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NO. 91247-5

SUPREME COURT OF THE STATE OF WASHINGTON

CAROLYN ROBBS BILANKO, an individual, Plaintiff/Respondent, vs. BARCLAY COURT OWNERS ASSOCIATION, a Washington non-profit corporation, Defendant/Appellant.	RESPONDENT BILANKO'S FIRST STATEMENT OF ADDITIONAL AUTHORITY

Pursuant to RAP 10.8 and in response to Appellant Barclay Court Owners Association's First Statement of Additional Authority, Respondent Carolyn Robbs Bilanko hereby identifies and attaches the following additional authority relevant to the issue of whether Amendment No. 1 to the Barclay Court Condominium Declaration was *void ab initio* for failure to comply with the voting requirements in RCW 64.34.264(4):

1. *Gaster Family Ltd. Partnership v. Colonial Hotel, LLC*, No. B193538, 2011 WL 3307912, at *16 (Cal. Ct. App. Aug. 3, 2011) (unpublished)[1] ("Our case is distinguishable because the failure to comply

[1] Under Washington RAP 14.1(b), a party may cite for authority an "unpublished" out-of-state opinion as long as "that opinion is permitted under the law of the jurisdiction of the issuing court." In turn, California Rule of Court 8.1115(b)(1) provides that "[a]n unpublished opinion may be cited or relied on ... [w]hen the opinion is relevant under the

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with the ULPA amendment requirements rendered the purported fee increase void from the outset, as GFLP argued. Neither *Costa Serena, supra*, 175 Cal. App. 4th 1175 nor *Schuman v. Ignatin, supra*, 191 Cal. App. 4th 255 involved a similar situation where an action was rendered void because of a failure to comply with statutory requirements.") (italics in original, underline added).

Respectfully submitted this 17th day of February 2016.

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doctrines of law of the case." Because *Gaster* is relevant to the issue of whether Amendment No. 1 was *void ab initio* for failure to comply with RCW 64.34.264(4), it is citable under California Rule of Court 8.1115(b)(1) and thus Washington RAP 14.1(b).

PROOF OF SERVICE

I declare that on February 17th, 2016, I caused a true copy of the foregoing RESPONDENT BILANKO'S FIRST STATEMENT OF ADDITIONAL AUTHORITY to be served on the following in the manner indicated:

Averil Rothrock, WSBA #24248 Larry A. Costich, WSBA #32178 Milton A. Reimers, WSBA #39390 Schwabe, Williamson & Wyatt, P.C. 1420 Fifth Avenue, Suite 3400 Seattle, WA 98101 arothrock@schwabe.com lcostich@schwabe.com mreimers@schwabe.com	☐ Via Hand Delivery ☐ Via Facsimile ☐ Via U.S. Mail ☐ Via Overnight Delivery ☒ Via E-Mail by Party Agreement

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APPENDIX A

2011 WL 3307912
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Second District, Division 4, California.

GASTER FAMILY LIMITED PARTNERSHIP, Plaintiff and Appellant,
v.
COLONIAL HOTEL, LLC et al., Defendants and Appellants.

No. B193538.
|
(Los Angeles County Super. Ct. No. SC069404).
|
Aug. 3, 2011.

APPEAL from a judgment of the Superior Court of Los Angeles County, Carl J. West, Judge. Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

Schreiber & Schreiber, Edwin C. Schreiber and Eric A. Schreiber, for Defendants, Appellants, and Cross–Respondents.

R. Roy Finkle for Plaintiff, Respondent, and Cross–Appellant GFLP.

Goodheart & Goodheart, Michael R. Goodheart and Gregory J. Goodheart for Defendants and Cross–Appellants Sunset Towers West, Ltd. and Linda Manor Ltd.

Opinion

EPSTEIN, P.J.

*1 In this opinion, we address the vicissitudes that can arise when a limited partnership continues to operate through the adoption of successive and overlapping partnership laws without amending its certificate to be bound by one of the newer statutes. The appeal arises out of a dispute concerning a number of real estate ventures in which the plaintiff, Gaster Family Limited Partnership (GFLP), was a limited partner. Defendants include general partners of the various real estate ventures and related entities (defendants). We conclude that the issues regarding one of these ventures, Sunset Towers West, Ltd. (Sunset partnership) are controlled by the California Uniform Limited Partnership Act (ULPA), Corporations Code section 15501 et seq.[1] Issues regarding Linda Manor Ltd. (Linda Manor), another of the entities, are governed by the California Revised Limited Partnership Act (RLPA), section 15611 et seq.

In the remainder of the opinion we reject defendants' argument that GFLP lacks standing to bring the derivative causes of action. We also conclude the Sunset management fee increase was illegal under the governing law. We reject defendants' argument that the increase was ratified by the Sunset partners, either expressly or by implication. The trial court properly concluded that the statute of limitations applied to limit GFLP's damages for the fee increase to the four years preceding the filing of the complaint, but that it was not a complete bar to the claim. We reject defendants' equitable defenses to the fee claim.

We reverse the excessive management fee award only as to individual defendants Brown, Rose, Leebove, and GESEG, Inc. because they were not general partners of the limited partnership to which the general partners charged excessive fees within four years prior to the filing of the complaint. The trial court made no finding that they were liable under an alter ego theory and we find no other basis to hold them liable. The excess fee award is affirmed as to the successor general partner, Sunset Plaza Management Co., LLC.

The judgment is affirmed on the usury causes of action. We agree with the trial court that section 203 Restatement Second of Conflicts governs the choice of law on these causes of action. GFLP was not entitled to recovery on the Linda Manor loans under that rule. We also affirm the trial court's conclusion that GFLP was precluded from recovering on the Sunset Plaza Renovation Loan because it did not comply with the statutory requirements to obtain a judgment against the individual defendants on this allegedly usurious loan.

We affirm the trial court's determination on fees with one exception. The trial court should have applied the common fund doctrine to GFLP's application for fees for its recovery of excessive management fees and usurious interest on one Sunset Plaza loan. We remand for the application of that doctrine and recalculation of fees on that basis. The trial court denied mandatory costs to all parties. We conclude that this was error, and remand for a determination of the appropriate cost awards. We also hold that defendants, except Linda Manor and La Mesa Inn are entitled to fees on appeal. All defendants are entitled to costs on appeal.

FACTUAL AND PROCEDURAL SUMMARY

A. The Parties and Relevant Entities

***2** Plaintiff GFLP is a limited partner with an equity stake in a series of real estate investment limited partnerships and limited liability companies. The Gaster Family Trust, the predecessor holder of an interest in these ventures, was created with Dr. Joseph and Tobe Gaster as sole trustees. The Gasters were husband and wife. The Sunset partnership was formed in 1979. The Gaster Family trust became a limited partner in the Sunset partnership with a 12 percent interest the same year. In October 1993, the trust's interest in the Sunset partnership was transferred to GFLP, with Joseph named general partner. Tobe Gaster died in 1993. In 1998, the Gasters' children, Wendy Gaster Tillman and Ronald Gaster, were substituted as general partners in GFLP. Joseph Gaster died in January 2001.

Linda Manor Ltd. was formed as a California limited partnership in 1986 to operate and manage a 188–unit apartment complex in Las Vegas, Nevada, known as the Linda Manor Inn. The general partners were Edward I. Brown, GESEG, Inc., a California Corporation, Dave Murray and David Rose. The Joseph & Tobe Gaster Family Trust had an eight percent interest as a limited partner. The trust's interest in Linda Manor was transferred to GFLP. For simplicity, we generally refer to the various interests acquired by Dr. and Mrs. Gaster, the Gaster Trust, and GFLP as held by GFLP unless otherwise necessary.

Defendants Edward Brown, Joel Leebove, David Rose, GESEG, Inc., and Glenn Grush are described in the litigation as general partners and managing members of these real estate ventures.[2] Also named as defendants were the limited liability companies and partnerships in which GFLP invested.[3] The final group of defendants was comprised of various entities formed by general partners for investment, management, or lending to the ventures in which GFLP invested. The parties engaged in eight real estate ventures, of which six investment partnerships were at issue in this case at trial.

B. Sunset Partnership Management Fee Increase

In October 1990, David Rose, on behalf of the general partners, wrote to the limited partners of the Sunset partnership seeking their approval of an increase in the three percent management fee allowed by the Sunset partnership agreement to five percent. The letter stated: "If you approve of this recommendation, you need do nothing, although, if you choose, you may signify your approval below and return this letter. If you disapprove you must indicate so on the bottom of this letter and return by October 12, 1990." In response, 56 percent of partners were in favor, 2.22 percent opposed, and the balance (41.78 percent) did not vote. The five percent management fee purportedly went into effect in November 1990.

David Rose wrote to the limited partners again in December 2003 about the 1990 vote. He explained that the ongoing Tillman litigation (which we assume to be this case, in which Wendy Tillman is a general partner of plaintiff GFLP), had raised issues about the 1990 management fee vote. Rose said that the limited partners who had not responded to the 1990 request were counted as approving votes. He requested confirmation that "you approved of the increase but did not respond in writing as it was not required at the time." Three ballots were returned stating that the 1990 fee increase was not approved.

C. Procedural History

***3** GFLP's complaint alleged individual causes of action for breach of fiduciary duty and intentional misrepresentation regarding properties in Las Vegas (all of the properties except Sunset), derivative causes of action (seven breach of contract, seven breach of fiduciary duty, four intentional misrepresentation), and equitable and non-monetary causes of action and a cause of action for aiding and abetting various misdeeds. The gravamen of the claims relevant to this appeal is that defendants illegally increased management fees paid them for the Sunset partnership in 1990 in violation of the partnership agreement and governing law and that usurious interest was charged on various loans to the real estate ventures and paid to the defendants. The charging pleading is the second amended complaint.

The issues between the parties were narrowed and focused through various pretrial motions. The court appointed a receiver for the investment partnerships. Pretrial rulings on cross-motions by the parties to resolve threshold issues were made by the trial court.

A bench trial was conducted over five days. The court issued a 31–page statement of decision. It initially concluded that GFLP's claim for excessive management fees was barred by the statute of limitations and because the partnership agreement permitted the fees.

The trial court substantially modified its findings and conclusions in two supplemental statements of decision, filed June 29, 2006 and July 26, 2006. Sunset partnership was awarded judgment for $633,580 plus prejudgment interest for breach of fiduciary duty arising from the illegal management fee increase from three to five percent. It also was awarded $35,297 for usurious interest paid without prejudgment interest (against all defendants except Rose). GFLP's recovery was expressly limited "to recovery on its derivative claims...."

The parties brought cross-motions for attorney fees and costs. In its amended ruling, the trial court found the "majority of Defendants" to be prevailing parties and awarded them the collective amount of $348,757 in fees and found costs not taxable. It also found GFLP to be the prevailing party on the Sunset management fee issue and awarded it $105,121 in fees. All parties' motions for costs were denied.

Following entry of judgment GFLP and defendants filed cross-appeals. Defendants' appeal challenges rulings only as to Sunset: the management fee increase, and the allegedly usurious loan. GFLP's appeal challenges the trial court's rulings regarding usurious loans by defendants to the Sunset partnership and Linda Manor in Nevada. In a separate brief, cross-appellants Sunset Towers West, Ltd. and Linda Manor Ltd. appeal the court's rulings on fees and costs.

Following oral argument, we vacated submission and directed the parties to file supplemental briefs on a number of issues related to the governing law. The matter was resubmitted at the conclusion of the supplemental briefing.

I

Governing Partnership Law

*4 The California Legislature has enacted three successive and overlapping limited partnership acts, and also successive general partnership laws to which the limited partnership laws resort on issues not covered by the limited partnership acts.[4] The resulting confusion is magnified by the position of counsel for both sides in successfully urging the trial court to apply what they later recognized to be inapplicable law to the Sunset partnership. The parties repudiated these positions in supplemental briefing ordered after oral argument here. The determination of the proper version of the law is significant to several issues in this case, including the validity of the increase in the Sunset management fees and GFLP's standing to bring this derivative action. We therefore first resolve that issue.

The Sunset partnership was formed August 21, 1979. The governing limited partnership law at that time was the California Uniform Limited Partnership Act (ULPA), adopted in 1949.[5] (§ 15501, et seq.) Linda Manor, the other partnership entity at issue in this case, was formed later, on April 28, 1986, under the terms of the California Revised Limited Partnership Act (§ 15611 et seq. RLPA) which governs limited partnerships formed after its July 1, 1984 effective date.

Defendants consistently urged the trial court to apply the RLPA to all issues, including the validity of the management fee increase for Sunset. GFLP's position as to the governing law was not consistent. Initially it urged the trial court to apply the RLPA, and through it, the 1994 Uniform Partnership Act (§ 16100 et seq. (UPA 1994)). This was GFLP's position when the trial court issued its threshold ruling that the increase in management fee for Sunset was unauthorized because it was not approved by a unanimous vote of the partners. A month before trial, GFLP filed a revised trial brief contending that the management fee issue was to be determined, instead, by application of the ULPA. Nevertheless, the trial court applied the RLPA to the management fee issue. Since there was no provision under the RLPA on the propriety of the fee amendment, it looked to the UPA 1994, section 16401, subdivision (j), to decide that issue. The court concluded that a unanimous vote of the partners was required to approve the fee increase under that statute .[6] We discuss the validity of the fee increase in a later portion of this opinion.[7]

On appeal, GFLP took the position that the ULPA governed the Sunset management fee increase. Alternatively, it argued we should affirm the trial court's conclusion based on the RLPA under a two-step analysis: first, the RLPA does not state an express standard for amendment of a partnership agreement; second, section 15722 of the RLPA states that in any case not provided for in its provisions, the limited partnerships shall be governed "in the same manner as general partnerships would be governed ... by the Uniform Partnership Act." The parties on appeal and the trial court all assumed that the relevant "Uniform Partnership Act" was the UPA 1994. As we shall explain, that assumption was incorrect.

*5 Defendants claimed in their appellate briefing that GFLP had never relied on the ULPA in the trial court, and therefore had forfeited the argument or had committed invited error. They also contended that application of the ULPA would open a "host" of new issues never raised at trial, including the viability of the Sunset partnership agreement. They argued instead that the key statute is section 16401, subdivision (j), of the UPA 1994, applicable through the RLPA.

After oral argument, we vacated submission and directed counsel to file supplemental briefs on the governing law. GFLP took the position that the ULPA governed Sunset, but that application of the RLPA to the management fee issue did not change the outcome of the case because unanimous approval of the partners was required under both statutes. It contended that application of the RLPA did not constitute prejudicial error on the fee increase issue for the same reason. Defendants repudiated their earlier reliance on the RLPA and section 16401, subdivision (j), of the UPA 1994, conceding that the UPA 1994 had no application to the vote to increase the Sunset management fee which was taken before the enactment of that version of the partnership law. Instead, defendants argued that all versions of the California limited and general partnership laws allow the partners to agree to terms inconsistent with the governing law. Since the Sunset partnership agreement allowed the partners to take action in contravention of the agreement by majority vote, defendants argued the fee increase was proper under the terms of their agreement.

The ULPA governs limited partnerships formed before the RLPA went into effect on July 1, 1984, unless the partners elect to be governed by the terms of the RLPA. (§§ 15711, 15712; *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559–560; *Wallner v. Parry Professional Bldg., Ltd .* (1994) 22 Cal.App.4th 1446, 1450, fn. 3 (*Wallner*).) It is undisputed that the Sunset partners did not elect to be bound by the RLPA. We conclude that the ULPA therefore governs issues regarding the Sunset partnership.

Defendants argue a 1997 amendment of the Sunset partnership agreement had the legal effect of bringing it under the RLPA. In their original briefing on appeal, they assert that a unanimous vote of the partners in 1997 to extend the life of the Sunset partnership 30 years "must be treated as if Sunset was a new, or renewed partnership, and thus, fall[s] under the provisions of the [Revised Limited Partnership Act]." The argument is forfeited because it is not supported by citations to legal authority or to the material facts in the record. (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324.) It would fail in any case because paragraph 6 of the 1997 amendment states that the original Sunset partnership agreement was to remain in full force and effect except as expressly amended. None of the amendments approved in 1997 provided that the RLPA was to apply to the Sunset partnership, and we find no agreement to apply it in the 1997 vote amending other terms of the Sunset partnership.[8]

*6 We therefore apply the provisions of the ULPA rather than the RLPA to issues regarding the Sunset partnership. As to the issues regarding Linda Manor, we apply the RLPA. We will address the impact of these holdings as we discuss the issues raised by the parties.

In 2006, the Legislature enacted the California Limited Partnership Act of 2008 (§ 15900 et seq. (2008 Act)). It went into effect January 1, 2008. Limited partnerships formed before that date were to continue to be governed by the predecessor acts, unless the partnership elected to be bound by the 2008 Act. (§ 15912.06.) But as of January 1, 2010, the 2008 Act governs all limited partnerships, and the predecessor acts are technically repealed. (§ 15912.06, see Historical and Statutory Notes, 24B West's Ann. Corp.Code (2011 Supp.) foll. § 15501, p. 1, and foll. § 15611, p. 5; see also 9 Witkin, Summary of Cal. Law (10th ed.2011 supp.) Partnership, § 121A, p. 86.) We say it is a "technical" repeal because section 15912.07 provides that the 2008 Act "does not affect an action commenced, proceeding brought, or right accrued before this chapter becomes operative." This action was pending in 2010, and therefore is still governed by the ULPA as to the Sunset partnership and the RLPA as to Linda Manor. For that reason, we do not use the designation "former" when referring to ULPA provisions, despite this tangled legislative history.

II

Limited Partnerships

The California Supreme Court examined the nature of limited partnerships in *Evans, supra,* 16 Cal.3d 300. It explained: "The form of business association known as a 'limited partnership' was not recognized at common law and is strictly a creature of statute. [Citations.] It can generally be described as a type of partnership comprised of one or more general partners who manage the business and who are personally liable for partnership debts, and one or more limited partners who contribute capital and share in the profits, but who take no part in running the business and incur no liability with respect to partnership obligations beyond their capital contribution. [Citations.]" (*Id.* at pp. 305–306, fn. omitted.)[9]

In order to form a limited partnership under the ULPA, two or more persons must execute a certificate setting out various details about the partnership and record the certificate in the county where the principal place of business of the partnership is located. (§ 15502.) In our case, the Sunset partnership was created by a single document which was entitled "CERTIFICATE AND AGREEMENT OF LIMITED PARTNERSHIP OF SUNSET TOWERS WEST, LTD." We refer to this as the Sunset partnership agreement. Similarly, Linda Manor was created by a "Certificate and Agreement of Limited Partnership."

III

Standing to Bring Derivative Action

GFLP acknowledges this action is primarily derivative in nature, brought on behalf of the investment partnerships and their limited partners, with GFLP serving as a representative plaintiff for purposes of this appeal.

A. Role of the Receiver

*7 Defendants argue GFLP lacked standing to bring a derivative action on behalf of the limited partners because a receiver was appointed and discharged upon entry of judgment, divesting GFLP of appellate standing. Defendants contend that there is no right to pursue a derivative action at common law in California. As we discuss in more detail below, the court in *Wallner, supra,* 22 Cal.App.4th at p. 1450, fn. 4, held that there was a common law right to bring a derivative action in equity.

Defendants also contend that a plaintiff in a derivative action is akin to a guardian ad litem with no personal interest in the outcome of the litigation, and therefore is not personally aggrieved by the judgment or order of the trial court and lacks standing to appeal. GFLP responds that the receiver was appointed for a limited purpose, and was not substituted as derivative plaintiff. It points out that in its briefing to the trial court on the appointment of the receiver, each side took the position that it was to be a limited appointment. In their trial brief on the issue, defendants stated: "[T]he Court, if it appoints a Limited Purpose Receiver, must ensure that the Limited Purpose Receiver has no authority other than to hire counsel for each entity, and oversee the process of the litigation and nothing more." And in its opening brief on appeal, defendants stated: "The Receiver permitted GFLP to continue to prosecute the litigation."

The record explains the context for appointment of the receiver. In July 2004, the trial court granted GFLP's motion to disqualify Edwin C. Schreiber and Schreiber & Schreiber as counsel for the derivative partnership entities, but ruled that Schreiber and his firm could continue to represent the Sunset management company and the individual defendants. The notice of ruling states that the court set an order to show cause "why David J. Pasternak should not be appointed as a limited purpose receiver for the derivative partnership entities for the purpose of selecting counsel for the entity defendants and managing litigation issues."

On this record, we find no merit in defendants' argument that the appointment of the receiver deprived GFLP of standing to pursue the appeal. By defendants' own admissions in their pleadings, the receiver did not supplant GFLP as plaintiff in pursuing this action. In addition, as a limited partner, GFLP, along with the other limited partners, has an interest in the outcome of the action and thus has standing to appeal.

B. Standing

1. As to Sunset

Defendants argue that GFLP failed to plead and prove the elements necessary to establish standing to maintain this derivative action. This argument is based on the requirements of section 15702, a provision of the RLPA, which requires the plaintiff in a derivative action to plead and prove a written demand or futility of a demand that the general partners take such action as the plaintiff desires before filing suit. (§ 15702, subd. (a)(2).) In support of their standing argument, defendants cite cases arising in the context of a derivative action brought against a corporation under section 800 rather than against a limited partnership. (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572; *Nelson v. Anderson* (1999) 72 Cal.App.4th 111; *Shields v. Singleton* (1993) 15 Cal.App.4th 1611.)

*8 Section 15702 of the RLPA has no application to causes of action regarding the Sunset partnership because, as we have discussed, issues in this case regarding that partnership are instead controlled by the ULPA.[10] Although the ULPA had no statutory requirements to establish standing to bring a derivative action, the Court of Appeal in *Wallner, supra,* 22 Cal.App.4th 1446 held that a derivative action may be brought under the ULPA. *Wallner,* governed by the ULPA rather than the successor acts, involved a partnership formed to acquire and operate a medical office building. Some of the office suites were leased to entities in which the general partners of the limited partnership also were principals. These tenants fell into arrears on rent payments, causing the partnership to discontinue monthly dividends to the limited partners. Wallner, a limited partner, unsuccessfully demanded that the general partners secure payment of the rents and related late charges. He then brought suit against the partnership and the general partners on behalf of the limited partners. (*Id.* at pp. 1448–1449.) The defendants demurred, claiming that only the limited partnership itself had standing to sue.

The defendants in *Wallner* argued that a derivative action was not available under the ULPA because that statute does not include a provision similar to section 15702 of the RLPA setting out prelitigation requirements for a derivative action. The Court of Appeal rejected the argument: "There is, however, no evidence in the record or legislative history of which we are aware that supports this claim. Moreover, and as explained in the text below, the courts have concluded that a limited partner's derivative action arises from both equitable as well as statutory grounds. The addition of a code section which specifically allows that which was otherwise permitted in equity does not thereby amend the former law to eliminate an otherwise proper equitable cause of action." (*Wallner, supra,* 22 Cal.App.4th at p. 1450, fn. 4.)

The analysis in *Wallner* turned on the language of section 15526 of the ULPA. Section 15526 is identical to section 26 of the Model Uniform Limited Partnership Act and provides: "A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." After reviewing California cases decided under section 15526 and authority from other jurisdictions applying identical provisions, the court concluded that Wallner had standing under the common law to bring the derivative action against the limited partnership. (*Wallner, supra,* 22 Cal.App.4th at pp. 1451–1453.)

The *Wallner* court acknowledged that equity governs where the ULPA is silent: "California courts have long recognized that equitable principles apply to ULPA. (Corp.Code, § 15529.) Indeed, ULPA did not purport to state the rights of the limited partners under all circumstances, and that in any case not provided for by law, equity would govern. (*Linder v. Vogue Investments, Inc.* [(1966)] 239 Cal.App.2d [338] at p. 341.) To quote *Linder,* if the law were 'that a limited partner who may have a substantial investment in the partnership, must sit idly by and watch it disappear because the general partner refuses to' carry on the business of the partnership because it would adversely affect the finances of the general partner, '... something would have to be done about it.' (*Ibid.*) Allowing a limited partner's derivative action where the general partner refuses to carry on the partnership, as alleged here, is thus appropriate under Corporations Code section 15526." (*Wallner, supra,* 22 Cal.App.3d at p. 1454 .) Under these principles, Wallner was found to have adequately pleaded a derivative action.

*9 In summary, unlike the RLPA, the ULPA does not expressly require a limited partner to plead and prove that a demand for action was made or was futile in order to acquire standing to bring a derivative action. Defendants have cited no authority, and we have found none, holding that a demand or futility must be proven in an equitable derivative action.

2. As to Linda Manor

All but one of GFLP's usury claims at issue on appeal concerned loans made to Linda Manor. As to these claims, because the RLPA governs, we must determine whether the requirements of section 15702 were pled. Under section 15702, subdivision (a)(2) the plaintiff must allege it attempted to secure the action it desires from the general partners, or the reasons for not making that effort, and that plaintiff either informed the limited partnership or the general partner in writing of the ultimate facts of each cause of action against each defendant or delivered a copy of the complaint to the limited or general partners. While we have found no authority interpreting this provision, we find guidance in cases interpreting an analogous provision relating to derivative actions brought by a shareholder against a corporation (§ 800).

GFLP points out that a shareholder bringing a derivative action may be relieved of the obligation to make a pre-litigation demand by demonstrating that such a demand would have been futile. (*Shields v. Singleton, supra,* 15 Cal.App.4th at p. 1618.) "[T]he court, in reviewing the allegations to support demand futility, must be able to determine on a director-by-director basis whether or not each possesses independence or disinterest such that he or she may fairly evaluate the challenged transaction. [Citation.]" (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 790 (*Bader*).)

The *Bader* court explained: "The test commonly employed in determining the adequacy of the pleading of demand futility was enunciated by the Delaware Supreme Court in *Aronson v. Lewis* (Del.1984) 473 A.2d 805[, overruled on another ground in *Brehm v. Eisner* (Del.Supr.2000) 746 A.2d 244] (*Aronson*).... *Aronson* held that a court, in deciding whether a plaintiff will be excused from making a demand on the board, must evaluate 'whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.' (*Id.* at p. 814; see also *Oakland Raiders I, supra,* 93 Cal.App.4th at p. 587 [describing *Aronson* test].) '[F]utility is gauged by the circumstances existing at the commencement of a derivative suit.' (*Aronson, supra,* at p. 810.)" (*Bader, supra,* 179 Cal.App.4th at pp. 790–791, fns. omitted.) The Delaware Supreme Court later explained that the two-prong test under *Aronson* is disjunctive; accordingly, there is demand excusal if either prong is satisfied. (*Brehm v. Eisner, supra,* 746 A.2d at p. 256.) The *Bader* court applies the disjunctive test, following *Brehm.* (*Bader, supra,* 179 Cal.App.4th at p. 791.)

***10** We are satisfied that GFLP adequately demonstrated demand futility. The second amended complaint alleges that in June 2000, GFLP was informed by defendant Rose of serious dissension among defendants Brown, Glenn Grush, Leebove and Rose concerning compensation being paid to the general manager of the Sunset Plaza Hotel. Despite GFLP's repeated requests for books, records, and documents regarding the investment entities, defendants refused GFLP access to such information. It alleges that the defendants "intentionally stymied Plaintiff's [GFLP's] prior reasonable efforts to learn of the true facts regarding the operation and the assets of the Gaster Investment Entities. Following a review of (incomplete) information obtained by Plaintiff from Defendants in May and June 2001, Plaintiff determined, within not more than one year prior to the filing of this Complaint, facts sufficient to bring this Action."

In addition, the complaint alleges that defendants paid excessive management fees and operation costs for investment entities, provided goods and services to them through affiliated parties at inflated prices or fees, concealed the non-profitable status of some investment properties in order to generate management fees, and converted assets to their own use. The complaint alleges: "Plaintiff has previously made efforts to secure action from Defendants controlling the Gaster Investment Entities with respect to the matters complained of in this Complaint. Defendants denied, at that time, and continue to deny, that such concerns of Plaintiff had (or presently have) merit. Plaintiff is informed and believes, and thereon alleges, that Defendants took no action to remedy and discontinue the improper actions that are alleged in this Complaint. Plaintiff has previously informed the General Partners or the Managers, whichever is applicable, of each of the Gaster Investment Entities, in writing, of the ultimate facts of each cause of action against each defendant through the delivery of a true and correct copy of (a) the initial Complaint in this Action, and (b) a true and correct [copy] of the First Amended Complaint, which First Amended Complaint ... Plaintiff proposed to file. Any further efforts by Plaintiff to procure remedial action would be futile in that Gaster Investment Entities remain under the control and domination of Defendants."

This pleading satisfied the demand futility test adopted by the *Bader* court. (*Bader, supra,* 179 Cal.App.4th at pp. 790–791.) We conclude that GFLP had standing to bring the derivative claims against defendants.

IV

Sunset Management Fee Increase

Defendants argue the trial court erred in ruling that an increase in the management fees paid to the general partners of the Sunset partnership violated the partnership agreement and governing law because it was not approved by all partners.

A. Sunset Partnership Certificate and Agreement

The form of the document which created the Sunset partnership is of particular significance. It is a single combined instrument titled "Certificate and Agreement of Limited Partnership of Sunset Towers West, Ltd." It serves as both the *certificate* of limited partnership as required by the ULPA and the limited partnership *agreement.* This is important because, as we discuss, the ULPA has no express provision regarding the vote of the partners required to amend a limited partnership *agreement,* but it does specifically provide the requirements for amending a limited partnership *certificate.* (For simplicity, we refer to this document as the Sunset partnership agreement, but do not intend by that reference to ignore the fact that it includes the formal certificate of partnership as well.)

***11** The Sunset partnership agreement granted the general partners broad powers in connection with the management and disposition of partnership assets. But management fees, whether or not paid to a company affiliated with one or more general partners, were expressly limited: "fees payable to any management company ... shall not exceed three percent (3%) of the Partnership gross receipts of whatever nature."

The authority of the general partners also was constrained by a clause which provides that "the General Partners may not do any act in contravention of this Agreement without the *written approval* of the Limited Partners holding a *majority* of the Limited Partner interests." (Italics added.) Paragraph 7(a) extends the powers of the general partners to "all of the powers and rights of a Partner in a partnership without Limited Partners under the partnership law of the State of California."

The only provision regarding amendment of the Sunset partnership agreement appears in paragraph 17, which provides that it "shall be amended whenever any of the events described in Section 15524 [ULPA] of the California Corporations Code occurs; provided, however, that no amendment shall change the Partnership to a General Partnership or change the status of the Limited Partners as Limited Partners." We discuss section 15524 of the ULPA next.

B. Governing Law

We have determined this case is controlled by the ULPA, not the RLPA. Section 15524, the provision of the ULPA cited in the Sunset partnership agreement, enumerates circumstances in which a certificate of limited partnership *must* be amended, for example when there is a change in the name or membership of the partnership. Subdivision (j) of section 15524 requires an amendment when "[t]he members desire to make a change in *any other statement* in the certificate in order that it shall *accurately represent the agreement between them* ...." (Italics added.)

The ULPA requires a *unanimous* written vote of the members to amend a limited partnership *certificate.* Section 15525 sets out the formalities required for amendment of the limited partnership certificate and requires that an amendment "be signed and acknowledged by *all* members ...." (§ 15525, subd. (1)(b), italics added.) Significantly, if a member of the partnership refuses to execute the amendment, section 15525, subdivision (3) requires the person desiring the amendment to petition the superior court to direct the amendment. (See *Brown v. Panish* (1979) 99 Cal.App.3d 429.)

Section 15509 of the ULPA defines the rights, powers, and liabilities of general partners. Subdivision (1)(a) provides that the general partners may not "[d]o any act in contravention of the certificate" "without the written consent or ratification of the specific act by *all* the limited partners [.]"[11] (Italics added.) Read together, these provisions of the ULPA make clear that a unanimous vote was required to authorize a change in the partnership certificate to allow an increase in the management fee from 3 percent to 5 percent. We previously have concluded that section 16401, subdivision (j) of the UPA 1994, which was applied by the trial court, has no application in this case.

C. The Parties' Positions

***12** In its original briefing on appeal, GFLP contends that the ULPA governs this action and invokes the unanimous vote requirement of section 15509, subdivision (1)(a). In the alternative, it contends that the same result is required under the RLPA and section 16401, subdivision (j) of the UPA 1994.

In response to our order vacating submission and directing additional briefing on the governing law issue, GFLP recognizes that amendment of a partnership certificate is required by the ULPA to reflect a change in the information contained in that certificate. Inexplicably, it also argues: "But, where there is an amendment to a partnership agreement of a term (such as the management fee issue here) that is *not* stated in the certificate, the amendment of the governing document does not require amendment of the certificate ." GFLP's characterization of the Sunset partnership certificate and agreement is simply wrong. That single document, which is a combined certificate and agreement, expressly limits management fees to three percent of gross receipts. Based on this error, GFLP concludes that "the statutory approval requirement for the amendment of the governing agreement of a partnership has *nothing to do* with the formalities of preparing, executing and filing of a certificate of limited partnership." Alternatively, in its supplemental brief after oral argument, GFLP argues that since the ULPA is silent on the standard for amendment of the partnership *agreement,* we must look to section 15018, subdivision (h) of the UPA 1949.

Defendants' supplemental brief in response to our order vacating submission argues that the ULPA and the UPA 1949 made no specific provision for amendment of partnership agreements. Instead, defendants invoke the UPA 1949, section 15018, subdivision (h) which allows the partners to agree to terms in contravention of statutory requirements. Based on this reasoning, they conclude that the 1990 vote to increase Sunset management fees was valid because it was approved by a majority of partners as required by the terms of the Sunset partnership agreement.

As to the significance of the fact that here the Sunset partnership agreement was created by a single combined certificate and agreement, defendants postulate: "It is possible UPLA did not regulate partnership agreements at all, rather it only regulated partnership certificates, leaving written partnership agreements to be interpreted under existing contract law." In the ensuing discussion, defendants do not acknowledge that because a combined document was used, the certificate of limited partnership for Sunset set the management fee at three percent.

Defendants concede that the results of the 1990 vote on the management fee increase "were approximately 56% 'yes,' 2.22% 'no,' with the balance abstaining [citation]." Under defendant's characterization of the evidence, the vote taken in 2003 during the pendency of this litigation to approve the management fee retroactively "obtained 77% 'yes' votes, with 2.22% still voting 'no' and the approximate remaining 20% not voting at all, including Plaintiff's 12% interest. [Citation.]"

D. Analysis

***13** We are satisfied that the increase in management fees constituted a change in the terms of the Sunset partnership certificate within the meaning of ULPA sections 15509, subdivision (1)(a), 15524 and 15525, therefore requiring a unanimous vote of the partners for approval.

Defendants argue the partners were allowed to contradict the statutory requirements for amendment of the Sunset agreement under section 15018[12] of the UPA 1949 because the ULPA is silent on amendment of a partnership *agreement.* We disagree for several reasons. First, as we have emphasized, the change in management fee constituted a change in the Sunset partnership *certificate,* not just the agreement. Second, the ULPA section 15529 requires resort to the provisions of the UPA 1949 only "[i]n any case *not provided for in this act* ....[13]" As discussed, the ULPA provides for amendment of the partnership certificate, so we may not resort to the UPA 1949. Third, defendant's argument is based on the first sentence of section 15018: "The rights and duties of the partners in relation to the partnership shall be determined, *subject to any agreement between them,* by the following rules: .... " (Italics added.) But subdivision (h) of that statute requires a unanimous vote for any act in contravention of the partnership agreement: "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of *all* the partners." (Italics added.)[14] The increase in management fee is an act in contravention of an express term of the partnership agreement and hence requires unanimous consent even under the UPA 1949.

Defendants rely on *Broffman v. Newman* (1989) 213 Cal.App.3d 252. That case involved a limited partnership formed in California in 1976 and governed by the ULPA since it was formed before 1984 when the RLPA went into effect. (*Id.* at p. 255.) For reasons not explained in the opinion, the *Broffman* court applied section 15018, subdivision (f) of the UPA 1949 instead of the ULPA. (*Id.* at p. 260.) It concluded that the partnership agreement did not permit payment to a general partner for services to the partnership and that the partnership was never formally amended to permit such compensation. Nevertheless, it concluded that an express agreement between the general partners to pay a management fee to general partners and failure of the limited partner to object was sufficient evidence of an implied agreement to meet the requirements of former section 15018 and the partnership agreement itself. It held that by failing to object, the limited partner was deemed to have implicitly agreed to that fee and was estopped to complain later. (*Ibid.*) But the *Broffman* court also held that once the limited partner objected to the management fee payment, there was no longer either an express or implied agreement to do so and hence no further obligation to pay the fee. (*Id.* at pp. 260–261, 263–264.)

***14** *Broffman* is distinguishable because it did not treat the provisions of the ULPA requiring a unanimous vote of all members of the limited partnership to amend the limited partnership *certificate.* As we have discussed, in this case, the Sunset partnership was formed by a single document, the Certificate and Agreement of Limited Partnership. The *Broffman* opinion repeatedly refers to terms of the limited partnership agreement, but does not indicate that it was contained in a single document with the certificate which formed the partnership. (*Broffman, supra,* 213 Cal.App.3d at pp. 256–259.) The distinction is critical in light of our conclusion that the ULPA requires a unanimous vote of the partnership to amend the terms of the certificate. (§§ 15524, 15525.)

E. Ratification

1. ***1997 Amendment to Sunset Partnership Agreement***

Perhaps in recognition of the fact that they failed to obtain the requisite unanimous vote to amend the management fee provision of the Sunset partnership agreement in 1990, defendants argue the increase was ratified by the terms of a 1997 amendment to the agreement. The trial court rejected this argument. The facts concerning this amendment are undisputed, resting solely on the terms of that document. Where the facts are undisputed, the interpretation of an agreement is a question of law which we review de novo. (*First National Ins. Co. v. Cam Painting, Inc.* (2009) 173 Cal.App.4th 1355, 1365.)

In 1997, by written amendment signed by *all* partners, the Sunset partnership agreement was amended in conformity with the requirements of the ULPA. The recitals of the amendment state: "The partners of the Partnership entered into a Limited Partnership Agreement of the Partnership on or about August 15, 1979 (the 'Agreement')." This is a reference to the original Sunset partnership agreement, which was recorded by Los Angeles County on August 15, 1979.

The amendment transferred the interests of the general partners to Sunset Plaza Management Co., LLC (Sunset Plaza Management), which became the sole general partner; changed the principal place of business; and extended the term of the partnership to December 31, 2027. Paragraph D of the amendment states: "The purpose of this Amendment is to substitute [Sunset Plaza Management] as the sole general partner of the Partnership in place of the Original General Partners and to provide for an extension of the term of the Partnership."

Paragraph 6 of the amendment expressly states that these were the only changes to the original partnership agreement: "Except to the extent that the Agreement has been expressly amended herein, the Agreement shall remain in full force and effect." No express provision for an increase in the management fees from three percent to five percent was included in the 1997 amendment.

Defendants contend that the 1997 amendment constitutes a ratification of the earlier fee increase, pointing out that when the 1997 amendment was executed the fee increase had been in effect for over seven years. Defendants cite paragraph 6 of the amendment, asserting: "The argument is simple, in agreeing to extend the Partnership as is and with all amendments 100% of the partners ratified the extension of the Partnership Agreement, including the seven year old management fee raise." They cite Civil Code section 1588 which states: "A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent." Defendants contend that ratification may be either express or implied.

***15** The express terms of the 1997 Amendment undercut defendants' ratification argument. Paragraph D limits the purpose of the amendment to the change in the general partners and extension of the life of the partnership with no mention of an intent to amend or ratify any change in management fee. Most telling, paragraph 6 of the 1997 amendment expressly states that in all other respects the terms of the original 1979 agreement "shall remain in full force and effect."

2. Implied Ratification

Defendants also argue: "Dr. and Mrs. Gaster orally ratified the 5% management fee both by failing to vote 'no' against it (JA 2694–98, V 11), and by telling Ed Brown that they supported such increase. (RT. 637 (line 16)–639 (line 17.)...." They also argue that GFLP "knew of the 5% rate (both personally (RT 637 (line 16)–639 (line 17.) and with monthly statements (JA. 2864–2915, V 12), and accepted the benefits of management services at a 5% rate for over eleven (11) years prior to instituting suit. Therefore, [Defendants] contend that based upon the undisputed facts presented at trial, the Trial Court should have found both express and implied ratification, all of which should have resulted in a finding that the raise in management fees was ratified, and thus there could be no recovery for the increased management fees."

This evidence is insufficient to establish implied ratification because it addresses only the knowledge of Dr. and Mrs. Gaster, or GFLP, and does not demonstrate unanimous ratification of the fee increase by all partners as required by the ULPA.[15]

F. Conclusion

The trial court concluded that the Sunset management fee could not be increased without unanimous approval of all the partners. It did so by applying the RLPA and section 16401, subdivision (j) of the UPA 1994. We agree with the conclusion, but disagree with the rationale. "[I]t is well settled that 'a judgment correct in law will not be reversed merely because given for the wrong reason; we review the trial court's judgment, not its reasoning.' (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 64.)" (*National Casualty Co. v. Sovereign General Ins. Services, Inc.* (2006) 137 Cal.App.4th 812, 818, fn.6.)

As discussed, the ULPA rather than the RLPA governs this question. The fee increase constituted a change in a statement in the certificate in order to accurately reflect the purported agreement of the Sunset partnership and therefore a unanimous vote was required under sections 15509, 15524 and 15525. In addition, we reject defendants' contention that the 1997 Amendment may be interpreted as a ratification of the fee increase.

Rather than supporting defendants, the 1997 Amendment establishes that they knew how to properly amend the Sunset partnership agreement by unanimous vote of the partners under the ULPA. When all the partners did not agree to the increased management fee, defendants imposed it anyway, in violation of the ULPA. Under section 15525, subdivision (b)(3) the general partners could have petitioned the superior court to direct the amendment but did not do so. (See *Brown v. Panish, supra,* 99 Cal.App.3d 429.) We conclude that the increase in the management fee was unauthorized. In light of that conclusion, we need not address GFLP's other arguments challenging the fee increase.

V

Defenses to GFLP's Management Fee Claim

***16** Defendants argue that GFLP's claim for reimbursement of the improperly imposed management fee increase is barred by the statute of limitations and the equitable defenses of estoppel, waiver, and laches.

A. *Statute of Limitations*

1. *Defendants' Claim of Complete Bar*

Defendants first argue the management fee claim is completely barred because the vote to amend the fee occurred in 1990, eleven years before GFLP filed suit. They cite Code of Civil Procedure sections 337 (4 years limitation period for breach of written contract), 338 (3 years for fraud), 340 (1 year for various causes of action) and 343 (4 years for breach of fiduciary duty). This argument is based on a faulty premise. GFLP challenges the continuing charge for increased management fees, not the 1990 vote. The fees were charged through the time of trial. We find no merit in this argument.

Nor do we find merit in defendants' argument that the 1990 vote was "at worst, voidable," and hence had to be attacked within the applicable time limits. In a supplemental brief, defendants cite *Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175 (*Costa Serena*), for the proposition that the unauthorized amendment was merely voidable. The issue in *Costa Serena* was whether amendments to conditions, covenants, and restrictions (CC & R's) in violation of this procedure for amendment were void ab initio and therefore subject to challenge at any time. The Court of Appeal reversed the trial court's conclusion that it was void ab initio because the only basis for the challenge was that it violated the CC & R's. (*Id.* at p. 1193.) The basis for this conclusion was that the plaintiff did not allege the amendments were procured by "some other method that would undermine the validity of the instruments in question from their inception." (*Ibid.*)

Defendants also cite *Schuman v. Ignatin* (2010) 191 Cal.App.4th 255 (*Schuman*), another case involving the validity of an amendment to CC & R's. The argument was that the amendment was not authorized because it was not approved by all lot owners as required by the CC & R's. The *Schuman* court followed *Costa Serena* in concluding that the claim was barred because the amendment was merely voidable and subject to the controlling statute of limitations. (*Id.* at p. 265.)

Our case is distinguishable because the failure to comply with the ULPA amendment requirements rendered the purported fee increase void from the outset, as GFLP argued. Neither *Costa Serena, supra,* 175 Cal.App.4th 1175 nor *Schuman v. Ignatin, supra,* 191 Cal.App.4th 255 involved a similar situation where an action was rendered void because of a failure to comply with statutory requirements.

The purported 1990 amendment of the Sunset partnership agreement had no effect because it was not approved by all the partners as required by the ULPA. (See *Black Hills Investments, Inc. v. Albertson's, Inc.* (2007) 146 Cal.App.4th 883, 894 [holding contract which violated prohibition of Subdivision Map Act (Gov.Code, § 66410 et seq.) illegal and "thus void rather than voidable as a matter of law" at the time executed].)

2. *GFLP's Argument that Its Claim to Fees Prior to 1997 Was Timely*

***17** GFLP argues the court erred in concluding that any claim to excess fees paid before November 16, 1997 (four years before suit was filed) was barred by the four-year statute of limitations under Code of Civil Procedure section 343. GFLP argues that the correct statute of limitations is three years, but that the delayed discovery rule applies so that the statute of limitations did not begin to run until it discovered the basis for the action shortly before suit was filed.

In its original statement of decision, the trial court ruled that the fee increase was illegal and constituted a breach of fiduciary duty. In its first supplemental statement of decision, the court concluded that GFLP's claims for fees paid more than four years before the action was filed is barred by the four-year statute of limitations under Code of Civil Procedure section 343. It did not address any issue regarding accrual or delayed discovery of the claim. The trial court's ruling was confirmed by the court in its second supplemental statement of decision.

"Where a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity. [Citations.] The existence of a trust relationship limits the duty of inquiry. 'Thus, when a potential plaintiff is in a fiduciary relationship with another individual, that plaintiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary.' [Citation.]" (*Eisenbaum v. Western Energy Resources, Inc.,* (1990) 218 Cal.App.3d 314, 324, (*Eisenbaum*).)

The *Eisenbaum* court concluded that where there is a fiduciary relationship, the usual duty of diligence to discover the facts within the limitations period does not exist. (218 Cal.App.3d at p. 325.) Where there is no duty to inquire, "*the limitations period does not begin to run until plaintiff actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available.* [Citation.]" (*Ibid.*) It explained: "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases 'in the confidential relationship category is that in the latter situation the duty to investigate may arise later by reason of the fact that the plaintiff is entitled to rely upon the assumption that his fiduciary is acting in his behalf.' [Citation.]" [Italics omitted.] (*Ibid; see also April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 827 [application of delayed discovery rule to fiduciary particularly appropriate where defendant maintains custody and control of plaintiff's property or interests]; 3 Witkin, Cal. Procedure (5th 3ed.2008), Actions, § 679, p. 895.)

We conclude that the delayed accrual rule of *Eisenbaum, supra,* 218 Cal.App.3d 314 applies here, but it does not aid the GFLP parties. "A promoter or insider, or a seller of a limited partnership interest, owes a fiduciary duty to the prospective purchaser of such an interest." (*Id.* at p. 322.) In addition, a "[p]artnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other. [Citation.]" (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 424 (*Everest*).) The *Everest* court explained the fiduciary obligations of the general partners: "In proceedings connected with the conduct of a partnership, partners are bound to act in the highest good faith to their copartners and may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. [Citation.] A general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the partnership and to the other partners as in a general partnership. [Citation.]" (*Ibid.*)

***18** The parties dispute when GFLP discovered the facts on which its action for excessive management fees is based. " 'Resolution of the statute of limitations issue is normally a question of fact.' [Citation.] More specifically, as to accrual, '... belated discovery is a question of fact.' [Citation.] As our state's high court has observed: 'There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. [Citation.] It is a question for the trier of fact.' [Citation.]" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320.) We apply the substantial evidence standard to review a factual finding: " ' "When a finding of fact is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.]" ' " (*Spencer v. Marshall* (2008) 168 Cal.App.4th 783, 792–793.)

GFLP argues that defendants failed to disclose the two percent excess management fee until shortly before commencement of this action. Wendy Gaster Tillman, a general partner of GFLP, is an attorney. She testified that at some point prior to 1998, she requested that all notices and documents regarding the real estate investment partnerships be forwarded to her rather than to her father. At first she received monthly statements, then quarterly statements, then monthly statements resumed. The statements showed an entry for management fees. She testified that she thought the statements said the fee was 4 or 4.5 percent rather than 5 percent. If an additional line for accounting fees was added, the total would be 5 percent or close to that according to Ms. Tillman.

Ms. Tillman testified that prior to the summer of 2000, she was not aware of the circumstances of the increase in management fee for Sunset partnership from three to five percent, and asked for information about that in an e-mail sent in January–February 2001.[16] She did not get the documents she requested and retained counsel in an effort to get them. In March 2001, counsel for defendants told her she could review records one record at a time, but eventually that year approximately 50 boxes of partnership records were produced for review and copying.

Ms. Tillman sent an e-mail dated February 28, 2001 requesting a special meeting of the Sunset Plaza Management Committee. She outlined a number of issues, including "[t]he nature of the services provided to the partnership by the management committee, the compensation paid for those services and from what source(s) those payments were made; [¶] (a.) Matters recited in David Rose's letter of October 1, 1990 explaining the general partner's request to increase their management fee at Sunset Plaza from 3% to 5%; ..." GFLP contends that this e-mail demonstrates "a lack of any meaningful knowledge about the circumstance" of the fee increase. It is apparent from the e-mail that Ms. Tillman learned of the proposed management fee increase at some earlier point. But the e-mail itself does not establish when that was.

19** GFLP contends that the Sunset partnership management statements did not put it on actual notice of the fee increase because the statements stated only a dollar figure for management fees rather than a percentage. Defendants assert that the statements "[... not only state the dollar amount, ***but also specifically state the management fee was 5% (JA 2864–2915, V 12)])." We have examined the statements cited by the parties and find no clear statement that the management fee was five percent after 1990 as claimed by defendants. But the statements reflect a significant increase in the management fees as a percentage of the total annual receipts after 1990. Before the increase was instituted, the management fees reflected on the annual statements represent a figure close to three percent of the total receipts for the year, as permitted by the Sunset partnership agreement. After 1990, the fees were significantly higher than three percent of the total annual receipts.

We are satisfied that the significant increase in management fees as a percentage of total receipts after 1990 put GFLP on notice of the fee increase. We conclude that the action accrued well before it was filed, and that damages should be limited to the preceding four-year period.[17]

3. *Standing to Challenge 1990 Fee Increase*

Defendants argue that GFLP lacks standing to challenge the fee increase imposed since 1990 because it did not become a limited partner until October 1993, when the Gaster Family Trust's interest was transferred to GFLP. They rely on *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527 to support this argument. We find no authority in *Jones* to aid defendants. It quoted section 15702, subdivision (a)(1): "To have standing to bring a derivative suit on behalf of a limited partnership, a partner-plaintiff must allege status as a partner 'at the time of the transaction or any part thereof of which plaintiff complains....'" (*Id.* at p. 1534.) In *Jones,* the derivative plaintiff was not a limited partner when the allegedly usurious loan was made. But it was a limited partner when the partnership later arranged a forbearance agreement extending the note's maturity date and raising the excess interest limit. The *Jones* court held that this was sufficient to confer standing on the derivative plaintiff to at least challenge the forbearance agreement.

Here, the excessive management fees were collected from 1990 through the trial. GFLP was a limited partner during the four years preceding the filing of the complaint for which damages were awarded. It had standing to challenge the fee at least for that period.

4. *Defendants' Claim an Award of Four Years of Fees Was Unwarranted*

In an alternative argument, defendants contend that fees should be recoverable only from the filing of the complaint, citing *Broffman, supra,* 213 Cal.App.3d 252. In *Broffman,* the court found an implied and express agreement between the partners to allow payment of a management fee to a general partner in contravention of the terms of the partnership agreement. But once the limited partner objected, it concluded that neither an express or implied agreement existed, and the partners were bound by the original terms of the partnership agreement. (*Id.* at p. 263.) As we have seen, in this case, in light of the ULPA requirement of a unanimous vote to increase the management fee, there was no authority to pay the fee at any time before the complaint was filed.

B. *Equitable Defenses*

***20** Defendants characterize their equitable defenses to the excessive management fee claim as "simple." They base them on estoppel, laches and waiver. Their showing is: 1) Dr. and Mrs. Gaster failed to vote no on the increase in 1990 and orally agreed to it; 2) no objection to the increase was raised for eleven years; and 3) GFLP and its predecessors accepted the benefits of management services with knowledge of the fee increase.

Defendants rely on *Broffman, supra,* 213 Cal.App.3d 252, for the proposition that GFLP is estopped from claiming the management fee increase paid before the complaint was filed. The *Broffman* court concluded that the limited partner was deemed to have impliedly agreed to the change in the partnership management fee provision because no objection was made. (*Id.* at p. 260.) But that holding was based on the conclusion that the partnership agreement was subject to implied amendment. (*Ibid.*) By contrast, and as we have discussed, in this case the management fee increase was never authorized from 1990 through trial because defendants failed to comply with the ULPA. Since the purported fee increase was ultra vires and unauthorized, it cannot be justified by a claim of implied consent contrary to the requirements of the governing law.

"A valid claim for equitable estoppel requires: (a) a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, pp. 527–528.) There can be no estoppel if one of these elements is missing. (*Id.* at p. 528.)" (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584.) There is no evidence that Dr. and Mrs. Gaster, or their successors, were informed by defendants that a unanimous vote of the partnership was required to agree to the management fee increase. Both the original 1990 proposal and the 2003 letter attempting a retroactive approval of the increase demonstrate that the limited partners were not told of the unanimity requirement in 1990. Under these circumstances, GFLP's claim is not equitably estopped.

The same analysis disposes of defendants' argument that GFLP has waived any challenge to the fee increase. "Waiver is an intentional relinquishment of a known right. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 532.) It may be implied through conduct manifesting an intention to waive. (*Id.* at pp. 532–533.)" (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1179.) Defendants did not reveal that the Gasters had a right to unanimous approval of the fee increase. There was no waiver.

Defendants also invoke the doctrine of laches to argue GFLP's claim for fees is barred. " ' "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." [Citation.]' (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) Prejudice is not presumed from the simple fact of delay; it must be affirmatively shown. [Citation.] In determining whether a defendant has sustained its burden of proving laches, the court may consider the extent to which the defendant is partially responsible for the delay. [Citation.]' " (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1494.)

***21** The defendants' laches argument is that they provided valuable and profitable services to GFLP and the other limited partners and it would be unjust to refund part of the compensation for these services because GFLP and its predecessors did not complain until this action was filed. Since the Gasters (and other limited partners) were not informed by defendants in 1990 that a unanimous vote of the partnership was required to increase the management fee, acquiescence is not demonstrated. At a minimum defendants were partially responsible for the delay in this action because they did not follow the appropriate procedures to obtain a fee increase, and only notified the partners of this issue after this lawsuit was filed. Laches does not apply under these circumstances.

VI

Liability of Defendants Brown, Rose, Leebove and GESEG for Excessive Management Fees

The trial court's judgment awards the Sunset limited partnership $633,580 plus prejudgment interest of $270,315 against David Rose, Edward Brown, GESEG, Inc., Joel Leebove and Sunset Plaza Management.

The original general partners of Sunset—Brown, Rose, Leebove and GESEG—argue they cannot be held liable for the excessive management fees paid after November 1997 because they were no longer general partners and were not found to be in an alter ego relationship with the successor general partner, Sunset Plaza Management. This argument is based on the 1997 amendment to the Sunset partnership agreement which substituted Sunset Plaza Management Company LLC[18] as general partner in place of Brown, Rose, Leebove and GESEG. From that point, these defendants characterize themselves as solely limited partners in Sunset, with no duty to the other limited partners. They contend there is no legal basis to impose a judgment against them for excessive fees once they were no longer general partners in Sunset.

The second amended complaint includes an alter ego allegation. It identifies individual defendants Brown, GESEG, Leebove and Rose as "Controlling Defendants." It alleges the Controlling Defendants controlled various entities involved in this action, including Sunset Plaza Management "such that any individuality and separateness between the Controlling Defendants and the Controlled Defendants have ceased and Controlled Defendants [including Sunset Plaza Management] are the alter ego of the Controlling Defendant...."[19]

GFLP appears to concede that the trial court made no alter ego finding: "The Trial Court did not have to address the issue of *alter ego* as it had before it Plaintiff's claim for declaratory relief seeking 'a judicial determination of its rights and duties, and a declaration that such amendments [the 1997 Amendment] did *not* change the relationship of the individual general partners with, and any of their respective contractual and fiduciary duties to, Sunset Plaza Hotel Ltd.'s Investors.' "

The declaratory relief cause of action alleges that the 1997 Amendment "is not effective to limit in any way the personal liability of the Sunset Plaza General Partners of Sunset Plaza Hotel Ltd. to Sunset Plaza Hotel Ltd. and to the Sunset Plaza Hotel Ltd.'s investors arising out of, or related to, the contractual and fiduciary duties and obligation owed by the Sunset Plaza General Partners to Sunset Plaza Hotel Ltd. and [to investors in that entity]." Defendants' Closing Trial brief asserts that GFLP made no effort to prove any form of alter ego as to any entity.

***22** The trial court's original statement of decision did not include findings or conclusions on either GFLP's alter ego claim or its declaratory relief cause of action. GFLP objected to the statement of decision and argued that the individual defendants are individually liable for damages notwithstanding the 1997 Sunset partnership amendment which substituted Sunset Plaza Management Company as the only general partner. It argued that the correspondence sent to the limited partners regarding the 1997 amendment did not suggest that the amendment "would also be used to protect the individual general partners from direct liability to the limited partners."

GFLP recognized that the 1997 amendment was cited by defendants in their master trial brief, and that it terminated their individual liability to the limited partners. But it contends that defendants dropped this argument in their closing trial brief. GFLP speculated the argument was dropped because David Rose testified at trial that the 1997 amendment was not intended to change the relationship of the individual general partners, nor to affect the defendants' contractual and fiduciary duties to their investors.[20] GFLP urged the trial court to "ignore Defendants' repeated attempts to cut-off any individual liability to their limited partners no matter when such liability accrued."

The trial court discussed certain objections to the statement of decision raised by the parties in its supplemental statement of decision filed June 29, 2006, but did not specifically address the liability of the individual general partners either on an alter ego theory or as raised by GFLP's cause of action for declaratory relief. All remaining objections raised by GFLP were overruled. The trial court expressly found GESEG, Brown, Rose and Leebove were required to reimburse the Sunset Plaza partnership for excessive management fees without explaining the basis for the award against these individual defendants.

GFLP objected to the trial court's supplemental statement of decision. Its objections are not included in the joint appendix on appeal, although the trial court noted that they were filed. In its second supplemental statement of decision, the trial court reiterated that the award for excessive fees was against defendants GESEG, Brown, Rose, Leebove and Sunset Plaza Management Co., LLC. It stated: "The Court finds that based on representations of the general partners that led to the substitution of Sunset Plaza Management Co., LLC, as general partner, judgment against Sunset Plaza Management Co. and the individual general partners is appropriate. (See Trial Exhibit C–15)."

The trial exhibit referenced by the court, C–15, is a November 5, 1997 letter to the Sunset Towers limited partners from Rose, Brown, Leebove and Seymour Grush (predecessor to GESEG). It states that the general partners recently had written to the recipients regarding their desire to convert their general partnership interest to a limited liability company and that all limited partners had approved that action. Enclosed with the letter was a proposed amendment to the partnership agreement that would effect this substitution of the general partner. The letter continues: "The individuals comprising the General Partner remain the same as before. Only the entity has changed from four individuals to a single entity known as SUNSET PLAZA MANAGEMENT CO., LLC." The limited partners were asked to sign the amendment and return it.

***23** GFLP cites trial testimony by David Rose about replacement of the individual general partners with Sunset Plaza Management (a limited liability company) to serve as the only general partner. Rose first described another limited liability company which was formed to manage four properties in Nevada. He testified that entity was formed to provide additional protection to the managing general partners. But Rose said the purpose was not to provide greater protection for the managing general partners from the *limited* partners. With respect to Sunset Plaza Management, Rose was asked "And was it your understanding it was for the same purpose?" He answered "Yes."

Later, Rose was asked about exhibit C–15, which he drafted. He was asked whether in drafting the letter, he was intending to protect the general partners from the limited partners. Rose answered: "There was no intention in our mind about that. All our partners have always been excellent partners. They've been very, very happy with their investments and we had nothing to fear or hide from our investors." He testified that the purpose of the conversion was to protect the general partners from third parties.

At best, exhibit C–15's statement that "the individuals comprising the General Partner remain the same as before" is opaque. We conclude the trial court's ruling based on this exhibit is not sufficient to constitute a finding based on an alter ego theory or on the cause of action for declaratory relief. Nor is Rose's testimony sufficient to supply the necessary finding. The court did not expressly address either theory and we decline to imply such a finding. In light of the 1997 Amendment, there was no other basis to hold the individual former general partners of Sunset liable for the excessive fees charged once they ceased to be general partners. On that ground, we reverse the judgment on excessive management fees as to Brown, Rose, Leebove and GESEG but only as to them. The judgment still stands against Sunset Plaza Management.

VII

GFLP's USURY CLAIMS

In the second amended complaint, GFLP alleged that six loans made by various lending entities created by defendants to the Sunset partnership and to Linda Manor were usurious. The trial court disallowed its claim as to all loans except Loan 10, for $350,000 made on June 8, 2000 to the Sunset partnership by individual lenders GESEG, Grush Family Trust, Ed/Linda Brown Trust, Joel Leebove and William Fox by Irwin Fox (William Fox is not a defendant in this action).

A. Claim was Pled

Defendants argue the second amended complaint did not include a cause of action for usury. It did not include a cause of action with that language, but it did include causes of action for breach of fiduciary duty based on the usurious loans solicited by, and made by, lender groups including the individual defendants and their entities. This is sufficient to preserve the claim for usurious interest.

B. Loans Subject of GFLP's Appeal

***24** GFLP's cross-appeal attacks the trial court's judgment as to four loans to Linda Manor and one to the Sunset partnership. Linda Manor was created in 1986 under the RLPA to acquire a 157–unit apartment building in Las Vegas. The general partners were Edward Brown, GESEG, Inc., Dave Murray and David Rose. The principal place of business was the Sunset Plaza Hotel in Los Angeles. The Linda Manor limited partnership agreement expressly provided that it was to be interpreted in accordance with California law. The Gaster Family Trust held an eight percent share in Linda Manor. At least some of the individuals and entities who made loans to Linda Manor also were investors in the various real estate limited partnerships involving the parties to this action. It apparently was the practice of defendants to create a new California general partnership to serve as lender on all but one of the Linda Manor loans at issue. The challenged loans are:[21]

LINDA MANOR ANNEX ACQUISITION LOAN[22]

This was a $500,000 loan made on May 9, 1988. The interest was 11.5 percent. The lender was an entity created for that purpose, Linda Manor Lenders, a California general partnership. The note was secured by a deed of trust payable in Las Vegas. When this loan was made, the maximum California legal rate of interest was 11 percent. (Cal. Const., art. XV, § 1, subd. (2), Federal Reserve Discount Rate.)

LINDA MANOR REFINANCE LOAN[23]

This loan for $1,580,000 was made on May 1, 1991 by Linda Manor Lenders # 2, a California general partnership, at 12 percent interest. It was secured by a note and deed of trust. (It paid off the $500,000 Linda Manor Annex Acquisition Loan.) The Gaster Family Trust invested $100,000 in this loan. The loan was ultimately consolidated into the Second Linda Manor

Refinance Loan. The maximum California legal rate of interest on this loan when made was 10.5 percent. (Cal. Const., art. XV, § 1, subd. (2), Federal Reserve Discount Rate.)

EPSTEIN SECOND TRUST DEED LOAN[24]

This $240,000 loan at 12 percent interest was made June 25, 1996 to retire a purchase money loan made by Helen Epstein, the seller of the Linda Manor property in 1986. The maximum California legal rate of interest on this loan when made was 10 percent. (Cal. Const., art. XV, § 1, subd. (2), Federal Reserve Discount Rate.) The lenders on this loan were individuals rather than a lending entity. It was consolidated on June 15, 2001 into the Second Linda Manor Refinance Loan.

SECOND LINDA MANOR REFINANCE LOAN[25]

This June 15, 2001 loan for $1,820,000 at 11 percent interest was made by the lending entity June 2001 Linda Manor Lenders Partnership, a California general partnership. The maximum California legal rate of interest at the time was 8.5 percent. (Cal . Const., art. XV, § 1, subd. (2), Federal Reserve Discount Rate.) The loan rolled over the Linda Manor Refinance Loan and the Epstein Trust Deed Loan. The note was secured by a deed of trust payable in West Hollywood, California, and executed in Los Angeles.

***25** SUNSET PLAZA RENOVATION LOAN[26]

This was a loan for $1,557,001.01 at 11 percent per annum made on February 15, 1998. The maximum legal rate of interest on this loan when made was 10 percent. (Cal. Const., art. XV, § 1, subd. (2), Federal Reserve Discount Rate.) The lender was Sunset Plaza Hotel Lenders Partnership, a California general partnership. On May 15, 2000, it was consolidated into the Sunset Plaza Refinance Loan.

Two of the lending partnership agreements (for the Linda Manor Refinance Loan and the Second Linda Manor Refinance Loan) have express choice of law provisions calling for application of California law. The record does not include the agreements with respect to the other two loans.

We turn to the legal issues regarding the challenged loans.

C. Legal Principles Regarding Usury

Nevada does not have a usury law. (*Dobron v. Bunch* (2009) 125 Nev. 36, 215 P.3d 35, 37.) California does. The California Constitution, article XV, section 1, states: "No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than the interest authorized by this section upon any loan or forbearance of any money, goods, or things in action."[27] "Section 1 of article XV sets an annual interest rate of seven percent on loans and forbearances, but allows parties to a written contract to set the interest rate at [the higher of] 10 percent, or at the level of the Federal Reserve's discount rate plus 5 percent, on loans or forbearances involving real property." (*OCM Principal Opportunities Fund L.P. v. CIBC World Markets Corp .* (2008) 168 Cal.App.4th 185, 198–199, fn. omitted.) The evidence establishes that the Federal Reserve's discount rate when the challenged loans were made varied from 3.5 percent to 6 percent.

"The purpose of the usury law is ' "to protect the necessitous, impecunious borrower who is unable to acquire credit from the usual sources and is forced by his economic circumstances to resort to excessively costly funds to meet his financial needs." [Citation.]' (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 804–805; see also *O'Connor v. Televideo System, Inc.* (1990) 218 Cal.App.3d 709, 718 ['usury laws were enacted primarily to "protect the indigent, who are helpless to protect themselves in a practical sense" '], quoting *Wooton v. Coerber* (1963) 213 Cal.App.2d 142, 148.)" (*Moore v. Hill* (2010) 188 Cal.App.4th 1267, 1282.)

A plaintiff claiming a transaction was usurious may recover the usurious interest paid. (1 Witkin, Summary Cal. Law, (10th ed. 2005) Contracts, § 468, p. 511.) The court has discretion to award treble damages (three times the amount of interest paid to the lender for one year) for violation of the state usury law. (*Gibbo v. Berger* (2004) 123 Cal.App.4th 396, 404, citing Deering's Ann. Uncod. Measures 1919–3 (2004 ed.) p. 51.)

D. Change of Trial Court Ruling on Choice of Law Regarding Linda Manor Loans

***26** The facts regarding the challenged loans are undisputed. In its ruling on threshold issues in May 2005, the trial court concluded that California law governed the maximum interest that could be charged on the Linda Manor loans. This ruling was based on choice of law provisions in the "instant partnership agreements" for those properties which state they are to be " 'construed, interpreted and enforced in accordance *with the laws of the State of California* applicable to contracts executed in and wholly to be performed *in the State of California.*' See Evidentiary Statement [¶] 34."

The court also relied on evidence that the parties are all California residents or entities. It rejected defendants' argument that Nevada law should apply because some of the properties owned by the partnerships were located in Nevada, reasoning that the limited partners had the right under the partnership agreements to insist on application of California law. The court denied recovery to GFLP on the alleged usurious loans under the doctrines of equitable estoppel, unclean hands, and in pari delicto. It also found GFLP had failed to prove damages with respect to the Linda Manor Annex Acquisition Loan and the Linda Manor Refinance Loan. GFLP was denied recovery on three of the loans for failure to join the lender partnerships.

In May 2006, the trial court issued its initial statement of decision. Based on its earlier determination that California law applied to the Linda Manor loans, the trial court disposed of the various issues regarding those loans under California law.

In its first supplemental statement of decision, filed in June 2006, the trial court changed its position on the choice of law issue. It did so based on *Mencor Enterprises, Inc. v. Hets Equities Corp.* (1987) 190 Cal.App.3d 432 (*Mencor*). In that case, notes executed by the parties included a choice of law provision for Colorado. The *Mencor* court applied Restatement Second on Conflict of Laws, section 203[28] (on usury and choice of law) which states: "The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188." (Rest.2d, Conf. of Laws, § 203; *Mencor, supra,* 190 Cal.App.3d at p. 436.)

The trial court here explained that "upon closer examination of the Restatement and the *Mencor* case, the court finds that Nevada indeed does have, at the very least, a 'substantial relationship' to the Linda Manor loans at issue." The court referenced the deed of trust for the Linda Manor Annexation Loan, finding that while the lending entity (Linda Manor Lenders) is a California general partnership, the property itself is located in Nevada, a Nevada title company was used, the loan was payable at Las Vegas, Nevada, was recorded in Nevada and income from the property was generated in Nevada. The court concluded that the other Linda Manor loans had "substantially the same characteristics" except they were payable in Los Angeles.

*27 Based on these findings, the trial court concluded "Under *Mencor,* the fact the usurious Linda Manor loans were only 1–2% points above the maximum 10% usury rate in California provides this Court with a basis for overruling the Plaintiffs' usury objections to the court's ruling [in the initial statement of decision] (given the Court's finding that Nevada does have a substantial relationship with the contracts at issue)."

GFLP objected to the supplemental statement of decision. It did not move for a new trial based on the trial court's change of position. Its objections were overruled in the second supplemental statement of decision, but the trial court did not expressly address the choice of law issue in its findings and conclusions. GFLP was awarded nothing on its usury claims relating to the Linda Manor loans.

On appeal, GFLP argues it was prejudiced by the trial court's reversal of position on choice of law. It asserts that it had relied on the threshold ruling that California law governed, and hence did not conduct further discovery on the choice of law issue, and did not present evidence at trial on that issue. It argues it was denied its day in court on this determinative issue and that this constituted reversible error per se. It suggests that we hold that California law applies to all of its usury claims "[i]n the interest of fundamental fairness and justice."

GFLP cites *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096–1097 (*Le Francois*) to support this argument. In that case the Supreme Court considered the authority of the trial court to reconsider previous interim rulings on its own motion in the context of a second motion for summary judgment brought on the same grounds as a previous, unsuccessful motion. The *Le Francois* court concluded: "To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion—something we think will happen rather rarely—it should inform the parties of this concern, solicit briefing, and hold a hearing. [Citations.] Then, and only then, would a party be expected to respond to another party's suggestion that the court should reconsider a previous ruling. This procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders." (*Id.* at pp. 1108–1109.)

In response to GFLP's argument that it was denied the right to be heard on the choice of law issue, defendants argue the court did not err, citing the general principle that a trial court has discretion to change its rulings at any time prior to entry of judgment. They also point out that

GFLP exercised the appropriate remedy by objecting to the supplemental statement of decision, but did not seek new trial on this issue or move to reopen the evidence. In its reply brief, GFLP reiterates its argument that the court was required to provide notice and an opportunity to be heard about its change of position on the choice of law issue.

***28** The record before us contains no motion for new trial, much less a motion for new trial based on the principles discussed in *Le Francois.* The facts regarding the Linda Manor loans are undisputed. While California had a substantial relationship with the loans, so did Nevada, as the trial court found. California applies the Restatement Second on Conflicts, section 203 on choice of law issues. (*Mencor,* at p. 437.)

This rule applies even to the two Linda Manor loans in which the agreements forming the lending partnerships chose California as the governing law. Comment *e,* page 653, to section 203 of the Restatement addresses application of this special rule for usury claims to situations in which the parties have made a contractual choice of law: "[T]he forum will examine the general usury statutes of all states which have a substantial relationship to the contract and *apply the statute which either sustains the contract in full or else imposes the lightest penalty for usury.*" (Italics added.) Here both California and Nevada have a substantial relationship to the Linda Manor loans. But only application of Nevada law would "sustain the contract in full" and would impose the lightest penalty for usury, in this case none under Nevada law. Application of California law would be contrary to this policy.

The loans called for interest rates that were between .5 percent and 2.5 percent over the legal maximum under the California Constitution. We conclude, as did the trial court, that these differentials were not greatly in excess of the rate allowed under California law. Thus under section 203 of the Restatement, the trial court properly concluded that Nevada law governs all four Linda Manor loans at issue.

Our conclusion that Nevada law governs the Linda Manor loans makes it unnecessary for us to reach the other defenses to GFLP's usury claims, including the statute of limitations; equitable defenses (unclean hands, estoppel and in pari delicto); the business judgment rule; standing; and the personal liability of the individual defendants. We also need not, and do not, reach the arguments on the merits of the usury claim under California law, and GFLP's contention it is entitled to prejudgment interest on its usury claims.

F. GFLP's Appeal on Sunset Plaza Renovation Loan

California law governs the issues regarding GFLP's claim that the interest charged on the Sunset Plaza Renovation loan was usurious. The trial court rejected GFLP's usury claim on this loan for a number of reasons. This February 1998 loan was at 11 percent interest, but the legal maximum was 10 percent at the time.

The court denied the usury claim for the Sunset Plaza Renovation Loan on the ground that GFLP had failed to join a necessary defendant. The loan was made by the entity Sunset Plaza Hotel Lenders Partnership, comprised of 34 individual and entity lenders. That lending entity was not named as a defendant in this action. Instead, GFLP named Sunset Plaza Hotel Lenders II as a defendant. Sunset Plaza Hotel Lenders II was formed in May 2000 as a general partnership to fund a different loan, the Sunset Plaza Refinance Loan. It was comprised of 56 individual and entity lenders.

***29** Based on its finding that GFLP had not named Sunset Plaza Hotel Lenders partnership as a defendant to the action, the trial court concluded that recovery against individual defendants Grush and Leebove (the defendants on this claim) was barred under section 16307, "(even assuming for sake of argument, that these Defendants were general partners of Sunset Plaza Hotel Lenders Partnership—a finding the court does *not* make at this time)." Section 16307 is part of the UPA 1994, which governs the Sunset Plaza Hotel Lenders general partnership which was formed in 1998. Section 16306 of that act provides that with exceptions not applicable here, "all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law."

The cited statute, section 16307, subdivision (d), states: "A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless any of the following apply: [¶] (1) A judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part." The other subparts of section 16307, subdivision (d) are inapplicable. Since GFLP did not obtain a judgment against the Sunset Plaza Hotel Lenders Partnership, the court ruled that it could not obtain individual damages against Grush and Leebove for this claim.

GFLP argues that section 16307 has no application because "it only deals with whether a judgment against a partnership is by itself a judgment against a partner *and* whether a judgment against a partnership can be satisfied from a partner's assets without a judgment against the partner." It contends that it is not seeking judgment against the defunct lending partnerships, e.g. Sunset Plaza Lenders Partnership, because it has ceased to exist. Instead, it seeks a judgment against the general partners of the former lending partners.

GFLP did not participate in making the Sunset Plaza Renovation Loan and was not a partner in the Sunset Plaza Hotel Lenders Partnership which made the loan in question. Rather, as a limited partner in the Sunset limited partnership, it was an investor of the borrower. Section 16307, subdivision (d) requires a party to obtain a judgment which is unsatisfied against a general partnership before seeking recovery from the individual partners of that partnership. GFLP failed to satisfy this requirement. (See *U.S. v. Park Place Associates, Ltd.* (9th Cir.2009) 563 F.3d 907, 922–923 [§ 16307, subd. (d) applies to action brought against partnership by person other than a partner].)

We find no merit to GFLP's argument that section 16307 does not apply because the Sunset Plaza Hotel Lenders Partnership was terminated before this action was brought in 2001. The Sunset Plaza Hotel Lenders Partnership agreement provided that the partnership would be terminated when "the loan is fully repaid...." This loan was repaid in May 2000 when the Sunset Plaza Hotel Lenders II Partnership made a loan which paid off the loan in question here.

***30** The California Supreme Court has held a dissolved corporation may be sued and may defend itself in that suit. (*Peñasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1184–1193.) The court reasoned that "the effect of dissolution is not so much a change in the corporation's status as a change in its permitted scope of activity." (*Id.* at p. 1190.) It distinguished between activities related to " 'doing of business as a going concern," ' and defending a claim as part of the process of winding up the corporations affairs after normal business activities have ceased. Participating in judicial resolution of claims against the corporation was found to be part of the winding-up process during which the corporation continues to exist. (*Ibid.*)

This principle extends to a dissolved general partnership. Section 16802 subdivision (a) of the UPA 1994, which governs this issue, provides that "a partnership continues after dissolution only for the purpose of winding up the business. The partnership is terminated when the winding up of its business is completed." (See *Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, 469 [under UPA 1949, partnership is not terminated until winding up is complete].) Section 16803, subdivision (c) provides that "[a] person winding up a partnership's business may preserve the partnership business or property as a going concern for a reasonable time, *prosecute and defend actions and proceedings, whether civil,* criminal, or administrative, ..." (Italics added.)

An exception to section 16802 is made where the partners waive the right to have the partnership's business wound up. (§ 16802, subd. (b).) GFLP does not invoke this subdivision and there is no indication in the record that the partners in Sunset Plaza Hotel Lenders Partnership waived this right. GFLP was required to, but failed to comply with section 16307 in order to obtain a judgment against individual defendants Grush and Leebove for the usurious interest charged on the Sunset Plaza Renovation Loan. The trial court properly denied relief on the usury claim on this ground.

VIII

Fees

A. Procedural Summary

Following entry of judgment, GFLP and defendants filed cost bills, moved to tax costs, and sought attorney fees. Each opposed the fee motion filed by the other. Defendants sought $435,946.12 plus fees incurred after June 30, 2006. GFLP sought $525,607.

The trial court concluded that all defendants except the "Sunset Four" (GESEG, Inc., David Rose, Edward Brown, and Joel Leebove); Sunset Plaza Management Co., LLC; Linda Manor Ltd.; Linda Manor Lenders Partnership # 2; and Las Vegas La Mesa Inn Ltd; were prevailing parties and were entitled to an award of attorney fees. It found that all of the defendants were named on claims involving the Sunset partnership agreement, the 6th & Carson agreement, and the Colonial Hotel, LLC operating agreement, each of which contains an attorney fee provision. The court also found that the majority of defendants "totally" prevailed on the majority of claims asserted against them.

***31** The Linda Manor partnership agreement and the La Mesa partnership agreement do not contain attorney fee provisions. The court also found that while there is a fee provision in Linda Manor Lenders Partnership # 2 agreement, this lender partnership was only a nominal defendant in the action. As to these three partnership agreements, the court found they did not support a fee award and therefore declined to award fees to defendants Linda Manor Ltd., Linda Manor Lenders Partnership # 2, and Las Vegas La Mesa Inn Ltd., even though GFLP recovered no relief against these entities. The court rejected GFLP's argument that defendants were not prevailing parties for purposes of a fee award because they prevailed on some claims on technical grounds and not on the merits.

The Sunset partnership agreement contains an attorney fee clause. The court found GFLP a prevailing party on its claim for excess management fees against GESEG, Rose, Brown and Leebove as well as the Sunset Plaza Management. We have reversed (on other grounds) the court's award of damages for excessive management fees as to all but Sunset Plaza Management, Co.

The court rejected the "primary rights" approach suggested by GFLP, which it defined as the right to be free of breaches of duties owed them by their fiduciaries and the right to be free of usurious interest. But even if the primary rights theory advanced were accepted, the court found that GFLP "did not win redress for its 'primary rights' as to the majority of the Defendants in this litigation."

The prevailing defendants were awarded $348,757 collectively, calculated by the court as 80 percent of their fee request. The court noted that Schreiber's declaration in support of defendants' motion for attorney fees stated that "the issue of the raise in the Sunset Management fees absorbed approximately 20% of counsel's legal time spent in this matter." The court found this fee award reasonable in light of the fact that some defendants did not prevail on the claim for excessive Sunset management fees. The court found that "given the posture of the litigation, the defense provided by the Schreiber firm was a unified defense as to all claims, notwithstanding the fact there were claims against individual entities, and that it is not practical to allocate fees as to the defense of individual parties in the litigation."

GFLP's claim that it already had contributed to defendants' fees as an investor in the entities was rejected as without merit because, to the extent it is a partner in the entities that recover fees, it will share in that recovery.

The court awarded GFLP fees of $105,121, calculated as 20 percent of the fees incurred and claimed. Viewing the litigation in its totality, the trial court found this amount reasonable and a reflection of the fees reasonably incurred in prosecuting the claims on which GFLP succeeded. The court expressly rejected GFLP's assertions that "(1) the Linda Manor and Colonial properties were sold due to the commencement and prosecution of this case; (2) the manner in which the general and managing partners managed the partnerships constituted a breach of fiduciary duty by the general partners; and (3) Plaintiffs were entitled to recover in this action on their claims that various loans were usurious." The court, in the express exercise of its discretion, concluded "that a percentage allocation of fees is the most equitable and practical approach in making the prevailing party fee awards in this case."

***32** GFLP, in its individual capacity, was ordered to pay the fee award to the prevailing defendants. The court rejected GFLP's argument that the fees be paid from a common fund, or that the award was appropriate under "the substantial benefit doctrine" which it described as a modern derivative of the common fund doctrine. In addition to the order that Sunset Plaza Management Co. was to pay fees, the Sunset Four defendants were ordered to pay fees awarded to GFLP in their individual capacities. The trial court made "no determination as to whether (if at all) the Sunset Four and Sunset Plaza Management Co., LLC are entitled to indemnification for fees or costs."

As to costs, based on its orders appointing Mr. Kojima for accounting purposes and Mr. Pasternak as receiver, the court split the costs for their services equally between GFLP and defendants because they benefited equally from the services and there was no reasonable basis to impose those costs on only one party. The parties were otherwise ordered to bear their respective costs of suit.

In another postjudgment order, prejudgment interest was awarded to GFLP in the amount of $270,315.00 and the clerk was ordered to amend the judgment to reflect this sum. GFLP filed an appeal from the judgment and postjudgment award of fees and a cross-appeal on orders after judgment. Defendants also filed a cross-appeal. Defendants Sunset Towers West, Ltd. and Linda Manor Ltd. filed a separate cross-appeal and appear separately from the other defendants on the issue of fees and costs.

We granted a motion by GFLP to dismiss the portion of defendants' postjudgment appeal challenging the order recusing attorney Schreiber and his firm from representing the investment partnerships on the ground that this aspect of the appeal was untimely.

B. Reimbursement of Fees Paid Schreiber

GFLP claims defendants must reimburse the investment partnerships for legal fees they paid to Schreiber & Schreiber from partnership assets for services rendered during the period the Schreiber firm represented conflicting interests in this action. Defendants point out that the question of fees paid to Schreiber was not part of this suit. Schreiber was recused before the second amended complaint was filed. That pleading does not name either Schreiber or his firm as a defendant and does not allege a cause of action for reimbursement of fees paid during the period that when there was a conflict of interest.

We have no basis to make an order requiring defendants to reimburse the investment partnerships for the legal fees paid to Schreiber & Schreiber. It is axiomatic that "[a] complaint must contain '[a] statement of the facts constituting the cause of action, in ordinary and concise language.' (§ 425.10, subd. (a)(1).) This fact-pleading requirement obligates the plaintiff to allege ultimate facts that 'as a whole apprise[ ] the adversary of the factual basis of the claim. [Citations.]' [Citations.]" (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415.) GFLP did not seek affirmative relief for this claim in this action and we therefore cannot grant it the relief it seeks. This conclusion also disposes of GFLP's related arguments regarding any alleged breach of duty by Schreiber to the investment partnerships, which was not alleged in the complaint and therefore is not part of this action. We conclude that any dispute regarding Schreiber's actions in this litigation must be resolved in another forum.

***33** We dismissed defendants' appeal of the order recusing Schreiber & Schreiber as untimely. We therefore do not reach the arguments of the parties regarding the merits of that order.

C. Impact of Partial Reversal of Management Fee Award

In the event of a full or partial reversal, defendants ask us to remand the matter for a reallocation of fees. We have reversed the award to the Sunset partnership for excessive management fees only as to the four individual defendants Rose, Brown, GESEG, Inc., and Leebove. This leaves the award intact as to the remaining defendant, Sunset Plaza Management. Thus GFLP still is the prevailing party on this claim and no reallocation of fees is required. But the attorney fee award in favor of GFLP must be modified to the extent that Rose, Brown, GESEG, Inc. and Leebove were ordered to pay this award. Only Sunset Plaza Management remains liable for the fees awarded GFLP for its success on the management fee issue. We note that these four individual defendants remain liable on the award for usurious interest on Sunset loan 10.

D. Prevailing Party

Fees were awarded pursuant to Civil Code section 1717 under the contractual attorney fee provisions in some of the entity agreements, as discussed in the procedural summary on fees. Under subdivision (b)(1) of that statute, the prevailing party in a contract action is "the party who recovered a greater relief in the action on the contract." "[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' [Citation.]" (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876.) " 'If neither party achieves *a complete victory* on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees.' (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)" (*De La Cuesta v. Benham* (2011) 193 Cal.App.4th 1287, 1294.)

" '[T]he trial court " 'is given wide discretion in determining which party has prevailed on its cause(s) of action. Such a determination will not be disturbed on appeal absent a clear abuse of discretion." ' [Citation.]" [Citation.]" (*Roden v. AmerisourceBergen Corp.* (2010) 186 Cal.App.4th 620, 663.)

1. GFLP as Prevailing Party

GFLP argues the trial court erred in failing to find that it was the prevailing party in the *entire* action, not just the Sunset partnership management fee and usury claims. It asserts: "It is the monetary award, *in combination with* Plaintiff's successes in its *other litigation objectives,* which establishes Plaintiff as the prevailing party." It contends: "Plaintiff obtained recovery of excessive management fees, recovery of usurious interest, recovery of over-charges, the dissolution of two unproductive Investment Partnerships (which benefited the Investment Partnership's passive investors at least $5,782,164) and, for the first time, receipt of an intelligible and informative view of the status and results of operation of their

Partnership. If these benefits do not constitute a win, and a big one at that, what would?" GFLP asserts that the investors in the investment partnerships are $5,782,164 "*better off* than they were before Plaintiff commenced this litigation."

***34** This $5 million plus figure is calculated by GFLP as follows:

1) proceeds of $4,708,997 to the investors Linda Manor Ltd. and La Mesa Inn Ltd. (another Nevada property) when these properties were sold on motion of GFLP for dissolution of the partnerships;

2) nearly $940,000 in excess management fees for the Sunset partnership plus prejudgment interest;

3) $154,712.24 in excess payroll taxes charged to the Sunset partnership and identified by the court's expert, Mr. Kojima; and

4) $35,297 in usurious interest on the Sunset Towers loan number 10.

GFLP also cites its successful recusal of attorney Edwin C.Schreiber for concurrently representing the investment partnerships and the general partnerships. Other successes cited by GFLP include appointment of the limited purpose receiver to protect the investment partnerships and to oversee the dissolution and windup of the Nevada partnerships and obtaining Mr. Kojima's forensic accounting report on the Sunset partnership.

Defendants dispute these claimed GFLP victories, pointing out that GFLP acknowledges that the trial court found that " '[d]efendants were going to sell Linda Manor Inn and La Mesa Inn anyway, ...' "[29] Defendants cite a declaration by David Rose in opposition to a summary adjudication motion stating that the general partners had attempted for years to sell Linda Manor. In addition, defendants cite evidence about the appreciation of these two properties and speculate that had the sale not been forced by GFLP, they could have been sold for a greater profit.

Substantial evidence establishes that the trial court did not abuse its discretion in determining that GFLP did not prevail on all its claims. The second amended complaint (98 pages long) alleges derivative claims for breach of contract regarding management and operation of the various investment entities, including Colonial Hotel (and Colonial II Lenders), Las Vegas Americana Inn, Las Vegas La Mesa Inn Ltd., Linda Manor Ltd., Sunset Towers West, Ltd., and 6th & Carson Hotel. The judgment provides no recovery to GFLP on these causes of action. Causes of action for breach of fiduciary duty are alleged in the second amended complaint regarding the management and operation of these same entities. GFLP alleged intentional misrepresentation and fraud causes of action arising from the operation and management of Colonial Hotel, Las Vegas Americana Inn, Las Vegas La Mesa Inn, Linda Manor, and Sunset Plaza Hotel. Eight defendants (individuals and entities) were alleged to have aided and abetted misrepresentations regarding the management of the entities in which GFLP had investments.

GFLP alleged individual causes of action for breach of fiduciary duty and intentional misrepresentation and fraud regarding operation and management of the Colonial Hotel, Las Vegas Americana, Las Vegas La Mesa Inn, and Linda Manor. Equitable causes of action for the dissolution and winding up of Colonial Hotel, Las Vegas Americana, 6th & Carson, Linda Manor and La Mesa Inn also were alleged. An accounting was sought as to Colonial Hotel, Las Vegas Americana Inn, Linda Manor and 6th & Carson. The 26th cause of action was for declaratory relief regarding the impropriety of the amendment of the Sunset partnership agreement to substitute Sunset Plaza Management as general partner. GFLP dismissed a cause of action for conversion of proceeds of the sale of Colonial before trial.

***35** The trial court pointed out that the first 19 derivative causes of action were against all defendants, as were the causes of action for an accounting and declaratory relief. As we have seen, from all of these causes of action, GFLP obtained recovery on two usurious loans, the improper management fee increase on Sunset, dissolution of Linda Manor and La Mesa, and an accounting. It is evident, no matter how GFLP characterizes the record, that the trial court did not abuse its discretion in determining that GFLP did not prevail on the entire matter as it claims.

2. Defendants as Prevailing Parties

In a heading in its opening brief on the fee issues, GFLP argues the trial court abused its discretion in determining that defendants were prevailing parties because they prevailed on several claims. Claimed errors under this heading in GFLP's opening brief on fees include ignoring GLFP's theories about how much it recovered as outlined above; minimizing the monetary relief it obtained; awarding fees against GFLP for investment partnerships that did not have fee clause provisions on a theory of indemnification that was not tried below; ignoring the arguments regarding fees to attorney Schreiber in the dual representation period; ordering GFLP to pay fees when it had participated in paying fees and costs as an investor in the investment partnerships; mistaking the identity of defendants and finding a joint defense was presented; and refusing to allocate time devoted to defending claims relating to investment entities without fee clauses in their partnership agreements.

Apart from the arguments regarding fees paid to Schreiber, which we have addressed, and one argument about the conversion cause of action regarding the sale of Colonial Hotel,[30] we find no argument in GFLP's briefs on appeal demonstrating why the court abused its discretion in finding that defendants were prevailing parties. The argument under the heading in GFLP's opening brief on this topic does not include specific argument regarding the finding that defendants had prevailed. We find no such argument in the other briefs filed by GFLP on fees.

In any event, our discussion of the many claims brought by GFLP and the limited results demonstrates that the trial court did not abuse its discretion in concluding that most of the defendants prevailed on all causes of action against them[31] and that even the Sunset Four defendants and Sunset Plaza Management prevailed on most of the claims against them. We have reversed the management fee award against the Sunset Four individual defendants, further establishing that they prevailed on most of the claims against them.

E. Common Fund

The trial court rejected GFLP's argument that the fee award against it be paid from a common fund or under the substantial benefit doctrine. It ruled: "The Court finds an award of fees to Plaintiff from either a common fund or under a 'substantial benefit' theory would not be appropriate. Such an award would prejudice those Defendants who prevailed against Plaintiff GLFP, and require them to pay fees for which they were not responsible."

***36** GFLP's common fund argument is also based on its claim that it recovered $5,782,000 in this litigation on behalf of the investment entities, as well as substantial nonpecuniary benefits such as improved financial records. It asserts that the passive investors have obtained sizeable cash distributions through no effort or expense of their own solely because of GFLP's prosecution of this action as a derivative action.

The common fund and substantial benefit doctrines are judicially developed equitable exceptions to the "American rule" (Code Civ. Proc., § 1021), which, as a general proposition, requires each party to a litigation to pay his or her own attorney fees. (*Cziraki v. Thunder Cats, Inc.* (2003) 111 Cal.App.4th 552, 557 (*Cziraki*).) " '[I]f the litigation has succeeded in creating or preserving a common fund for the benefit of a number of persons, the plaintiff may be awarded attorney fees out of that fund. [Citation.] Likewise, if a judgment confers a substantial benefit on a defendant, such as in a corporate derivative action, the defendant may be required to pay the attorney fees incurred by the plaintiff." (*Id.* at pp. 557–558, fn. omitted.)

The common fund doctrine was explained by the court in *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 Cal.App.4th 387 (*Mrs.Gooch's*) as "based on the commonsense notion that the 'one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs.' [Citation.]" (*Id.* at p. 397.) The court analogized an award of fees under this doctrine to an action in quantum meruit in that the individual seeking compensation has benefited another and seeks payment for the value of the services performed. (*Ibid.*) "An essential prerequisite to the application of the equitable common fund principle is the existence of a 'fund' from which attorney fees may be paid. [Citation.]" (*Ibid.*)

The court in *Mrs. Gooch's* also addressed the related substantial benefit doctrine, an extension of the common fund doctrine. "It applies where no common fund has been created, but a concrete and significant benefit, although nonmonetary in nature, has nonetheless been conferred on an ascertainable class. [Citation .]" (*Mrs. Gooch's, supra,* 127 Cal.App.4th at p. 397.)

In *Cziraki,* the court concluded that the corporate derivative action had created both a common fund (a monetary judgment against the majority of shareholders) and a substantial benefit (preservation of a patent assignment, the main corporate asset). (*Cziraki, supra,* 111 Cal.App.4th at p. 558.) It explained that these doctrines are generally applied "to cases involving a distinct class of beneficiaries among whom the costs of litigation can be fairly spread to prevent the unjust enrichment of class members at the expense of the successful litigant." (*Ibid.,* fns.omitted.)

***37** The *Cziraki* court applied these doctrines in the context of a minority shareholder's derivative action based on the failure of defendant shareholders to assign patent rights to the corporation as promised. The trial court found the defendant shareholders had breached their fiduciary duties by failing to assign the patent rights. It ordered them to do so and to pay a total of $258,000 in economic damages resulting from failure to assign the patents. No damages were awarded Cziraki on his individual claims. (*Cziraki, supra,* 111 Cal.App.4th at p. 556.) The court explained: "In a derivative action, the corporation represents the class of beneficiary shareholders. When the corporation pays attorney fees to the successful plaintiff, all shareholders indirectly share the cost of the beneficial litigation with the shareholder who brought the action." (*Id.* at p. 558.)

In response to the common fund issue, defendants argue: "Just because Plaintiff sought to act in what Plaintiff thought was best for the entity defendants does not mean that Plaintiff should therefore be reimbursed every cent it expended, and should be exempt from paying attorney fees for those claims it lost." They contend that GFLP chose to file an action alleging multiple causes of action against many parties, but prevailed only on the Sunset management fee and usurious loan issues. As "[t]he price of such action, Plaintiff must bear the burden of its choices and must pay the costs associated with its litigation choices." Under these circumstances, defendants argue the trial court did not abuse its discretion in deciding to deny GFLP fees under the common fund or substantial benefit doctrines.

As we have discussed, GFLP did not obtain the full $5,782,000 for which it claims credit.[32] But it is clear that GFLP recovered excessive management fees of $633,580, $270,315 in prejudgment interest, plus $35,297 in usurious interest for the Sunset partnership. These sums were recovered in the derivative action only because GFLP pursued the claims. This is a classic situation in which the common fund doctrine applies. GFLP obtained this amount and the partners in Sunset partnership benefited from the award.

We agree with defendants' concern that application of the common fund or substantial benefit doctrines must take into account the fact that GFLP prevailed on only some of the claims it brought, and obtained an award against a small number of the total defendants sued. In addition, we caution that GFLP is not entitled to double recovery of the fees incurred with respect to the excessive management fees and the usurious interest. The trial court's order on the common fund doctrine on remand must take into account the $105,121 Sunset Plaza Management is ordered to pay GFLP. We reverse the trial court's fee order and remand the matter for application of the common fund doctrine based only on the recovery of the Sunset partnership's excess management fees, prejudgment interest and usurious interest.

***38** GFLP argues that the common fund doctrine should apply to the fee award levied against it as well as the fee award in its favor based on the recovery it obtained for the Sunset partnership. We conclude that the common fund does not apply to relieve GFLP of its obligation to pay attorney fees to defendants for its unsuccessful litigation of numerous claims against many defendants. The Sunset partners obtained no benefit from that effort.

F. Allocation of Defense Fees

GFLP argues that the trial court abused its discretion in refusing to allocate defense attorney fees between efforts expended in the defense of entities whose partnership agreements had fee clauses and those that did not. It contends: "Although this award was ostensibly predicated upon the attorney's fees provision in the 3 investment agreements of Sunset Towers West Ltd., Colonial Hotel LLC and 6th & Carson, [citations] in reality it was not. There were 3 other Investment Partnerships (La Mesa Inn Ltd. Linda Manor Ltd. and Americana Inn Ltd.) which *did not have any attorney's fees clauses in their investment agreements*—and which were very much the focus of this Action [citation]."

The trial court distinguished between these entities in the fee order. It expressly found that the Linda Manor and Las Vegas La Mesa Inn partnership agreements do not have attorney fee provisions. In addition, it found that Linda Manor Lenders Partnership # 2 was only a nominal defendant in this action. Based on these findings, the court expressly found that these partnership agreements cannot be the basis for a fee award in this litigation, and declined to award fees to these entities even though GFLP recovered no relief against them.[33]

The rule is that "allocation is not required when the issues are 'so interrelated that it would have been impossible to separate them into claims for which attorney fees are properly awarded and claims for which they are not.' [Citation.]" (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 555; *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1277 [allocation of fees incurred in representing multiple parties not required when claims are inextricably intertwined " 'making it "impracticable if not impossible, to separate the multitude of conjoined activities into compensable or noncompensable time units" [citation.]' "] The trial court was satisfied that the scope of the allegations in GFLP's action necessitated a common defense on behalf of all defendants which made allocation between the entities with fee clauses and those who had none impossible. The court noted that the original complaint (199 pages long) alleged 51 causes of action. It found that all defendants were named in the claims involving the agreements with the fee clauses and that the majority of defendants prevailed on these claims. In light of the overlapping defense issues the court found the allocation problem "insurmountable." We find no abuse of the trial court's discretion in approaching the fee award to defendants in this manner.

G. Indemnification Rights of Individual Defendants as Basis for Award

***39** GFLP argues that the partnership entities improperly contributed to the defense of this action and that therefore no fee recovery should be based on those amounts. It claims the trial court erred in awarding defense fees based on its conclusion that the partnership entities contributed to the defense because they contained provisions indemnifying the individual defendants. This was error, GFLP asserts, because the right of the defendants to indemnity was not adjudicated in this action. It also contends that defendants should not recover fees actually paid from assets of the Linda Manor and La Mesa partnerships which did not have fee clauses in their partnership agreements.

These claims are supported by reference to entries for legal fees in income and expense reports for several of the partnerships. The trial court expressly rejected this argument as speculative, stating that there was no evidence before the court establishing whether these entries for legal fees were for this litigation, or for operation of the partnership or in connection with distribution of profits from the sale of some partnership assets. The court declined to resolve the issue by guess work. We agree. The evidence cited by GFLP in support of this argument does not establish that the legal fees paid by the partnerships were for this litigation.

In a related argument, GFLP cites portions of the hearing on fees to argue the trial court sanctioned the defendants' improper use of partnership funds to pay defense legal fees based on indemnity clauses in the partnership agreements. The cited comments were made by the trial court as it worked through the issue of which parties were entitled to fees, particularly Linda Manor and La Mesa Inn, which had no fee clauses in their partnership agreements. Additional statements by the trial court are cited by GFLP, but they occurred in the context of a colloquy about the impact of the derivative nature of the action on the fee issue. The court ultimately denied any fee award to Linda Manor and La Mesa Inn for this reason. We find no abuse of the court's discretion in this ruling.

H. Double Fee Recovery to Individual Defendants

GFLP also argues that defendants used their positions as general partners to provide themselves a complete defense throughout this action from funds of the investment partnerships. Without benefit of citation to the record, GFLP asserts that the individual defendants "did not pay one single dollar of legal fees (or costs) to Attorney Schreiber and, therefore, should not have been awarded any amount of legal fees."

The record establishes that the individual defendants prevailed on all but two of the Sunset claims against them. As prevailing parties, they were entitled to an award of fees. GFLP cites no authority for the proposition that a prevailing party whose attorneys were paid from other sources during the course of litigation is not entitled to recover fees at the conclusion of the case. The issue is forfeited. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [point not supported with citations to authority is waived]; *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 [argument not supported by citations to record is forfeited.].)

I. Sufficiency of Evidence of Defense Fees

***40** GFLP argues that the declaration submitted by Schreiber in support of the defense claim of attorney fees did not account for 15 percent of the time spent on the defense of this case. Schreiber's declaration states that he and his firm billed 1,371.20 hours on this matter. Based on a review of the bills, he summarized the categories of issues which "absorbed the greatest amount of legal fees." These were: 1) alleged conversion of $2,000,000 in proceeds from the sale of the Colonial Hotel (15 percent); 2) the unsuccessful usury claims (30 percent); 3) Sunset management fee increase (20 percent); affirmative defenses, including statute of limitations, estoppel, waiver and laches (20 percent). Schreiber concluded that these four were the largest individual items. "Of the multitudinous other issues raised by Plaintiff, the one that absorbed the most legal time was the numerous assertions of fraud and breach of fiduciary obligations."

On appeal, we infer all findings in favor of the prevailing parties on a fee award. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254–255.) Contrary to GFLP's argument, Schreiber declared that all of the 1,371.20 hours claimed were spent on defense of this litigation and set out the relevant hourly billing rates for these services. The fact that his summary of the major categories of time spent did not include a residuary 15 percent does not render the evidence in support of the fee award insufficient. "California case law permits fee awards in the absence of detailed time sheets." (*Id.* at p. 255.)

J. Fees for Colonial Hotel Conversion Claim

GFLP claims there was no legal basis for an award of fees to defendants based on the defense of the conversion cause of action regarding the proceeds from the sale of the Colonial Hotel. In effect, GFLP argues that defendants brought this claim upon themselves by withholding evidence that they had not converted funds from the sale. GFLP dismissed its conversion claim in April 2005.

The award of fees under section 1717 is guided by equitable principles. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.) GFLP made this argument in its fee motion. The trial court did not expressly reduce the fees awarded defendants on this basis. In light of the principle that we infer all findings in favor of the prevailing parties on a fee award, (*Wershba v. Apple Computer, Inc, supra,* 91 Cal.App.4th at pp. 254–255), we infer that the trial court rejected GFLP's argument. "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong'—meaning that it abused its discretion. [Citations.]" (*PLCM Group v. Drexler, supra,* 22 Cal.4th at p. 1095.) Since Colonial Hotel was named a defendant in many of the causes of action in addition to the conversion cause of action, presumably the fee award took into account the result in all of those claims. We find no abuse of the trial court's discretion.

IX

Costs

*41 Both GFLP and defendants sought costs. On appeal, neither disputes the court's decision that the costs for the services of the receiver and the accounting expert be split evenly between them. The trial court exercised its discretion under Code of Civil Procedure sections 1032 and 1033 to order each party to bear its respective costs of suit. On appeal, GFLP, Sunset and Linda Manor, and the remaining defendants all claim the trial court erred in denying them an award of mandatory costs under section 1033.5, which itemizes recoverable costs.

"Unless otherwise provided by statute, a 'prevailing party' is entitled to recover costs in any action or proceeding 'as a matter of right.' ([Code Civ. Proc.,] §§ 1032, subd. (b); see § 1033.5, subd. (a)(10)(A)-(C).) ... 'Prevailing party' for purposes of section 1032(a)(4) is defined as including: '[1] the party with a net monetary recovery, ... [4] a defendant as against those plaintiffs who do not recover any relief against that defendant.' ... [Citation.]" (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1333.) The court has no discretion to deny costs to the prevailing party absent statutory authority to do so. (*Vons Cos., Inc. v. Lyle Parks Jr,. Inc.* (2009) 177 Cal.App.4th 823, 832.) But "where one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party. [Citations.]" (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1075 (*Textron*).) That is not our case; *Textron* is distinguishable. Here, there were multiple defendants who presented a unified defense to multiple claims. GFLP ultimately prevailed against only one of them, Sunset Plaza Management, on the management fee and usurious interest claims. We conclude that GFLP and the defendants other than Sunset Plaza Management come within the definition of prevailing party for the purposes of costs. They were entitled to the mandatory fees set out in Code of Civil Procedure section 1033.5. We remand the matter to the trial court for that determination.

X

Fees on Appeal

All of the defendants, except Sunset Plaza Management, have prevailed on this appeal. These prevailing defendants are entitled to an award of costs and fees on appeal. (Cal. Rules of Court, rule 8.278; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 352.) Since there is no fee clause in the agreements for Linda Manor and La Mesa, they are not entitled not recover fees on appeal. We remand the matter to the trial court to determine the appropriate amount of fees.

DISPOSITION

We reverse the award of excessive Sunset management fees against individual defendants Brown, Rose, Leebove and GESEG. We reverse the trial court's order denying application of the common fund doctrine to GFLP's fee request. We also reverse the trial court's order denying mandatory costs to the parties. The matter is remanded for determination of fees and costs consistent with the views expressed in this opinion.

***42** Sunset partnership is to have its costs on appeal as against GFLP and GFLP is to have its costs on appeal against Sunset Plaza Management.

We concur: MANELLA and SUZUKAWA, JJ.

All Citations

Not Reported in Cal.Rptr.3d, 2011 WL 3307912

Footnotes

1 All statutory references are to the Corporations Code unless otherwise indicated.

2 An additional defendant is the general partners' management company, Sunset Plaza Management Company.

3 These included Colonial Hotel, LLC, a California limited liability company; Colonial Hotel II, a California Limited Partnership; Las Vegas Americana Inn Limited Partnership, a California Limited Partnership; Las Vegas La Mesa Inn Ltd., a California Limited Partnership; Linda Manor Ltd, a California Limited Partnership; Linda Manor Lenders Partnership # 2, a California general partnership; Sunset Affiliated Hotel Management Company, Inc., a California corporation; Sunset Plaza Hotel Lenders II, a California general partnership; Sunset Plaza Hotel Mgmt. Co., LLC, a California limited liability company; Sunset Towers West, Ltd ., a California limited partnership; and 6th & Carson Hotel, a California general partnership.

4 We discuss the successive limited partnership acts in detail. The successive general partnership acts are the Uniform Partnership Act of 1949 (§ 15001 et seq.) and the 1994 Uniform Partnership Act (§ 16100). "In 1996, effective January 1, 1997, the sections of the Corporations Code that included the Uniform Partnership Act [UPA], ... were repealed and replaced with the Revised Uniform Partnership Act [RUPA]. (Stats.1996, ch. 1003 §§ 1.2, 2, pp. 5906, 5908).)" (*In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1422.)

5 The 1949 Act was derived from an earlier Uniform Limited Partnership Act adopted in 1929 and reenacted in 1949. (*Evans v. Galardi* (1976) 16 Cal.3d 300, 306 (*Evans*).)

6 Section 16401, subdivision (j) provides: "An act outside the ordinary course of business of a partnership *and* an amendment to the partnership agreement may be undertaken *only* with the consent of *all* the partners." (Italics added.)

7 We conclude that the invited error doctrine does not apply here. It is abundantly clear that counsel for both sides and the trial court were perplexed about which version of the limited partnership and partnership laws applied. "[T]he invited error doctrine requires affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party. [Citations.]" (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 706.) In light of the continuing confusion about the governing law demonstrated by all counsel, a deliberate tactical choice has not been demonstrated. In its absence, there is no basis to apply the doctrine.

8 In their supplemental briefing after oral argument, defendants take the position that the UPA 1994 governs all partnerships after January 1, 1999 by operation of law, citing section 16111, subdivision (b). But section 16112 states: "This chapter does not affect an action or proceeding commenced or right accrued before this chapter takes effect [on January 1, 1997]." As we explain in more detail below, because GFLP's claim of excessive fee increases is based on a vote that took place in 1990, UPA 1994 has no application to claims regarding Sunset.

9 Section 15501 of the ULPA defines limited partnership as "a partnership formed by two or more persons under the provisions of Section 15502, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership."

10 The trial court ruled that GFLP had satisfied the standing requirements of section 15702.

11 Section 15509, subdivision (1) states: "A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to: [¶] (a) Do any act in contravention of the certificate...."

12 Section 15018, provided: "The rights and duties of the partners in relation to the partnership shall be determined, *subject to any agreement between them,* by the following rules: [¶] (h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners." (Italics added.)

13 The full text of section 15529 is: "In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern." The court in *Pribus v. Bush* (1981) 118 Cal.App.3d 1003, 1007, fn. 5 cites to a definition of the law merchant: "An excellent discussion of the history and development of the law merchant appears in *Bank of Conway v. Stary* (1924) 51 N.D. 399 [200 N.W. 505, 508–509, 37 A.L.R. 1186]. The law merchant is there defined as 'a system of law that does not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world. [Citations.] ... "This lex mercatoria or common law of merchants is of more universal authority than the common law of England." [Citation.]' (*Id.,* 200 N.W. at p. 508.)"

14 Defendants also argue that the RLPA section 15618 allowed a majority vote on the fee increase because it expressly permits the effect of that chapter to be "varied as among the partners by the partnership agreement," except as to provisions not relevant here. As discussed, the RLPA has no application to the increase in the Sunset partnership management fee.

15 GFLP points to a December 8, 2003 letter sent by general partner David Rose to investors who had not responded to the 1990 request to approve the fee increase. The letter states it was sent because the nonresponding interests (41.78 percent) were counted as approvals in 1990 and that action was being challenged in litigation brought by another investor (Tillman litigation). The 2003 letter asks the investors to provide "written confirmation that you approved of the increase but did not respond in writing, as it was not required at the time. [¶] By doing so it will help in eliminating one of the allegations in the Tillman lawsuit, which has become so costly to the partnership." Three of the investors (other than GFLP) responded to this solicitation by stating they did not approve the fee increase in 1990, confirming that defendants instituted that increase in violation of the ULPA because it was not approved by all partners.

16 GFLP explains that Tillman's delay in contacting the partnership about her concerns until February 2001 was because of her father's terminal illness and death in January 2001.

17 The parties' challenges to the excess fee award are legal rather than mathematical; they do not dispute the trial court's calculation on appeal.

18 " '[A] limited liability company is a hybrid business entity formed under the Corporations Code consisting of at least two members who own membership interests. The company has a legal existence separate from its members. While members actively participate in the management and control of the company, they have limited liability for the company's debts and obligations to the same extent enjoyed by corporate shareholders. [Citations.]' (*Kwok v. Transnation Title Ins. Co.* (2009) 170 Cal.App.4th 1562, 1571 (*Kwok*).) Under Corporations Code section 17300, a member of a limited liability company 'has no interest in specific limited liability company property.' (Accord, *Kwok,* at pp. 1570–1571.)" (*Capon v. Monopoly Game LLC* (2011) 193 Cal.App.4th 344, 356, fn. 11.)

19 Section 17101, subdivision (b) states: "A member of a limited liability company shall be subject to liability under the common law governing alter ego liability, ..." (See *People v. Pacific Landmark, LLC* (2005) 129 Cal.App.4th 1203, 1212.)

20 In its objections to the statement of decision, GFLP argued that defendants had again asserted the 1997 amendment and substitution of general partner had cut off their individual liability in the Non–Partnership Defendant's Post Trial Brief on The Raise of Sunset Fees From Three Percent to Five Percent. That pleading does not appear in the joint appendix on appeal.

21 Two loans addressed by the trial court are *not* the subject of GFLP's appeal. The Sunset Plaza Refinance Loan on May 15, 2000 for $3,575,252 was at the legal rate of interest in California at that time, 10 percent. The lender on that loan was the Sunset Plaza Hotel Lenders II Partnership. GFLP does not directly challenge this loan as usurious, but it claims that the balance of the usurious Sunset Plaza Renovation Loan was rolled over to this loan, and may thus be

traced to this loan. In addition, GFLP raises no issue on appeal regarding Loan 10, a June 15, 2000 individual loan by defendants GESEG, Grush, Brown and Leebove of $350,000 since the trial court found this loan usurious and awarded damages on that basis.

22 Designated Loan 1 by GFLP below, but the trial court combined this loan and the Linda Manor Refinance Loan in the loan it designated as Loan 1.

23 Designated as Loan 2 by GFLP below, but the trial court combined it with the Linda Manor Annex Acquisition Loan in its designation of Loan 1.

24 Originally designated Loan 2 by the trial court.

25 Designated Loan 3 by the trial court, but referred to as Loan 4 by defendants.

26 Designated Loan 7, but the trial court originally designated it Loan 5.

27 The Supreme Court explained that California's proscription against usury also appears in an uncodified statute enacted by initiative, which remains in full force and effect to the extent it does not conflict with the constitution. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 798, fn. 2 (*Ghirardo*).) As was the practice in *Ghirardo,* our references to "usury" refer to both the constitutional and statutory provisions. (*Ibid.*)

28 All further references to the Restatement are to the Restatement Second on Conflicts of Law.

29 Defendants argue GFLP did not challenge the trial court's findings that these two properties would have been sold and therefore cannot rely on contrary factual assertions in support of their fee argument. We agree that absent a challenge to the evidence supporting this finding, GFLP cannot now be heard to claim the finding is unsupported in order to bolster its claim that it prevailed on all issues.

30 We address this claim below.

31 The trial court identified these 20 defendants in footnote 4 of its order on fees and costs.

32 The record supports the trial court's finding that the Linda Manor and La Mesa Inn properties would have been sold even if this litigation had not been brought, as we discuss. In addition, GFLP claims that $154,712 was reimbursed to the Sunset limited partnership after the court's accounting expert discovered payroll tax overcharges in that amount. But no citation to the record is offered to support that assertion.

33 We are uncertain as to why GFLP cites Americana Inn, Ltd. as one of the entities which did not have a fee clause. It is not mentioned in the fee order and was not awarded fees.

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Subject: RE: Supreme Court No. 91247-5 / Respondent Bilanko's First Statement of Additional Authority

Received on 2-17-2016

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Subject: Supreme Court No. 91247-5 / Respondent Bilanko's First Statement of Additional Authority

Dear Clerk:

Please find attached the following document to be filed with the Court in the matter of Carolyn Robbs Bilanko v. Barclay Court Owners Association, Case No. 91247-5:

- RESPONDENT BILANKO'S FIRST STATEMENT OF ADDITIONAL AUTHORITY

Regards,
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