 17(a) and 19(a) forbid such a result.”); see also Utah R. Civ. P. 23.1 (“The derivative action may not be maintained if it appears that the

plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.”).

The trial court properly dismissed GLFP’s dissolution and accounting claims as well. GLFP claims that it possesses standing to pursue the dissolution and accounting claims even if the property mismanagement and fee misappropriation claims are derivative.⁶ Appellant Br. at 10-14. The accounting claim is not a separate claim, but rather GLFP requested an accounting “as part of the dissolution” claim against CL Management and Clark Leaming Properties. R. at 6. However, GLFP does not dispute, and indeed must concede that its complaint is fundamentally based on the purported derivative theories of recoveries for property mismanagement and fee misappropriation. See R. at 1-6. The dissolution claim is a remedy requested in part based on the core derivative theories of recovery set forth in the complaint. Id.

The inclusion of a dissolution claim in the complaint does not excuse GLFP’s failure to comply with applicable law and procedure. GLFP cannot avoid

⁶ GLFP raised this argument in its motion for reconsideration. A motion for reconsideration is not authorized under Utah procedure. Gillett v. Price, 135 P.3d 861, 863 (Utah 2006) (“In fact, postjudgment motions to reconsider are not recognized anywhere in either the Utah Rules of Appellate Procedure or the Utah Rules of Civil Procedure.”). The trial court was forced to reject this argument twice. See R. at 436, 575.

the requirements of Utah law and procedure by simply including a claim for dissolution. The complaint, given its derivative foundation, was deficient and subject to dismissal at the outset because it was not verified, and GLFP failed to otherwise comply with the substantive and procedural requirements mandated by Utah law. See Richardson v. Arizona Fuels Corp., 614 P.2d 636, 640 (Utah 1980) (“The eleventh cause of action alleges the possibility of other conversions . . . and alleges that the defendants should be required to account . . . for all of the assets . . . and disgorge themselves of any assets so converted. This claim also clearly belongs to the corporation.”).

Finally, and most critical, GLFP cannot seek the dissolution of CL Management and Clark Leaming Properties because GLFP failed to name all of the required parties to such an action, including one of the general partners of CL Management, and a 45% owner of Clark Leaming Properties. See Kemp v. Murray, 680 P.2d 758 (Utah 1984); Terracor v. Utah Bd of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986) (“[T]his Court may address . . . [a standing] issue *sua sponte*.”); Seftel v. Capital City Bank, 767 P.2d 941, 944 (Utah App. 1991) (“We also note that a party may raise the issue of failure to join an indispensable party at any time in the proceedings, including for the first time on appeal.”). GLFP’s complaint is fatally defective on many grounds, and the trial court correctly dismissed it pursuant to established Utah law and procedure.

3. GLFP'S FUTILITY ARGUMENT BASED ON A CLAIMED CONFLICT OF INTEREST POSSESSED BY CL MANAGEMENT LACKS MERIT, AND WAS RENDERED MOOT BY THE SUMMARY JUDGMENT DECISION.

GLFP, as its final argument, contends that the trial court erred by failing to grant GLFP leave to amend its complaint so as to include unspecified allegations regarding a purported conflict of interest possessed by Mr. Howard Clark in his capacity as one of the general partners of CL Management. Appellant Br. at 17-19. Simply put, GLFP seeks to be excused from its failure to comply with Utah statutory law and procedure based on the after-the-fact belief that Mr. Howard Clark possesses a conflict of interest regarding the alleged derivative claims because these claims challenge Mr. Howard Clark's conduct. *Id.* In support of this futility/conflict of interest theory, GLFP submitted to the trial court numerous documents reflecting settlement discussions between GLFP's counsel and Mr. Howard Clark.⁷

⁷ CL Management filed a motion to strike the submission of settlement documents to the trial court. The trial court determined that the motion was moot, given the entry of summary judgment, but it is CL Management's position that the wholesale filing of settlement documentation with the trial court was and is prejudicial. *See* R. at 469-79. GLFP cannot save its complaint by attempting to plead the content of settlement discussions in violation of Utah Rule of Evidence 408. GLFP further claims that Mr. Howard Clark has admitted a conflict of interest by offering, after the entry of summary judgment, to "involve respected third party experts for assessment of the merits or any purported derivative

GLFP's futility/conflict of interest argument is unsupported in the record, and more importantly, it has already been rejected by the Utah Supreme Court in the decision of Dansie v. City of Herriman, 134 P.3d 1139 (Utah 2006). It is more than significant that GLFP only mentions this decision by way of footnote because a complete reading of the opinion confirms that the trial court's decision must be affirmed. See Appellant Br. at 15 n. 3.

In Dansie, the Utah Supreme Court sets forth an extensive analysis regarding the futility exception (based on a conflict of interest or otherwise), and held that it *is only applicable in two limited circumstances, both of which do not apply to this case as a matter of law*. See Dansie, at 134 P.3d 1147. Moreover, in Dansie, the Utah Supreme Court rejected the very argument in substance offered by GLFP in this appeal:

Before us, Plaintiffs allege that the continued antagonistic relationship between Plaintiffs and [the Defendant], as evidenced by this litigation, demonstrates that a perfectly crafted demand would have been futile. However, this is the first instance where they present such a claim. **The second amended complaint, in which**

claims.” Appellant Br. at 18. This statement does not show bad faith, or that complying with Utah law and procedure would have been futile. Rather, it proves the opposite. Mr. Clark is empowered under the partnership agreement to retain such experts, and the use of third party experts in the evaluation of alleged derivative claims is an accepted, proper and reasonable practice. R. at 385; Whalen v. Connelly, 593 N.W.2d 147, 156 (Iowa 1999) (“We believe that the language of . . . the partnership agreement is sufficiently broad to include the authority of the board to appoint a special committee to investigate a demand made by a limited partner.”).

Plaintiffs brought their derivative claims, makes no mention of the futility exception and fails to address why demand would have been futile. This fact alone would be a sufficient basis for turning away Plaintiffs' futility claims; however, even had Plaintiffs properly preserved their futility claims, a close analysis shows that they are insufficient to satisfy the exception and waive the demand requirement.

It is axiomatic that the right to seek the redress of corporate grievances belongs to the corporation to be exercised by corporate management. *See, e.g., In re Kauffman Mut. Fund Actions*, 479 F.2d 257 (1st Cir. 1973). Utah Rule of Civil Procedure 23.1 provides an exception to this general rule by allowing members or shareholders to bring derivative actions, but this exception must be carefully applied in order to protect the right of corporations to govern their own affairs. *In re Kauffman*, 479 F.2d at 263-64. Therefore, we must exercise considerable caution before using futility to relieve a shareholder [or limited partner] of his obligation to make a statutorily-required demand.

This presumption is further strengthened by the relative ease with which demand can be made. A potential litigant would, of necessity, have prepared and outlined the legal claims upon which his lawsuit will be based. **The marginal cost for presenting these claims to corporate management and demanding that they take them up is so insignificant that to strip the corporation of its rights based solely on conjecture or a post hoc judicial determination would be unreasonable in most instances. Courts must not leave such determinations of futility to the subjective determination of the party upon which the law requires action; to do so unnecessarily risks stripping the corporation of its rights.** In fact, it will generally require less effort for the plaintiff to make a demand on the corporation than to satisfy rule 23.1's stringent pleading requirements. For this reason, application of rule 23.1's futility exception requires close scrutiny.

Dansie, 134 P.3d at 1146-47 (Emphasis added); see also Arndt v. First Interstate Bank of Utah, N.A., 991 P.2d 584, 589 (Utah 1999) ("It seems reasonable, then, to

infer that the same principles apply to define derivative actions in the limited partnership context as in the corporate.”).⁸

The Utah Supreme Court has also rejected GLFP’s argument of futility based on the claim that Mr. Howard Clark’s conduct is called into question by the alleged derivative claims. A general partner is responsible for conducting the operations of a limited partnership. See Utah Code Ann. § 48-2a- 403 (“[A] general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.”); U.S. v. Heffner, 916 F. Supp. 1010, 1012 n. 2 (S.D. Cal. 1996) (“[T]he general partner controls the business of the limited partnership to the exclusion of the limited partners.”). Thus, if GLFP’s argument were accepted, virtually any act or omission by a general partner can be labeled as involving a conflict of interest.

⁸ Even if the trial court had allowed GLFP to amend its complaint, GLFP’s complaint still would have remained deficient, and subject to immediate dismissal. GLFP did not state in its motion to amend that it planned to include proper verified allegations regarding standing as required under Utah Code Ann. § 48-2a-1002 and Utah Rule of Civil Procedure 23.1. Moreover, GLFP’s proposed amendments do not address, resolve, or even touch upon the fact that GLFP has failed to name several critical and required parties to this litigation, including MB Management (a general partner of CL Management), HCFP, Ltd (a 45% limited partner of Clark Leaming Properties), and Ming, Ltd, and Sumerlea, Ltd (both recognized limited partners of CL Management and Clark Leaming Properties), among other parties. Kemp v. Murray, 680 P.2d 758, 761 (Utah 1984). GLFP’s proposed amendments, were incapable of saving its complaint. Tretheway v. Furstenau, 40 P.3d 649, 654 (Utah App. 2001) (“[A] court should deny motions to amend ‘when the moving party seeks to assert a new claim that is legally insufficient or futile.’”).

This goes too far and would render the laws and procedures applicable to derivative actions in the limited partnership context meaningless. For this reason, GLFP's argument has already been rejected by the Utah Supreme Court:

We conclude that adoption of such a rule in Utah would virtually dissolve any distinction between derivative and direct actions based on breach of fiduciary duty, mismanagement, etc., in the limited partnership context, despite the fact that these are the very actions traditionally defined as actions that must be brought derivatively. *See Richardson v. Arizona Fuels Corp.*, 614 P.2d 636, 639 (Utah 1980). We also conclude that the blanket adoption of such a rule would ignore concerns justifying derivative actions that we addressed in *Aurora Credit* – that direct suits could expose defendants to a multiplicity of actions, that direct suits could materially prejudice the interests of other potential partnership creditors, and that direct suits could interfere with a fair distribution of the recovery among all interested persons.

Arndt, 991 P.2d at 589-90.

GLFP's complaint violates applicable law and procedure, and nothing under Utah law, or the undisputed facts excuses GLFP's conduct. The record reveals Mr. Howard Clark and CL Management have acted reasonably and consistent with Utah law throughout. GLFP cannot claim that Mr. Howard Clark possesses a conflict, or that GLFP should be excused from complying with applicable law or procedure simply because CL Management refused to accept GLFP's unexplained and unsubstantiated settlement demand. Utah law and procedure are worthy of respect, and required more of GLFP. The trial court properly granted summary judgment consistent with the Utah Supreme Court's holdings in Arndt v. First

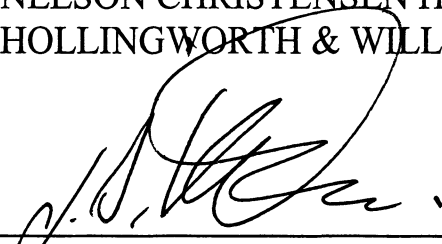
Interstate Bank of Utah, N.A., 991 P.2d 584 (Utah 1999) and Dansie v. City of Herriman, 134 P.3d 1139 (Utah 2006), and in accordance with Utah Code Ann. §§ 48-2a-1001 through 1006 and Utah Rule of Civil Procedure 23.1.

CONCLUSION

For the above stated reasons, CL Management and the other defendants respectfully request that the trial court's motion for summary judgment be affirmed in its entirety.

DATED this 5th day of October, 2006.

NELSON CHRISTENSEN HELSTEN
HOLLINGWORTH & WILLIAMS



Jeffery S. Williams
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing **BRIEF**
OF APPELLEE were served in the manner indicated below on this 5th day of
October, 2006, upon:

Brent E. Johnson
Katherine Norman
HOLLAND & HART LLP
60 East South Temple, Suite 200
Salt Lake City, Utah 84111

(Via hand delivery)

A. Bruce Jones
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201
Attorneys for Plaintiff-Appellant

(Via first class mail, postage prepaid)

A handwritten signature in black ink, appearing to read "J. D. Hart", is written over a horizontal line.