

2006

GLFP v. CL Management, Clark Leaming Properties, Howard S. Clark, and H. Scott Clark: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLFP, LTD., a former Utah limited partnership,
Plaintiff and Appellant,

v.

CL MANAGEMENT, LTD., a Utah limited
partnership, CLARK LEAMING PROPERTIES,
LTD., a Utah limited partnership, and HOWARD
S. CLARK and H. SCOTT CLARK, Individuals,
Defendants and Appellees.

BRIEF OF APPELLANT

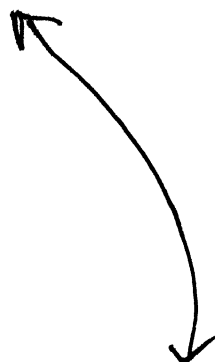
Case No. 20060440-CA

Trial Court No. 050902498

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

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TABLE OF CONTENTS

JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTES.....	2
STATEMENT OF THE CASE.....	2
A. Nature of the Case, Course of Proceedings and Disposition Below.....	2
B. Statement of Facts.....	4
ARGUMENT	8
I. GLFP ASSERTED DIRECT, NON-DERIVATIVE CLAIMS AGAINST DEFENDANTS.....	8
A. GLFP’s Damage Claim Was Direct, Not Derivative.....	8
B. GLFP’s Requests for Dissolution and An Accounting Were Not Derivative Claims.	10
II. TO THE EXTENT GLFP’S CLAIMS ARE DEEMED DERIVATIVE, UTAH LAW PERMITS SUCH CLAIMS TO BE BROUGHT BY GLFP RATHER THAN VIA CLP.	14
III. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF’S MOTION TO AMEND	17
CONCLUSION.....	19

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Peller v. Southern Co.</i> , 911 F.2d 1532 (11th Cir. 1990)	19
<i>Simon v. Mann</i> , 373 F. Supp. 1196 (D. Nev. 2005)	17

STATE CASES

<i>Arndt v. First Interstate Bank of Utah</i> , 991 P.2d 584 (Utah 1999)	14, 17
<i>Aurora Credit Services, Inc. v. Liberty West Development, Inc.</i> , 970 P.2d 1273 (Utah 1999)	9, 14, 16
<i>Compton v. Paul K. Harding Realty Co.</i> , 285 NE 2d 574 (Ill. 1972)	12
<i>Crowther v. Carter</i> , 767 P.2d 129 (Utah App. 1989)	10
<i>Dansie v. City of Herriman</i> , 2006 UT 23, ¶ 15, 134 P.3d 1139 (Utah 2006)	15
<i>Donahue v. Rodd Electrotpe Co. of New England</i> , 367 Mass. 578, 328 N.E.2d 505 (1975)	16
<i>Kalabogias v. Georgou</i> , 627 NE 2d 51 (Ill. App. 1993)	11
<i>Richardson v. Arizona Fuels Corp.</i> , 614 P.2d 636 (Utah 1980)	9
<i>State v. Straight</i> , 2004 UT 88, ¶ 5, 108 P.3d 690 (Utah 2004)	2
<i>Stewart v. K&S Co.</i> , 591 P.2d 433 (Utah 1979)	10
<i>White v. Perkins</i> , 189 SE 2d 315 (Va. 1972)	12

STATE STATUTES

<i>Utah Code Ann.</i> § 48-2a-1003	2, 17
<i>Utah Code Ann.</i> §§ 48-2a-1001 to 1006.....	3
<i>Utah Code Ann.</i> §§ 48-2a-802, §§ 48-2a-305	13
<i>Utah Code Ann.</i> §§ 48-2a-503 & 504.....	13
<i>Utah Code Ann.</i> § 78-2a-3(2)	1

MISCELLANEOUS

PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, § 7.01, cmt. C).....	9, 15
FLETCHER CYCLOPEDIA CORPORATIONS § 5915, 5965 (2004)	11, 18

Attached hereto is the Addendum which contains:

Exhibit 1-Chart;

Exhibit 2-Chart;

Exhibit 3-November 7, 2005 Memorandum Decision; and

Exhibit 4-April 5, 2006 Minute Entry, Order and Judgment.

JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) and the Supreme Court's transfer order of May 15, 2006.

ISSUES PRESENTED FOR REVIEW

1. In a case arising from an intra-family dispute involving closely-held limited partnerships, was it erroneous to grant summary judgment when:
 - a) the district court based its conclusion on a finding that all the claims asserted were derivative (i) despite evidence that Plaintiff was uniquely harmed; and (ii) despite the judicial dissolution/accounting requests made by Plaintiff; and
 - b) the court refused to invoke an exception allowing limited partners to pursue derivative claims in closely-held partnerships.
2. Did the district court err in refusing to reconsider its summary judgment decision to allow Plaintiff's judicial dissolution claim to go forward when such a claim is, by definition, not derivative?
3. Did the district court err in declaring Plaintiff's motion to amend "moot" when Plaintiff sought to allege futility of demand so it could proceed with its claims derivatively?

Standard of Review

Because all these matters were decided in the context of summary judgment, review is *de novo*, with no deference given to the district court's legal interpretation. *See, e.g., State v. Straight*, 2004 UT 88, ¶ 5, 108 P.3d 690 (Utah 2004). All of the foregoing issues were addressed by the district court's summary judgment orders, R. at 432-38; 578-80, and thus are preserved for review.

DETERMINATIVE STATUTES

1. 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.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below.

This case arises from an intra-family dispute involving closely-held limited partnerships. Merline Leaming is the majority owner of Plaintiff GLFP¹, which is an equal owner (along with an entity controlled by Ms. Leaming's brother, Defendant Howard Clark) of Defendant Clark Leaming Properties. R. at 265.

¹ GLFP was established initially as a limited partnership, and was so classified in the Complaint. However, it was converted to a limited liability company on July 28, 2004. This conversion did not alter Merline Leaming's status as the primary owner. The Court granted summary judgment before Plaintiff could correct the case caption to reflect that GLFP had been converted to a limited liability company. *See* R. at 253, 265.

Howard Clark is the managing partner of Defendant CL Management, Ltd. which in turn is the managing partner of Clark Leaming Properties, Ltd. *Id.* The remaining defendant below, H. Scott Clark, is the son of Howard Clark.

GLFP filed suit against Clark Leaming Properties, CL Management and the Clarks, as individuals, in the Third Judicial District Court on February 8, 2005. R. 1. GLFP asserted claims for (a) damages for breach of fiduciary duty against the Clarks and CL Management, (b) dissolution of both CL Management and Clark Leaming Properties, and (c) an accounting in conjunction with dissolution. R. at 5-6.

After limited discovery, Defendants moved for summary judgment on July 20, 2005, arguing that all of GLFP's claims were derivative, and that GLFP had not complied with Utah Code Annotated §§ 48-2a-1001 to 1006, which govern derivative actions. R. at 192. On August 15, 2005, Defendants filed a separate motion for summary judgment asserting that GLFP lacked standing or capacity to bring its claims because it purportedly had assigned its interests in Clark Leaming Properties and CL Management to two different entities. R. at 279-80.

On November 7, 2005, Judge Iwasaki issued his summary judgment decision, finding a question of fact concerning the assignment issue, R. at 434,² but holding in Defendants' favor with respect to the derivative nature of Plaintiff's

² Given the district court's finding, the assignment question is not an issue in this appeal.

claims, *id.* at 436. However, Judge Iwasaki did not enter judgment in favor of Defendants at that time. On November 14, GLFP promptly moved for reconsideration of the summary judgment decision with respect to its judicial dissolution claim, R. at 467, and also sought leave to amend its Complaint to assert its other claims on a derivative basis, R. at 439-41. On April 5, 2006, Judge Iwasaki denied the motion to reconsider, declared the motion to amend “moot,” and entered final judgment in favor of Defendants. R. at 575-76; 581-82. GLFP timely filed a Notice of Appeal on May 5, 2006. R. at 590-91.

B. Statement of Facts.

The issues in this case arise from the extended and often contentious business dealings between Ms. Leaming and her brother, Mr. Clark, and their respective families. The Leamings and Clarks have been business partners in a variety of entities for many years.

Defendant CL Management, Ltd. (“CL Mgmt”) is a Utah limited partnership established in 1983, with Mr. Clark as the managing general partner, R. at 265 although plaintiff alleged that Mr. Clark assigned or delegated most of his responsibilities and duties to his son, H. Scott Clark. R. at 2. Defendant Clark Leaming Properties, Ltd. (“CLP”) is a Utah limited partnership established in 1988. Its primary business is ownership of various real estate interests. R. at 265. CL Mgmt is the managing general partner of CLP. As a result, the Clarks

effectively function as general partners of CLP, as well. *Id.* CL Mgmt owns 10% of CLP. *Id.* The remaining 90% is owned equally by the Leaming family through Plaintiff GLFP (short for “George Leaming Family Partnership”) and the Clarks, through an entity called HCFP (the “Howard Clark Family Partnership”). R. at 264-65.

CL Mgmt’s primary business is to manage and operate various real estate holdings, including those of CLP. R. at 265. In addition to CLP, CL Mgmt is the managing general partner of at least two other Clark/Leaming entities – CL Investment Company and Modulus Investment Company. *Id.* The Clarks also have other properties and businesses for their sole benefit, which are also managed by CL Mgmt. R. at 265-66. Although members of the Leaming family have ownership interests in CL Investment and Modulus, GLFP is not an owner of CL Investment, Modulus, or any of the other entities operated by the Clarks for their sole benefit.

For all essential purposes, CL Mgmt is owned equally by the Clark and Leaming families, who fund CL Mgmt primarily via various fees charged by the Clarks for the management of the families’ holdings, including: (a) property management fees; (b) asset management fees; and (c) leasing fees. R. at 265. CL Mgmt’s overhead and expenses, in theory, should be shared equally by the Leaming and Clark families. *Id.* Accordingly, each family has traditionally paid

equal amounts (*e.g.*, via CLP) for the administration and overhead of CL Mgmt and should receive equal distributions (*e.g.*, to GLFP and HCFP). (*See* Exhibit 1 of the addendum which is a chart based on the foregoing facts and is helpful in defining the various companies and ownership interests.)

In its Complaint, GLFP alleged that many of the fees assessed by CL Mgmt were excessive. R. at 4. In response to inquiries by the Leamings, the Clarks had stated that the fees charged were not excessive, but in any event, equally benefited the Clarks and Leamings because of their joint ownership status in CL Mgmt. *Id.* However, since the Clarks commingled the activities of numerous properties and interests – in which the Leamings have no ownership, but the Clarks do – within the business of CL Mgmt, the Clarks used the improper fees to help fund their own interests, to the detriment of GLFP specifically, and thereby the Leamings generally. *Id.* In other words, because of CL Mgmt’s involvement with entities that benefit the Clarks alone, and not the Leamings, the Leamings have been paying for a disproportionate share of expenses, and more importantly, receiving less in distributions to GLFP, thereby effectively subsidizing the management of properties and businesses from which they derive no benefit. This fact was the genesis of the lawsuit, and a key aspect of Plaintiff’s Complaint. R. at 4-5. This fact also was fundamentally misunderstood by the district court.

In their summary judgment pleadings, Defendants argued that GLFP was not charged any of the excessive fees by CL Management, which instead were directly charged to CLP. R. at 209. Thus, Defendants argued that GLFP's alleged claims were derivative (*i.e.*, belonged to CLP) in that only CLP was directly harmed by the fees. R. at 194-95. In opposition, GLFP asserted that the Clarks had commingled the activities of numerous properties and interests and, in doing so, had used the improper fees to help fund their own interests, to the direct detriment of GLFP by way of reduced distributions. R. at 255-56, 265-66. Thus, the direct harm to GLFP was that, contrary to the Clarks' representations, the excessive fees did not equally benefit the Clarks and GLFP via distributions from CL Mgmt; adequate distributions did not take place because of the commingling and use of the fees to benefit the Clarks' separate business entities. R. at 256, 258.

SUMMARY OF ARGUMENT

The district court wrongly classified all of plaintiff's claims as derivative, ignoring both the unique harm suffered by GLFP and the non-derivative nature of claims for judicial dissolution. Alternatively, the district court ignored Supreme Court case law recognizing an exception to derivative-claim requirements when a limited partner challenges the actions of a general partner in a closely-held partnership.

The district court also erred in refusing to reconsider its decision to allow plaintiff to proceed on its dissolution claim, which was not based solely on excessive fees. Further, refusal to reconsider did not render plaintiff's motion to amend moot. Plaintiff should have been allowed to assert futility of demand, and pursue those claims classified by the district court as derivative.

ARGUMENT

I. GLFP ASSERTED DIRECT, NON-DERIVATIVE CLAIMS AGAINST DEFENDANTS.

The district court's initial summary judgment order largely consists of a synopsis of the parties' respective positions. R. at 434-36. No case law is cited.

The court's reasoning is set forth in two sentences:

[A]lthough 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 claim for an accounting and for dissolution lack any basis.

R. at 436.

A. GLFP's Damage Claim Was Direct, Not Derivative.

Contrary to the district court's decision, GLFP's damage claims against CL Mgmt and the Clarks (based on breach of fiduciary duty) were for injuries uniquely suffered by it, and not by CLP. By definition, such claims are not derivative.

In shareholder litigation, which is directly analogous to actions by limited partners, Utah defines derivative claims as follows:

A derivative action must necessarily be based on a claim for relief which is owned by the stockholder's corporation The stockholder, as a nominal party, has no right, title or interest whatsoever in the claim itself – whether the action is brought by the corporation or by the stockholder on behalf of the corporation.

Richardson v. Arizona Fuels Corp., 614 P.2d 636, 638 (Utah 1980). In contrast to derivative claims, to maintain a direct action a shareholder “need show only an injury to him or herself that is distinct from that suffered by the corporation.”

Aurora Credit Services, Inc. v. Liberty West Development, Inc., 970 P.2d 1273, 1280 (Utah 1999) (citing PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS, § 7.01, cmt. C) (hereafter, “PRINCIPLES”)).

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 the 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. (*See* addendum, Exhibit 2, for a chart depicting these facts.) 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. R. at 436. 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.

GLFP did not merely rely on the allegations in its Complaint on this issue. Despite having had only limited discovery, GLFP retained an expert to analyze Defendants' documents and records. His initial report revealed that the excessive fees disproportionately benefited the Clarks and their businesses to the detriment of GLFP. R. at 272-73. The district court's decision makes no mention of this report.

Defendants did not cite a single case holding that commingling and misdirection of assets by a general partner is not directly harmful to the limited partner that is denied the benefit of those assets. Defendants' focus was on where the funds originated – *i.e.*, from CLP's payment of excessive fees – and not on where the fees went once received by CL Mgmt. The injury was unique to GLFP because the other primary owners of CL Mgmt were either a Clark entity (HCFP) or Howard Clark himself, who were receiving the benefits of the commingling and misdirection of assets.

B. GLFP's Requests for Dissolution and An Accounting Were Not Derivative Claims.

Just as importantly, the district court failed to analyze GLFP's requests for an accounting and judicial dissolution. Defendants failed to cite any law holding that actions for an accounting and dissolution are derivative; indeed, such actions are classically brought directly by a minority owner. *See, e.g., Stewart v. K&S*

Co., 591 P.2d 433 (Utah 1979) (individual shareholder brought direct action for accounting); *Crowther v. Carter*, 767 P.2d 129 (Utah App. 1989) (a limited partner brought direct action for dissolution of a limited partnership). Again, the district court's holding began and ended with the issue of excessive fees, and failed to distinguish these claims by GLFP from its request for damages. In the district court's view (implicit, but not directly stated), a limited partner may not seek dissolution based on a harm suffered by the partnership at the hands of the general partner. No case law was cited for this proposition.

GLFP moved for partial reconsideration of the initial summary judgment decision, arguing both that a claim for dissolution is not derivative, and that this claim was not based solely on the excessive fees charged to CLP. *See, e.g.*, UTAH CODE ANN. 48-2a-802; *Kalabogias v. Georgou*, 627 NE 2d 51, 57 (Ill. App. 1993); 12B FLETCHER CYCLOPEDIA CORPORATIONS § 5915.20 at 478-79 (2000) ("An action which has for its purpose compelling the directors to dissolve a corporation is representative in character, since the right to determine whether a corporation shall be dissolved resides in the majority of the shareholders and not in the corporation itself."). In contrast, by their nature derivative actions are brought to maintain the continued and profitable existence of a partnership.

Minority shareholders may sue a company directly for its dissolution when they can establish that those in control have acted in a manner that is oppressive,

illegal, or fraudulent. *Kalabogias*, 627 NE.2d at 53. A limited partner has the right to seek dissolution upon a showing of oppressive conduct which has the effect of excluding that partner from taking part in the affairs of the partnership. *See, e.g., Compton v. Paul K. Harding Realty Co.*, 285 NE 2d 574, 581 (Ill. 1972) (holding that there was ample evidence showing a record of arbitrary, overbearing, and heavy-handed conduct to justify finding of oppression and thereby supporting dissolution); *White v. Perkins*, 189 SE 2d 315, 318-19 (Va. 1972) (finding oppressive conduct where the majority shareholder/officer had excluded other shareholders from participating in the affairs of the company and had used the company for his own benefit).

GLFP's Complaint alleged that Defendants had failed to hold timely, regular, and proper partnership meetings and failed to provide adequate financial and business documents. R. at 3-4. In fact, the Leamings often had to request partnership meetings in order to obtain financial and business information. *Id.* Despite these requests, meetings were held so sporadically and access to financial information had been so limited that GLFP was unable to track revenues and expenses to compare with the fees and distributions. *Id.* Likewise, the Complaint alleged that no partnership meeting of CLP had been held since September 15, 2004 (nearly 6 months at the time the complaint was filed) and at the time of that September meeting, financial records were not up-to-date and agenda items were

ignored or glossed over. *Id.* GLFP further alleged that minutes of meetings, when and if distributed, did not accurately reflect what had occurred. *Id.* In essence, GLFP and the Leamings had been excluded not only from participating in CLP and CL Mgmt, but from being able to effectively monitor and evaluate the activities of these businesses.

In the briefing on its motion to reconsider, GLFP submitted an affidavit from Merline Leaming indicating that the problems alleged in GLFP's initial Complaint had not been resolved. R. at 562-63. Ms. Leaming had not been notified of a CLP partnership meeting in 2005 and had not received minutes of any such meeting. R. at 563. Further, GLFP had not received any distributions from CL Mgmt or CLP since April 2005, despite a large accumulation of cash. *Id.* Under Utah's Revised Limited Partnership Act, § 48-2a-802, judicial dissolution is allowed when a partnership is not reasonably able to carry on business in conformity with the partnership agreement or there is a failure to comply with the requirements of §§ 48-2a-101 *et seq.* GLFP's initial claim for dissolution specifically cited the failure of both CL Mgmt and CLP to comply with requirements of the Limited Partnership Act, particularly § 48-2a-305 (inspection of records – right to information), § 48-2a-503 (sharing of profits and losses), and § 48-2a-504 (sharing of distributions). R. at 3-4.

Having a second opportunity to address the issue, the district court again ignored these allegations and again focused on the allegation that excess fees were charged by CL Mgmt to CLP; as such, any claim based on the fees was derivative, according to the district court, and therefore all of Plaintiff's claims were derivative since they were all based on the same disputed conduct. R. at 575. This combination fact finding/legal conclusion was contrary to the record, and contrary to basic summary judgment standards. The district court thus erred, in the alternative, regarding GLFP's request for judicial dissolution and an accounting (the latter was requested as part of dissolution). Even if GLFP's damage claim was derivative, dismissal of the entire case was unwarranted.

II. TO THE EXTENT GLFP'S CLAIMS ARE DEEMED DERIVATIVE, UTAH LAW PERMITS SUCH CLAIMS TO BE BROUGHT BY GLFP RATHER THAN VIA CLP.

To the extent any of GLFP's claims could be considered to be derivative, Defendants were not entitled to summary judgment based on that finding alone. Instead, the district court should have addressed whether GLFP nonetheless should have been allowed to assert these claims. In fact, the cases Defendants cited to the district court were to this effect. In particular, Defendants relied upon *Aurora Credit* and *Arndt v. First Interstate Bank of Utah*, 991 P.2d 584 (Utah 1999). Both of these cases recognize that, under some circumstances, shareholders in a closely-held corporation (or limited partners in a closely-held limited partnership) may

bring claims directly which are by their nature derivative. *Aurora*, 970 P.2d at 1280-81; *Arndt*, 991 P.2d 588-89. These two decisions essentially adopted the following recommendation of the American Law Institute:

In the case of a closely-held corporation . . . , the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose a corporation or defendants to a multiplicity of actions, (ii) materially prejudice the interest of creditors of the corporation, or (iii) interfere with the fair distribution of the recovery among all interested persons.

PRINCIPLES § 7.01(d).³ The PRINCIPLES thus recognize that, with limited exceptions, closely-held business entities should be treated differently with respect to derivative-claim requirements. Here, there was no showing by Defendants that any of the three exceptions applied; therefore, GLFP should have been allowed to pursue the asserted claims.

The district court's response to GLFP's argument was to shift the summary judgment burden to the non-moving party, *i.e.*, GLFP. The district court stated that "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 evidence in the record, however, was undisputed that the entities in question were

³ While questioning its scope, the Supreme Court's recent decision – *Dansie v. City of Herriman*, 2006 UT 23, ¶ 15, 134 P.3d 1139, 1144-45 (Utah 2006) – does not negate the holding of *Aurora Credit*.

closely held, and all the key parties were before the court, such that a multiplicity of actions or unfair distribution of a recovery were not issues. Further, a court should not place the burden on the limited partner or minority shareholder to prove that none of the exceptions cited in the PRINCIPLES apply. The general partner – given his or its control over the partnership – should be required to demonstrate that an exception – *e.g.*, prejudice to creditors – requires the claim to be pursued derivatively, rather than directly.

The Utah Supreme Court recognized in *Aurora Credit* that “the rationale for requiring an action to proceed derivatively is often absent in a closely-held corporation, where it is unlikely that there is a disinterested board because the majority shareholders are often the corporation’s managers.” 970 P.2d at 1280. Other courts have allowed derivative claims to be brought directly by a shareholder or limited partner by drawing a comparison between the closely-held corporation and a partnership:

Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another.

Donahue v. Rodd Electrotpe Co. of New England, 367 Mass. 578, 592-93, 328 N.E.2d 505, 515 (1975).

This comparison is particularly applicable to a closely-held limited partnership like the ones at issue here. Both CL Mgmt and CLP are closely-held limited partnerships. GLFP alleged that the Clarks, as managing general partners of both entities, acted for their own benefit (and that of the Clark family) and to the detriment of GLFP (and the Leamings). As managing general partners, the Clarks were the equivalent of controlling shareholders in a close corporation, *i.e.*, it would have been the Clarks' decision as to whether CLP would bring any action for derivative harm. Accordingly, requiring that a damage claim be brought in the name of CLP places GLFP in an untenable position and exalts form over substance. Therefore, even if the district court were correct in classifying all the asserted claims as derivative, it should have permitted GLFP to pursue these claims under established Utah law. *See Arndt*, 991 P.2d at 589. *See also Simon v. Mann*, 373 F. Supp. 1196, 1198-1200 (D. Nev. 2005) (discussing rationale for close-corporation exception for bringing derivative claims).

III. THE DISTRICT COURT ERRED IN DENYING PLAINTIFF'S MOTION TO AMEND.

In light of the district court's determination that the asserted claims were derivative, GLFP moved to amend its Complaint to comply with the court's decision. Specifically, GLFP sought leave to allege that it was entitled to pursue the derivative claims consistent with § 48-2a-1003, which provides:

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*.

This statute effectively recognizes the “futility of demand” exception to bringing derivative claims in the name of the limited partnership when the general partner controlling the partnership has a conflict in asserting those claims. Here, GLFP’s Complaint, on its face, showed that the Clarks had a conflict because their conduct (both individually and through CL Mgmt) was the basis for the asserted claims. R. at 3-5. These allegations were sufficient to establish futility of demand. *See* 13 FLETCHER CYCLOPEDIA CORPORATIONS § 5965 at 87 (2004) (“if the plaintiff pleads sufficient facts to create a reasonable doubt that the directors are disinterested or independent, futility of demand has been established”); *id.* at 74-75 (“Courts have generally excused demand if it would be directed to individuals who, by reason of hostile interest or participation in the alleged wrongdoing, cannot be expected to institute litigation on behalf of the corporation.”).

GLFP’s motion to amend noted that Mr. Clark had acknowledged the conflict by offering to “involve respected third party experts for assessment of the merits of any purported derivative claims.” R. at 440. Nothing in the case law supports a requirement that a limited partner must agree to have a third party evaluate derivative claims when the general partner has a conflict. To the contrary,

the Utah statute recognizes that a limited partner may bring the action and assert the derivative claim when it is futile to request the general partner to do so. *Cf. Peller v. Southern Co.*, 911 F.2d 1532, 1537 (11th Cir. 1990) (in appointing special committee to evaluate claim, board of directors conceded its conflict and therefore demand was excused).

The district court failed to address the merits of the motion to amend. Instead, the district court erroneously concluded that, because it had denied the motion for reconsideration regarding the dissolution claim, the motion to amend was moot. R. at 576. No rationale was offered for this conclusion, which was clearly erroneous. GLFP in no way linked the motion for reconsideration with the motion to amend. In fact, the whole basis for the motion to amend was the district court's determination that the asserted claims were derivative in nature. R. at 440. In that respect, denial of the motion to reconsider buttressed the motion to amend, rather than rendered it moot. The motion to amend, in seeking to assert derivative claims, could not have been moot when the district court reiterated its conclusion that all the claims at issue were derivative. The district court's finding of mootness is a non sequitur.

CONCLUSION

In this case, GLFP (and the Leamings) had facially valid complaints regarding the actions of Defendants, whether labeled derivative or otherwise. The

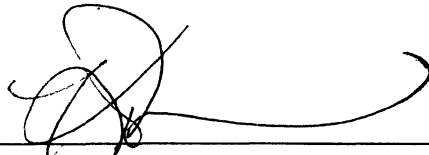
district court's decision requires minority shareholders or limited partners, such as GLFP, to present claims to the alleged wrongdoers for consideration and action.

This perverse outcome should be rejected.

Plaintiff-Appellant respectfully requests that the district court's summary judgment be reversed and this matter be remanded for full discovery and trial on the merits.

Dated this 7th day of September, 2006.

HOLLAND & HART LLP

By: 
Brent E. Johnson, 7558
Katherine Norman, 9573
Holland & Hart LLP

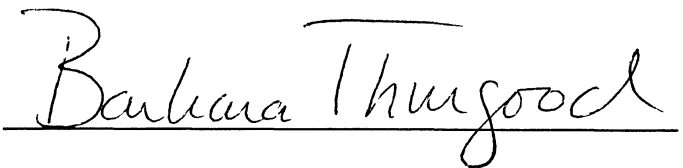
A. Bruce Jones, #11370
Holland & Hart LLP

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that two (2) true and correct copies of the BRIEF OF APPELLANT
were hand delivered on September 7, 2006 to the following:

Jeffery S. Williams
Jeffrie L. Hollingworth
NELSON CHRISTENSEN & HELSTEN
68 South Main Street, Suite 600
Salt Lake City, Utah 84101



3599080_4.DOC

Addendum

Exhibit 1

CL MANAGEMENT, LTD.

GENERAL PARTNERS:

Howard Clark – 10%

MB Management, Inc. – 2%

LIMITED PARTNERS:

GLFP – 47%

HCFP – 39%

GL Marital Trust – 2%

Assets:

No real property

**CLARK LEAMING
INVESTMENT CO.**

GENERAL PARTNER:

CL Management – 2%

LIMITED PARTNERS:

HCFP – 45%

J. Leaming Trust – 22.5%

S. Pollish – 22.5%

Assets:

Have been sold

**MODULUS
INVESTMENT CO.**

GENERAL PARTNERS:

CL Management – 2%

Woodbury Trust – 1%

G. Richard Young – 1%

LIMITED PARTNERS:

HCFP – 24%

Woodbury Trust – 24%

Riuchard Young – 24%

J. Leaming Trust – 12%

S. Pollish – 12%

Assets:

Have been sold

**CLARK LEAMING
PROPERTIES**

GENERAL PARTNER:

CL Management – 10%

LIMITED PARTNERS:

HCFP – 45%

GLFP – 45%

Assets:

Phoenix (land and building)

Sacramento (building only)

Santa Monica (building only)

Montery (building only)

CLARK LEAMING, INC.

Merline Leaming – 50%

Howard Clark – 14%

Betty Clark – 36%

**MB MANAGEMENT,
INC.**

Merline Leaming – 50%

Betty Clark - 50%

Exhibit 2

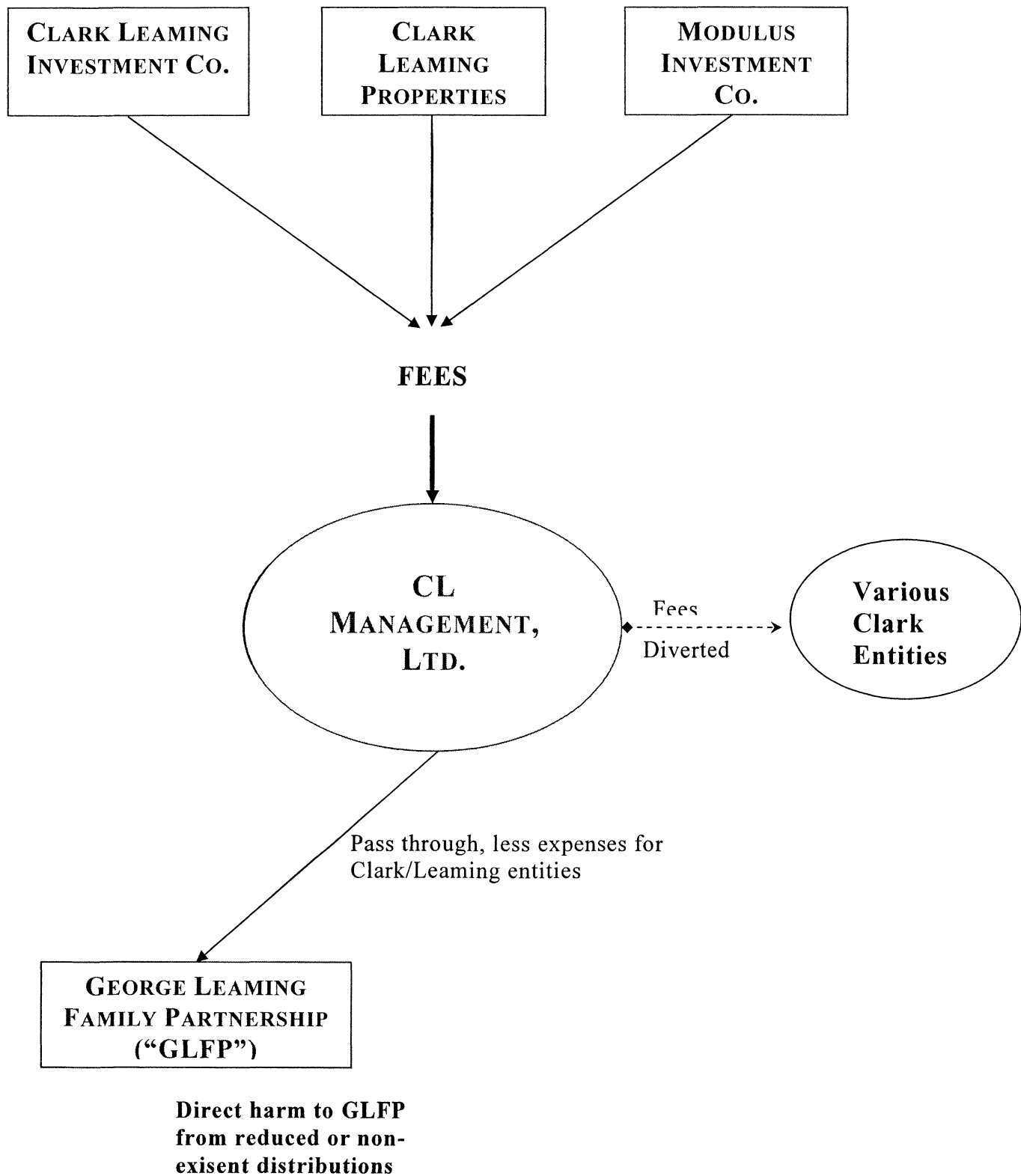


Exhibit 3

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

<p>GLFP, LTD., a Utah limited partnership,</p> <p>Plaintiff,</p> <p>vs.</p> <p>CL MANAGEMENT, LTD., a Utah limited partnership; CLARK LEAMING PROPERTIES, LTD., a Utah limited partnership; and HOWARD S. CLARK and H SCOTT CLARK, individuals,</p> <p>Defendants.</p>	<p>FILED DISTRICT COURT Third Judicial District</p> <p>NOV - 7 2005</p> <p>SALT LAKE COUNTY</p> <p>By <u>[Signature]</u> Deputy Clerk</p> <p>MEMORANDUM DECISION</p> <p>Case No. 050902498</p> <p>Honorable GLENN K. IWASAKI</p> <p>November 3, 2005</p>
--	---

The above-entitled matter comes before the Court pursuant to Defendants' Motion for Summary Judgment Re: Assignments and Defendants' Motion for Summary Judgment Re: Derivative Claims. The Court heard oral argument with respect to the motions on October 31, 2005. Following the hearing, the matters were taken under advisement.

The Court having considered the motions, memoranda, exhibits attached thereto and for the good cause shown, hereby enters the following ruling.

Turning initially to the motion regarding assignments, Defendants assert it has now been established that GLFP in 2002 assigned, entirely, its limited partner interests in CL

Management and Clark Leaming Properties, Ltd., to the wholly separate parties of Sumerlea, Ltd. and Ming, Ltd. Given these assignments, it is Defendants' position GLFP has no standing to pursue any of the claims set forth in the Complaint. Thus, contend Defendants, CL Management is entitled to summary judgment on all claims.

Plaintiff opposes the motion arguing Merline and Jan Leaming vigorously assert that no assignment ever took place.¹ Moreover, asserts Plaintiff, the evidence shows that the Consent documents were never fully executed and the Consents were intended as consents to assignments that were never consummated. Indeed, contends Plaintiff, one of the alleged assignees, Ming, was never formed. Furthermore, the Consent documents were never delivered to Plaintiff, as required for valid acceptance.

Even if the Consents were otherwise valid as assignments, it is Plaintiff's position Defendants should be estopped to rely upon them because of their inequitable action in concealing the executed Consent documents from Plaintiff while extracting continued cash calls and fees from Plaintiff.

¹Merline contends that as part of her estate planning, she contemplated using two partnerships to divide the assets among her daughters. Ming with her daughter Jan and Sumerlea with her daughter Susan. Plaintiff, however, contends said plans were ultimately abandoned.

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.

Turning next to the motion regarding derivative claims, Defendants argue Plaintiff is seeking to assert, directly, claims that are as a matter of law, derivative. Indeed, contend Defendants, Plaintiff in its Complaint and discovery responses identifies two factual theories that allegedly support all of its claims. These theories, assert Defendants, are that Defendant CL Management, as the general partner, (1) mismanaged certain real property holdings owned by Clark Leaming Properties Ltd.; and (2) charged improper and illegal fees to Clark Leaming Properties, Ltd. Both of these theories, contend Defendants, are derivative and can only support derivative claims for relief.

The aforementioned in mind, it is Defendants' position Plaintiff failed to comply with Utah law regarding the assertion of derivative claims. For example, Plaintiff has not set forth any efforts made to secure the action desired from the general partner, the reasons the effort failed, or why they chose not to make the effort.

In light of the forgoing, Defendants seek summary judgment

on the theories noted above, as well as Plaintiff's attempted direct claim for breach of any fiduciary duties and such related damage theories.

Plaintiff opposes the motion arguing its claims are not derivative, rather, such are for injuries directly suffered by GLFP. Indeed, contends Plaintiff, its claim is that the harm to GLFP is direct in that, contrary to the Clarks' representations, the excessive fees do not equally benefit the Clarks and GLFP-via distributions from CL Management. Rather, contends Plaintiff, the Clarks have used the improper fees to help fund their own interests to the detriment of Plaintiff and derivatively to the Leamings.² In other words, asserts Plaintiff, because of CL's involvement with entities that benefit the Clarks alone, the Leamings have been paying a disproportionate share of expenses and receiving less in distributions, thereby effectively subsidizing the management of properties from which they derive no benefit.³

²As background, Defendant Clark Leaming Properties ("CLP") is a Utah Limited Partnership. CL Management ("CL") is a Utah Limited partnership and Defendant Howard Clark is the Managing Partner of CL. CL is the Managing General Partner of CLP. CL Owns 10% of CLP. The remaining 90% of CLP is owned equally by the Leaming family through Plaintiff GLFP (short for George Leaming Family Partnership) and the Clarks, through an entity called HCFP (short for the Howard Clark Family Partnership).

³In the Complaint Plaintiff states ". . . the Clarks have commingled the activities of numerous properties and interests-in


Indeed, to the extent any of GLFP'S claims could be deemed derivative, it is Plaintiff's position Utah law permits such claims under circumstances such as this, where the shareholders are part of a closely held corporation.

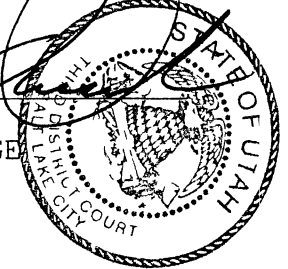
After, again, reviewing the record in this matter, the Court agrees that GLFP is seeking to assert, directly, claims that are, as a matter of law, derivative. Indeed, although GLFP may ultimately experience the indirect effect of the alleged wrongdoing, the undisputed evidence indicates that the only 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.

Based upon the forgoing, Defendants' Motion for Summary Judgment Re: Derivative Claims is granted.

which the Leamings have no ownership but the Clarks do-with the business of CL Management. In doing so, the Clarks have used the improper fees to help fund their own interests, to the detriment of Plaintiff and, derivatively, to the Leamings." Complaint at 13.

DATED this 7 day of November, 2005.


GLENN K. IWASAKI
DISTRICT COURT JUDGE




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050902498 by the method and on the date specified.

METHOD NAME

Mail	BRENT E JOHNSON ATTORNEY PLA 60 E S TEMPLE STE 2000 SALT LAKE CITY, UT 84111-1031
Mail	A BRUCE JONES ATTORNEY PLA PO BOX 8749 555 17TH ST STE 3200 DENVER CO 80201-8749
Mail	JEFFERY S WILLIAMS ATTORNEY DEF 68 S MAIN ST 6TH FLR SALT LAKE CITY UT 84101

Dated this 17th day of Nov., 2005.



Deputy Court Clerk

Exhibit 4

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GLFP ltd., a Utah limited
partnership,

Plaintiff,

vs.

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

Defendants.

MINUTE ENTRY

Case No. 050902498

Honorable GLENN K. IWASAKI

April 5, 2006

FILED DISTRICT COURT
Third Judicial District

APR - 5 2006

SALT LAKE COUNTY

By [Signature] Deputy Clerk


The above-entitled matter comes before the Court pursuant to Plaintiff's Motion for Reconsideration, Plaintiff's Motion to Amend, Defendant's Motion to Strike and Defendant's Motion for Entry of Judgment, submitted for decision on March 23, 2006. Although oral argument was requested, the Court is not persuaded such would be of assistance in this matter, nor is a hearing required by the applicable Rules. Accordingly, the ruling with respect to the motions will be addressed in the following Minute Entry.

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).

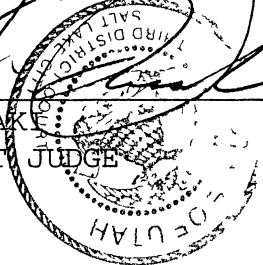
Based upon the forgoing, Plaintiff's Motion for Reconsideration is, respectfully, denied. Accordingly,

Plaintiff's Motion to Amend and Defendant's Motion to Strike are moot. The Court will execute the submitted Order and Judgment.

DATED this 5 day of April, 2006.



GLENN K. IWASAKI
DISTRICT COURT JUDGE




CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050902498 by the method and on the date specified.

METHOD NAME

Mail	A BRUCE JONES ATTORNEY PLA PO BOX 8749 555 17TH ST STE 3200 DENVER, CO 80201-8749
Mail	KATHERINE NORMAN ATTORNEY PLA 60 E S TEMPLE STE 2000 SALT LAKE CITY UT 84111
Mail	JEFFERY S WILLIAMS ATTORNEY DEF 68 S MAIN ST 6TH FLR SALT LAKE CITY UT 84101

Dated this 5 day of April, 2006.


Deputy Court Clerk

FILED DISTRICT COURT
Third Judicial District

APR - 5 2006

SALT LAKE COUNTY

By _____
Deputy Clerk

Jeffery S. Williams (6054)
NELSON CHRISTENSEN & HELSTEN
68 South Main Street, Suite 600
Salt Lake City, UT 84101
Telephone: (801) 531-8400
Facsimile: (801) 363-3614

Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

GLFP, LTD., a Former Utah limited
partnership,

Plaintiff,

vs.

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

Defendants.

**ORDER GRANTING SUMMARY
JUDGMENT REGARDING DERIVATIVE
CLAIMS AND DENYING SUMMARY
JUDGMENT REGARDING
ASSIGNMENTS**

Civil No.: 050902498
Judge Glenn K. Iwasaki

The defendants CL Management, Ltd, Clark Leaming Properties, Ltd, Howard S. Clark and H. Scott Clark filed two motions for summary judgment, which came before the Court for hearing on October 31, 2005. These motions were fully briefed, and extensive argument was offered to the Court. At the hearing, the defendants were represented by Mr. Jeffery Williams, and the plaintiff GLFP, Ltd was represented by Mr. Bruce Jones and Ms. Katherine Norman.


Having considered the arguments of counsel and the briefing previously provided to the Court, the Court hereby Orders as follows:

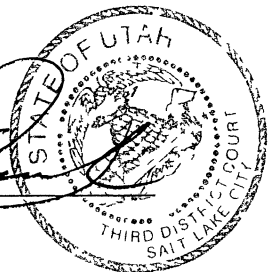
1. The Court denies the defendants' motion for summary judgment based on the contested assignments between the plaintiff and the third party entities of Ming, Ltd and Sumerlea, Ltd. The grounds for denying this motion for summary judgment are set forth in the Court's memorandum decision dated November 7, 2005.

2. The Court grants the defendants' motion for summary judgment based on the existence of only derivative claims asserted in the plaintiff's complaint. The grounds for granting this motion for summary judgment are set forth in the Court's memorandum decision dated November 7, 2005. A judgment consistent with this portion of the Order was entered by the Court.

DATED this 5 day of April, 2008

BY THE COURT:


Honorable Glenn K. Iwasaki



CERTIFICATE OF SERVICE

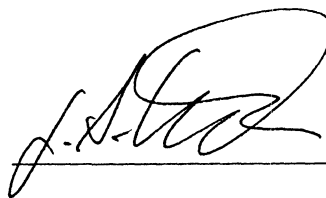
I hereby certify that a true and correct copy of the foregoing **ORDER GRANTING SUMMARY JUDGMENT REGARDING DERIVATIVE CLAIMS AND DENYING SUMMARY JUDGMENT REGARDING ASSIGNMENTS** was served in the manner indicated below this 18th day of November, 2005, upon:

Brent E. Johnson
Katherine Norman
Holland & Hart, LLP
60 East South Temple, Suite 2000
Salt Lake City, UT 84111-1031

(VIA HAND-DELIVERY)

A. Bruce Jones
Patricia Dean
Holland & Hart, LLP
555 17th Street, Suite 3200
P.O. Box 8749
Denver, CO 80201-8749

(VIA U.S. MAIL)

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

Jeffery S. Williams (6054)
NELSON CHRISTENSEN & HELSTEN
68 South Main Street, Suite 600
Salt Lake City, UT 84101
Telephone: (801) 531-8400
Facsimile: (801) 363-3614

Attorneys for Defendants

FILED DISTRICT COURT
Third Judicial District

APR 5 2006
SALT LAKE COUNTY
By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

<p>GLFP, LTD., a Former Utah limited partnership,</p> <p>Plaintiff,</p> <p>vs.</p> <p>CL MANAGEMENT, LTD., a Utah limited partnership; CLARK LEAMING PROPERTIES, LTD., a Utah limited partnership; and HOWARD S. CLARK and H. SCOTT CLARK, individuals,</p> <p>Defendants.</p>	<p>JUDGMENT</p> <p>Civil No.: 050902498 Judge Glenn K. Iwasaki</p>
---	---

The Court, pursuant to Rule 54 of the Utah Rules of Civil Procedure, hereby enters judgment in this matter based on the motion for summary judgment filed by the defendants.

The Court finds that all of the claims set forth in plaintiff's complaint are derivative claims, and/or are premised on derivative claims for relief. Thus, the Court accordingly directs judgment in favor of the defendants, in that the plaintiff has improperly asserted such claims

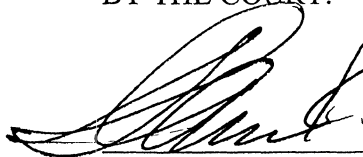
directly and in violation of Utah statutory law. See Utah Code Ann. §§48-2a-1001 through 1006, and Arndt v. First Interstate Bank of Utah, 991 P.2d 584 (Utah 1999). The grounds and rationale supporting this judgment are set forth in the Court's Memorandum Decision dated November 7, 2005.

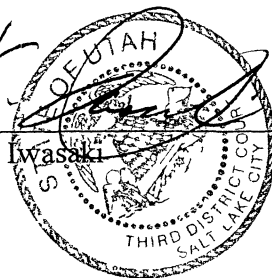
This judgment does not preclude the plaintiff from pursuing proper derivative proceedings consistent with the requirements of Utah law, and to the extent such proceedings are otherwise appropriate.

Pursuant to Rules 54(d) and 73 of the Utah Rules of Civil Procedure, fees and/or costs in the amount of \$_____ are awarded to the defendants.

DATED this 5 day of April, 2006

BY THE COURT:


Honorable Glenn K. Iwasaki



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **JUDGMENT**
was served in the manner indicated below this 18th day of November, 2005, upon:

Brent E. Johnson (VIA HAND-DELIVERY)
Katherine Norman
Holland & Hart, LLP
60 East South Temple, Suite 2000
Salt Lake City, UT 84111-1031

A. Bruce Jones (VIA U.S. MAIL)
Patricia Dean
Holland & Hart, LLP
555 17th Street, Suite 3200
P.O. Box 8749
Denver, CO 80201-8749

