

IN THE COURT OF COMMON PLEAS
OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Alan Wurtzel, et al.	:	
	:	June 2001
	:	No. 3511
v.	:	
	:	
Park Towne Place Associates	:	Commerce Program
<u>Limited Partnership, et al.</u>	:	

FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS OF LAW
IN SUPPORT OF ORDER DENYING PRELIMINARY INJUNCTION
WITH RESPECT TO A NOVEMBER 2, 2001 TENDER OFFER

Plaintiff Wurtzel filed a Petition for a Preliminary Injunction on November 15, 2001 to enjoin a Tender Offer by defendant Aimco Properties, L.P. "AIMCO" because of allegedly misleading or deficient disclosures and coercion. Plaintiff had previously sought a Preliminary Injunction against a Merger announced on May 29, 2001 which this court granted. Because the Tender Offer was due to expire on December 3, 2001, a hearing was scheduled for November 26, 2001.

After considering the briefs, documents, and arguments presented, this court by order dated December 4, 2001 denied plaintiff's petition to enjoin the November 2001 Tender offer based on the preliminary record presented for the reasons set forth below.

FINDINGS OF FACT

I. THE PARTIES

1. Plaintiff Alan Wurtzel has been a limited partner in defendant Park Towne Place Limited Partnership ("Partnership") since 1986.¹
2. The Partnership is a Delaware Limited Partnership formed in 1985 that owns Park Towne Place, an apartment complex in Philadelphia.²
3. The Partnership sold 380 limited partnership units to investor limited partners for \$75,000 to \$100,000 per unit. Wurtzel purchased one unit.³
4. Defendant PTP Properties, Inc. is the sole general partner of the Partnership and on February 26, 1999 PTP became a

¹ This opinion adopts the findings of fact previously set forth in this court's September 11, 2001 opinion (hereinafter "9/11/01 Findings of Fact"). That opinion focused on plaintiff's petition to enjoin, inter alia, the limited partnership from merging with Park Towne Place Transitory Company an entity wholly owned by Aimco Properties, LP ("AIMCO"). Plaintiff's present petition sought to enjoin the defendants from proceeding with a tender offer dated November 2, 2001. For clarity, only the 9/11/01 findings relevant to this second petition will be reproduced along with the additional findings that emerged from the parties' documents and arguments. See 9/11/01 Findings of Fact, para. 1, citing Stip. para.1. The stipulation (i.e. "Stip.") referenced by the 9/11/01 opinion was submitted by the parties in connection with the first petition for a preliminary injunction.

² 9/11/01 Findings of Fact, para. 2, citing stip. para. 2.

³ 9/11/01 Findings of Fact, para. 3, citing stip. para.6.

wholly owned subsidiary of AIMCO Properties, L.P ("AIMCO").⁴

5. AIMCO Residential Group L.P. is the manager of the property. AIMCO controls AIMCO Residential Group.⁵

II. THE PARTNERSHIP AGREEMENT

6. In 1986, the Partnership's original general partner and its original limited partner signed an Amended and Restated Limited partnership agreement ("1986 Partnership Agreement").⁶
7. The 1986 Partnership Agreement provides that its construction and enforcement is controlled by Delaware law. Complaint, Ex. 1, Partnership Agreement, section 11.6.
8. The Partnership Agreement provides that the General Partner "shall at all times act as a fiduciary toward the Partnership and the limited partners." Complaint, Ex. 1, Partnership Agreement, section 5.2

III. THE TENDER OFFERS AND PROPOSED MERGER FOR JUNE 29, 2001

⁴ 9/11/01 Findings of Fact, paras. 4-5, citing stip. paras. 3, 7, Ex. D-1; Ex. D-9.

⁵ 9/11/01 Findings of Fact, para. 6, citing Ex. P-14; stip. para. 7.

⁶ 9/11/01 Findings of Fact, para. 7; stip. para. 5; Complaint & Answer, & Ex. 1.

9. In March 1999, Equity Resources Boston Fund offered to buy partnership units from the limited partners for \$5,000 per unit. Around the same time, AIMCO offered \$8208 per unit and its offer contained the statement that the general partner believed AIMCO's price was fair.⁷
10. In March 2000, Equity increased its offer to \$12,000 per unit and in May 2000, AIMCO increased its offer to \$48,533. AIMCO's offer contained the statement that the general partner believed that the price was fair.⁸
11. In February 2001, AIMCO increased its offer to \$66,788 per unit and its offer contained the statement that the general partner believed AIMCO's price was fair.⁹
12. Some limited partners sold their partnership units to AIMCO. By May 29, 2001 AIMCO owned 58.14% of the limited partnership units.¹⁰
13. On or about May 29, 2001, the Partnership sent a letter and information statement to the limited partners announcing

⁷ 9/11/01 Findings of Fact, para. 10, citing P-14, at S-10. See also stip. at para. 8.

⁸ 9/11/01 Findings of Fact, paras. 11-12, citing stip. 10; stip. 11; Ex. P-4 at 7.

⁹ 9/11/01 Findings of Fact, para. 13, citing stip. 12 & P-5, at 2.

¹⁰ 9/11/01 Findings of Fact, para. 14, citing stip. para. 13.

that the Partnership would merge with Park Towne Place Transitory Company LLC ("the Transitory Company"), which was an entity wholly owned by AIMCO. The letter also stated:

- (a) the merger would occur on June 29, 2001;
- (b) the Partnership would be the surviving entity;
- (c) the merger would force the minority limited partners to give up their interests in exchange for \$81,422 in cash or 1776 AIMCO partnership units;
- (d) AIMCO based the consideration on an appraisal of the liquidation value of the partnership interests;
- (e) because AIMCO owned 58.14% of the outstanding interests in the partnership, the partnership did not require the agreement of the other limited partners.¹¹

14. On June 28, 2001, Wurtzel filed a class action complaint seeking to enjoin the Merger preliminarily while claiming breach of fiduciary duty, breach of the partnership and fraud. See generally Complaint.

15. Wurtzel also petitioned for a temporary restraining order and preliminary injunction against the defendants. By order dated June 28, 2001, this court granted the TRO.

¹¹ 9/11/01 Findings of Fact, para. 15, citing stip. 16 & Ex. D-E. This court observed that the partnership agreement expressly authorized disposing of the partnership interest of an unwilling partner based on the fair market value of the partner's interest; nonetheless PTP consented to a merger forcing limited partners to sell their shares at liquidation value. Wurtzel v. Park Towne Place Apartments Ltd. Partnership, No. 0106-3511 slip op. at 4, n.1 (Phila. Ct. Common Pleas).

16. By order and opinion dated September 11, 2001, this court granted plaintiff's petition for a preliminary injunction based on its conclusion that the threatened merger of the Partnership with the Transitory Company without obtaining the consent of two-thirds of the partnership interests violated the Partnership Agreement and would irreparably harm Wurtzel and his fellow limited partners by depriving them of their right to vote on the merger. Wurtzel, slip op. at 5 & 19. This court also issued an order providing that:

- (a) The defendants were preliminarily enjoined from purchasing limited partnership units from the limited partners of defendant Park Towne Place Associates Limited Partnership; and
- (b) The defendants were preliminarily enjoined from undertaking the announced merger of defendant Park Towne Place Associates Limited Partnership with Park Towne Place Transitory Company, LLC. Wurtzel, 9/11/01 Order.

17. Defendants Park Towne Place Associates Limited Partnership LP, PTP Properties, and AIMCO on September 28, 2001 subsequently filed a Motion for Clarification of this court's September 11, 2001 order. They sought to link the prohibition on purchasing limited partnerships units to the merger proposal stated in the May 29, 2001 Merger Announcement.

- (a) Defendants stated in this motion that they had

abandoned the proposed merger and "will not seek to revive it at any time based on the terms and disclosures in the May 29, 2001 Merger Announcement that was the subject of the Court's decision and Order."

- (b) Defendant informed the court that it had sent a letter notifying all 194 limited partners of this decision and it attached a copy of the September 28, 2001 letter (hereinafter "September 28, 2001 letter").
- (c) The defendants stated that they would "not attempt to proceed with any merger or sale of Associates while this case remains pending in this Court, nor will any future transaction which they might propose be based on the appraisal prepared by Koeppel Tener Real Estate Services Inc. which is described in Complaint and Court's decision."¹²

18. Plaintiff opposed this motion for clarification and filed a cross motion concerning communications with present and former limited partners. He sought to send a letter to the limited partners and to restrict defendants' communication with them.¹³

- (a) The court scheduled oral argument on this motion for December 13, 2001, but plaintiff withdrew his motion after this court by order dated December 4, 2001 denied his request for a preliminary injunction as

¹² Defendants' 9/28/2001 Motion for Clarification, Memorandum at 2.

¹³ See Plaintiff's 11/15/2001 Petition for Preliminary Injunction, Ex. B. In his 11/15/2001 Memorandum, Plaintiff characterizes this cross-motion somewhat differently as requiring prior court approval of any tender offer. Plaintiff's Memorandum at 2.

to the November 2001 tender offer.¹⁴

19. On October 10, 2001, this court issued an order clarifying the September 11, 2001 order as follows:

"2. The defendants are preliminarily enjoined from purchasing limited partnership units from the limited partners of defendant Park Towne Place Associates Limited Partnership in furtherance of the announced merger of the defendant Park Towne Place Associates Limited Partnership with Park Towne Place Transitory Company, LLC." 10/10/2001 Order.

IV. PETITION FOR PRELIMINARY INJUNCTION WITH RESPECT TO THE NOVEMBER 2001 TENDER OFFER

20. Plaintiff filed a Petition for a Preliminary Injunction on November 15, 2001 seeking to enjoin a tender offer dated November 2, 2001 addressed to the limited partners in Park Towne Place Associates Limited Partnership.

(a) Plaintiff asserted, inter alia, that the Tender Offer was misleading, deceptive and coercive. He asserted more specifically that the Private Placement Memorandum ("PPM") included misleading statements and relied on a misleading appraisal that had been conducted in conjunction with the prior Merger proposal.¹⁵

(b) Plaintiff also stated that the Letter of Transmittal attached to the Private Placement Memorandum "attempts to divert from the limited partners all right to relief in this litigation."¹⁶

¹⁴ See Plaintiff's Praecipe to Withdraw Cross-Motion Regarding Communications Without Prejudice (filed 12/10/2001).

¹⁵ Plaintiff's 11/15/2001 Memorandum at 1.

¹⁶ Plaintiff's 11/15/2001 Memorandum at 25 & 9.

21. The Private Placement Memorandum describing the November 2, 2001 Tender Offer contained the following statements and disclosures:

- (a) The Merger that had been announced on May 29, 2001 between the partnership and Park Towne Place Transitory Company LLC was terminated on September 27, 2001 after a limited partner filed a class action and this court issued a preliminary injunction against the merger. PPM at 1, 7, 8, 35, 36.
- (b) In the litigation, the plaintiff alleged, among other things, that the consideration offered in the Merger was unfair and represented a breach of fiduciary duty on the part of AIMCO and the general partner. PPM at 3, 10, 25, 36.
- (c) The court initially enjoined the Merger and AIMCO from purchasing units from the limited partners but it subsequently issued a clarification order that the preliminary injunction only prevented exchange or purchase of units in furtherance of the Merger announced in May 2001. PPM at 1, 8, 36.
- (d) The class action is still in litigation and has been contested by AIMCO and the general partner. PPM at 2, 8, 15.
- (e) AIMCO is now offering to purchase limited partnership units for \$81,422 plus interest at a simple rate of 3% per annum. PPM at 1, 9.
- (f) AIMCO is making this offer to accommodate limited partners who have expressed an interest in selling their units for the same amount of cash or number of OP units that were offered in the merger. It is also making this offer to make a profit. PPM at 1,2,24,25,36.
- (g) The general partner of the partnership is AIMCO's affiliate and has a substantial conflict of interest. There is a conflict between AIMCO's

desire to make a profit and the limited partners' desire to sell their units at a high price. Because of this conflict, the general partner does not make any recommendation as to whether or not a limited partner should tender his or her unit. PPM at 2, 5, 10, 11, 33.

- (h) Each limited partner was advised to make his or her own decision as to whether to accept the offer based on a number of factors such as financial situation, need for liquidity, other financial opportunities that may be available and tax considerations. PPM at 34.
- (i) In connection with the Merger, AIMCO had obtained an appraisal by Koeppel Tener Real Estate Services, Inc. (the "KTR" Appraisal"), a third party with respect to the limited partnership interests. PPM at 3, 10.
- (j) Subject to the conditions set forth in the KTR Appraisal, the appraised value was \$81,422 per unit. The appraisal set forth a computation of the appraised liquidation value taking into consideration \$7,199,573 for capital expenditures. The Private Placement Memorandum stated that the partnership had an ongoing program of capital improvements that were budgeted at \$7,199,573 for 2001 for roofing, HVAC side trim fascia soffit, sidewalk, window replacements and retaining wall repairs. PPM at 3,10, 33, 35.
- (k) In the litigation, the plaintiff alleged, among other things, that the consideration offered in the Merger was unfair and represented a breach of fiduciary duty on the part of AIMCO and the general partner. PPM at 3, 10, 25, 36.
- (l) In the litigation, the plaintiff retained another appraiser who did not prepare his own appraisal of the value of the property or minority ownership interests in the partnership. The plaintiff's appraiser was critical of aspects of the Appraisal and its valuation conclusions. PPM at 10, 33.

- (m) A different appraiser might reach a different valuation for the partnership units. An arms-length sale of the property after offering it for sale through licensed real estate brokers might be a better way to determine the true value of the property rather than the way chosen by AIMCO. PPM at 10, 25, 33.
- (n) This court expressed doubt as to whether a Merger at liquidation value was at the proper value without deciding that issue. PPM at 3, 10, 25, 36.
- (o) In structuring the tender offer, no one separately represented the interests of the limited partners. PPM at 25.
- (p) The amount offered was determined without arms-length negotiations and the terms could differ if they were subject to independent third party negotiations. PPM at 2,3,9.
- (q) If AIMCO acquires sufficient units in this offer, it may have the ability to control most of the votes of the partners. In the litigation, the Court determined that the consent of the general partner and 66 2/3% in interest of the limited partners was necessary for mergers, consolidations or sale of the partnership assets. While AIMCO has no intention to engage in a merger during the pendency of the litigation, if they obtain 34.08 additional units in this offer they may have the authority to cause any such transaction to occur at any time. PPM at 4, 6, 21, 23.
- (r) The general partner has no intention of proposing a merger or sale of the partnership's property based on the Appraisal while the litigation is pending and has so informed the court. PPM at 3, 5, 23.

22. The Letter of Transmittal that accompanied the Private Placement Memorandum contained the following statement regarding future claims by a limited partner who accepts

the tender offer:

Subject to and effective upon acceptance for consideration of any of the Units tendered hereby and thereby in accordance with the terms of the Offer, the Signatory hereby and thereby irrevocably sells, assigns, transfers, conveys and delivers to, or upon the order of the Purchaser all right, title and interest in and to such Units tendered hereby and thereby that are accepted for payment pursuant to the Offer including, without limitationpayments in settlement of existing or future litigation(iv) all present and future claims, if any, of the Signatory against the Partnership, the other partners of the Partnership, or the general partner and its affiliates, under or arising out of the Partnership Agreement, the Purchase Agreement, the Signatory's status as a limited partner, or the terms or conditions of the Offer, for monies loaned or advanced, for services rendered, for the management of the Partnership or otherwise.¹⁷

23. A Hearing was held on plaintiff's petition on November 26, 2001 because the tender offer was due to expire by December 3, 2001.

(a) At the hearing, plaintiff presented no witnesses but

¹⁷ See Plaintiff's 11/15/2001 Motion for Preliminary Injunction, Ex. A, Letter of Transmittal, II-2. This transmittal letter was admitted into the record as P-30 during the oral argument on November 26, 2001. Plaintiff also submitted as P-29 the "Acknowledgment and Agreement" form for accepting the tender offer which provides, inter alia, that "[t]he signatory hereby makes the representations, warranties and covenants, and agrees to the terms and conditions, in each case set forth in the Transmittal Letter. See P-29 at 4. Whether the waiver provisions in the Transmittal letter are incorporated by reference is an issue to be addressed when, and if, actually framed.

relied instead on the following record:

- (1) Private Placement Memorandum;
- (2) Stipulation that the Private Placement Memorandum was distributed to the limited partners at the beginning of November 2001;
- (3) Defendant's Motion for Clarification;
- (4) Complaint and Answer;
- (5) Plaintiff's August 2001 Appendix of Documents
- (6) Tender Offer Acceptance Form;
- (7) Transmittal Letter¹⁸

24. By Order dated December 4, 2001, this Court denied Plaintiff's Petition for a Preliminary Injunction as to the November 2 Tender Offer because, inter alia, the Plaintiff failed to meet his burden of showing that his right to relief was clear or that an injunction was necessary to prevent irreparable harm that cannot be compensated by damages.

DISCUSSION

I. STANDARD FOR A PRELIMINARY INJUNCTION

To obtain a preliminary injunction, the moving party has the burden of showing:

- (1) that relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages;
- (2) that greater injury will occur from refusing the injunction than from granting it;
- (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- (4) that the alleged wrong is manifest, and the

¹⁸ See N.T. at 4 & 16-18.

injunction is reasonably suited to abate it; and (5) that the plaintiff's right to relief is clear. Anchel v. Shea, 762 A.2d 346, *351 (Pa. Super. 2000), app. denied, 782 A.2d 541 (Pa. 2001).¹⁹

Pennsylvania courts have emphasized that because preliminary injunctions are extraordinary, interim measures, they should be granted only if the plaintiff demonstrates a clear right to relief to preserve the status quo pending a determination of the issues on the merits. Cappiello v. Duca, 449 Pa. Super. 100, 672 A.2d 1373, 1376 (Pa. Super. 1996). These requirements "are cumulative, and if one element is lacking, relief may not be granted." Norristown Mun. Waste Auth. v. West Norriton Twp. Auth., 705 A.2d 509, 512 (Pa. Cmwlth. 1998).

II. THE RECORD PRESENTED DID NOT SATISFY THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION AGAINST THE NOVEMBER 2, 2001

¹⁹ Under Delaware law, a party seeking a preliminary injunction must show that there is a reasonable likelihood of success on the merits, and that he will suffer irreparable harm if an injunction does not issue. The moving party must also show that the harm he will suffer if the injunction is not granted is greater than the harm the defendant will suffer if the relief is granted. Ivanhoe Partners v. Newmont Mining, Corp., 535 A.2d 1334, *1341 (Del. 1987). See also Eisenberg v. Chicago, Milwaukee Corp., 537 A.2d 1051, *1055-56 (Del. Ch. 1987); Katz v. Oak Indus., 508 A.2d 873, *878 (Del. Ch. 1986).

TENDER OFFER

A. Burden of Proof for a Preliminary Injunction Against the November 2, 2001 Tender Offer

Wurtzel sought to enjoin the defendants' tender offer dated November 2, 2001 because he alleged that they had breached their duty of full and fair disclosure as evidenced by the Tender Offer and Private Placement Memorandum that were "riddled with misrepresentations and omissions." Plaintiff's 11/15/2001 Memorandum at 2. It is this Private Placement Memorandum that is a primary focus of plaintiff's concern together with the transmittal letter. In fact, at a hearing held on plaintiff's petition, Wurtzel presented no witnesses but argued instead that the defendant had the burden of showing full disclosure.²⁰

Wurtzel is correct, of course, that under Delaware law the standard for disclosure in a tender offer is that a corporate director or majority shareholder owes a "fiduciary duty to their stockholders to disclose all facts material to the transaction in an atmosphere of entire candor." Eisenberg

²⁰ N.T. at 1-19. In In re Marriott Hotel Properties, II, Ltd. Partnership Unitholders Litigation, 1996 WL 342040, *6 (Del. Ch. 1996), the court, in concluding that plaintiff had failed to show that the tender offer was misleading, noted that the record was still at a preliminary stage with no discovery and a focus solely on the tender offer documents.

v. Chicago Milwaukee Corp., 537 A.2d 1051, **1057 (Del.Ch. 1987). Similar standards have been applied in the context of limited partnerships. See In re Marriott Hotel Properties II Limited Partnership Unitholders Litigation, 2000 WL 128875, *10 (Del. Ch. 2000) ("The law is well settled that in extending an offer to the limited partners to buy their limited partnership units, the general partner owes a duty of full disclosure of material information respecting the business and value of the partnership which is in its possession").

A more subtle, contentious issue is posed, however, as to which party bears the burden of proving the requisite material disclosures in the present procedural context. In fact, both parties dispute this threshold burden of proof issue. Neither party, unfortunately, has carefully briefed this issue although both cite to cases that provide excellent guidance.

Wurtzel asserts that the defendant has the burden of showing "that it has made full disclosure of all facts within its knowledge that are material to the transaction."²¹ In thereby suggesting that the defendants have the burden of proof to avoid the imposition of an injunction against them, Wurtzel relies on Shell Petroleum, Inc. v. Smith, 606 A.2d

²¹ Plaintiff's 11/15/2001 Memorandum at 11. At the oral argument, defense counsel objected to plaintiff's claim that the burden of proof was on the defendant. N.T. at 19.

112, 114 (Del. 1992). Shell, however, is not directly apposite for several reasons: (1) Shell is not an injunction case; (2) the focus in Shell was on a merger not a tender offer, and; (3) the plaintiffs in Shell had provided a record that documents disseminated in conjunction with a proposed merger had failed to include in its calculations gas and oil reserves valued at nearly one billion dollars.

A case both parties cite that offers more relevant guidance on the burden of proof where a party seeks to enjoin a tender offer in a corporate context in Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051 (Del.Ch. 1987). The Eisenberg court emphasized the differences between a tender offer and a merger.²² In contrast to a merger, a tender offer is normally considered a voluntary transaction:

By its nature and form, a tender offer is normally regarded as a voluntary transaction. Unlike a cash-out merger where public stockholders can be involuntarily eliminated from the enterprise, in a properly conducted tender offer the stockholder-offerees may freely choose whether or not to tender. That choice will normally depend upon each stockholder's individual investment objectives and his evaluation of the merits of the offer. Moreover, tender offers often afford shareholders a

²² See also In re Siliconix Inc. Shareholders Litigation, 2001 WL 716787, * 6 (Del.Ch. 2001)(outlining the differing levels of judicial scrutiny applied to a merger and a tender offer); In re Marriott Hotel, 2000 WL 128875 at *10 ("The challenged transaction was a tender offer not a merger. Therefore, the entire fairness standard does not apply to the transaction". . .).

unique opportunity to sell their shares at a premium above market price. For those reasons, a tender offer that is voluntary (and that otherwise satisfies applicable legal standards) will not be enjoined. Eisenberg, 537 A.2d at *1056 (citations omitted).²³

There are, however, two situations under Delaware law where a tender offer will lose its voluntary character: "(i) cases involving materially false or misleading disclosures made to shareholders in connection with the offer, and (ii) cases where the offer, by reason of its terms or the circumstances under which it is made, is wrongfully coercive." Eisenberg, 537 A.2d at *1056 (citations omitted). If either circumstance can be shown, injunctive relief is appropriate. Id.

Courts emphasizing the high standard of conduct imposed by Delaware law on fiduciaries in a tender offer case have outlined how the burdens of proof differ depending upon whether the procedural context is petition for a preliminary injunction or a trial. In Joseph v. Shell Oil Co., 482 A.2d 335, * 340 (Del. Ch. 1984), for instance, the court noted that where the defendants stood on both sides of a transaction and were under a fiduciary duty to the minority shareholders of

²³ See also In re Siliconix Inc. Shareholders Litigation, 2001 WL 716787 at *6 ("In responding to a voluntary tender offer, shareholders of Delaware corporations are free to accept or reject the tender based on their own evaluation of their best interests").

Shell, “[a]t trial, therefore, the burden of persuasion would fall upon the defendants.” Joseph, 482 A.2d at *340. If, however, the plaintiffs seek a preliminary injunction, they bear the burden of proof. As the Joseph court explained:

The present matter is before the Court, however, upon an application for a preliminary injunction and therefore plaintiffs have the burden of showing that there is a reasonable probability of their prevailing on the merits if a trial were held. Joseph, 482 A.2d at *340.

In fact, the applicable burden of proof that is placed on the plaintiff is illustrated in Eisenberg where the court noted that it would issue an injunction against a tender offer where the plaintiff had shown a reasonable probability that the defendants had breached a fiduciary duty. Eisenberg, 537 A.2d at **1062.

A critical issue in the present case is the adequacy of the disclosures in the Private Placement Memorandum. Under Delaware precedent, where there is a claim that a majority shareholder failed to disclose material facts surrounding a tender offer, the plaintiff seeking an injunction has the burden of showing the materiality of the undisclosed fact. In re Siliconix Inc. Shareholders Litigation, 2001 WL 716787, *9 (Del. Ch. 2001). Because a majority shareholder who makes a tender offer to acquire stock owes a fiduciary duty to disclose accurately all material facts surrounding the tender,

"[i]n the context of a preliminary injunction proceeding regarding a tender offer, the issue becomes whether there is a reasonable probability that a material omission or misstatement has been made 'that would make a reasonable shareholder more likely to tender his shares.'" Id. at *9.

When analyzing disclosures made in conjunction with a tender offer, the Delaware Supreme Court emphasized that a majority shareholder owed a fiduciary duty to the minority shareholders "which required 'complete candor' in disclosing in full 'all the facts and circumstances surrounding the tender offer.'" Lynch v. Vickers Energy Corp., 383 A.2d 278, *279 (Del. 1977). This standard was more recently invoked by the Delaware Supreme Court in the context of the duties of corporate directors in Malone v. Brincat, 722 A.2d 5, *11 (Del. 1998).

In a case involving a tender offer in a limited partnership, the Marriott Hotel court observed that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. In re Marriott Hotel, 2000 WL 128875 at *10.

Delaware courts have noted, moreover, that due to the voluntary nature of a tender offer where an offeree is free to

make his own decisions based on full material disclosures, a majority shareholder is under no obligation to offer any particular price for the minority-held stock in the absence of evidence that material information was withheld or that the offer was coercive. As the Siliconix court observed, the defendant majority shareholder is "under no duty to offer any particular price, or a 'fair' price, to the minority shareholders of Siliconix unless actual coercion or disclosure violations are shown" by plaintiff.²⁴

These same standards have been applied in the context of limited partnerships. The Delaware Chancery court in Marriott Hotel recently observed that the "law is well settled that in 'extending an offer to the limited partners to buy their limited partnership units, the general partner owes a duty of full disclosure of material information respecting the business and value of partnership which is in its possession.'" In re Marriott Hotel, 2000 WL 128875 at *10.

The Marriot Hotel case is particularly relevant due to the similarity of its facts to those of the instant case. In Marriott, for instance, the tender offer to purchase limited partnership units was made by the corporate parent of the general partner who acknowledged its substantial conflict of

²⁴ In re Siliconix Inc., 2001 WL 716787 at *6.

interest and therefore made no recommendation as to whether the tender offer should be accepted. In re Marriott Hotel, 2000 WL 128875 at *1, *4. In setting forth the general standard applicable in the Marriott case, Chancellor Lamb observed that the prior Chancellor Allen had denied a preliminary injunction based on "well-established precedent" that the general partner "was under no fiduciary duty to offer a 'fair price' for the limited partnership interests so long as the tender offer did not entail coercion and was made with full disclosure." Id. at *7. He also cautioned that "[w]here, as here, the lone source of disclosure is a fiduciary having a conflicting interest, an obligation of complete candor is imposed on the fiduciary and judicial scrutiny of the disclosure is more exacting." Id. at *11.

B. On the Preliminary Record Presented, Wurtzel Has Failed to Show that the Defendants Breached Their Duty by Failing to Make Full Disclosure of all Material Facts in the Private Placement Memorandum and Tender Offer

The adequacy of the disclosures made by AIMCO in the Private Placement Memorandum is therefore critical to analyzing the issues presented by Wurtzel in his petition for a preliminary injunction. At the hearing held on November 26, 2001, plaintiff elected not to present any witnesses.

Instead, he presented a stipulation for the record that the Private Placement Memorandum was distributed to the limited partners at the beginning of November 2001 and that its accompanying documents are also part of the record. 11/26/2001 Hearing N.T. at 4-5 (hereinafter "N.T."). Plaintiff also requested that the record include defendant's motion for clarification, the Complaint and Answer, plaintiff's August 2001 Appendix of documents that had been filed with his earlier petition, the tender offer acceptance form (Ex. 29) and the transmittal letter (Ex. 30) that had accompanied the Private Placement Memorandum. N.T. at 16-19.

The defendants, likewise, presented no witnesses although they indicated that they would have done so if plaintiff had presented any witnesses. N.T. at 4. It is necessary, therefore, to analyze the documents presented, and especially the Private Placement Memorandum, to determine whether defendants have breached their duty of full disclosure in their November 2, 2001 tender offer. Plaintiff has presented seven ways in which the Private Placement Memorandum is misleading or incomplete, and they will be analyzed in the order presented in his Memorandum. See Plaintiff's 11/15/2001 Memorandum at 12.

1. Presentation of the KTR Appraisal

A central theme in Wurtzel's effort to enjoin the November 2001 Tender Offer is that the Private Placement Memorandum improperly referenced an Appraisal that had been conducted by Koepfel Tener Real Estate Services, Inc. ("KTR") last Spring in conjunction with the proposed merger.²⁵ Plaintiff objects that the appraisal is presented in the tender offer "as if it were a valid determination of value" and in essentially the same manner as it had been presented in the May 2001 merger information statement.²⁶ The only reason for citing it, plaintiff argues, is to support the \$81,422 per unit tender offer. Plaintiff further objects that the Private Placement Memorandum should have disclosed that defendants had represented to this court that it would no longer rely on the KTR appraisal in any transaction, emphasizing that deposition testimony of an appraiser Reaves Lukens had exposed the flaws of this appraisal²⁷ and that the court during the August 15, 2001 hearing had expressed skepticism about the independence of the appraisal. Finally, plaintiff suggests that the court had been induced to grant

²⁵ Plaintiff's 11/15/ 2001 Memorandum at 12.

²⁶ Plaintiff's 11/15/ 2001 Memorandum at 13.

²⁷ Plaintiff's 11/15/2001 Memorandum at 15, citing deposition of Reaves Lukens, Jr. reproduced in Plaintiff's August Appendix.

defendants' Motion for Clarification of the September 11 order because of defendants' representation that they would no longer proceed with any merger during the pendency of this litigation and that no future transaction would be based on the KTR Appraisal. Plaintiff's 11/15/2001 Memorandum at 16.

Initially, it must be noted that the decision to grant defendants' motion for clarification of this court's September 11, 2001 order was not influenced by representations concerning the KTR Appraisal. Rather, on reconsideration the September 11, 2001 order, in granting plaintiff's petition for a preliminary injunction, went too far when it enjoined the defendants from purchasing limited partnership units from the limited partners of Park Towne Place Associates Limited Partnership. As plaintiff concedes, plaintiff's petition was granted on the sole ground that "defendants had not disclosed that the Partnership Agreement required the consent of two-thirds of the partners for a merger, not merely a majority." Plaintiff's 11/15/2001 Memorandum at 9. This court concluded that the merger proposed for June 29, 2001 posed irreparable harm to Wurtzel and the other limited partners because they were deprived of their right to vote on the merger.²⁸ Enjoining that merger was reasonably suited to

²⁸ Wurtzel, slip op. at 5.

abating the specific harm of the denial of plaintiff's right to vote. In retrospect, however, the restriction in the September 11, 2001 order on defendants' right to purchase limited partnership units was too broad since it went beyond the voting rights issue presented by the merger proposal. It is, of course, axiomatic that since an injunction is an extreme measure, it must be carefully crafted so that it is "no broader than is necessary for the petitioner's interim protection." Anchel v. Shea, 762 A.2d 346, 352 (Pa. Super. 2000), app. denied, 782 A.2d 541 (Pa. 2001).²⁹ For this reason, the September 11, 2001 order was amended to delete the restrictions on the purchasing of the limited partnership units.

It is true, however, that this court had been skeptical of the KTR appraisal. Specifically, it concluded that the appraisal had been based on liquidation value of the partnership units while the partnership agreement provided

²⁹ Delaware courts similarly recognize that in granting injunctive relief, "the remedy must be tailored to meet the needs of the situation." Eisenberg v. Chicago Milwaukee, 537 A.2d at *1062. In fact, in Joseph v. Shell Oil Co., 482 A.2d at *345, the court refused to enjoin all tender offers after concluding that a particular offer was defective due to inadequate disclosures because such a remedy was overbroad, might not be consistent with the investment goals of the investors, and might prohibit a tender offer that complied with the disclosure requirements of Delaware law.

that partnership units of an unwilling partner could be disposed of based on fair market value not liquidation value. Wurtzel, slip op. at 4, n. 1. Defendant's Private Placement Memorandum, however, repeatedly informs the limited partners about this court's concern about the valuation of the limited partnership units based on liquidation valuation. See, e.g., Findings of Fact, 21(n); PPM at 3, 10, 25, 36. This information is conveyed initially in the unnumbered pages preceding the table of contents where the Private Placement Memorandum states in bold print that the Merger announced on May 29, 2001 had been terminated after a limited partner filed suit against it and this court subsequently issued a preliminary injunction prohibiting the partnership, the general partner and AIMCO from undertaking the merger or purchasing limited partnership units. It then notes that the court modified its order so that the preliminary injunction prevents "exchange or acquisition of units only in furtherance of the now-terminated Merger." Private Placement Memorandum at unnumbered 1.

The Private Placement Memorandum then sets forth "Risk Factors" attendant to the tender offer. In so doing, it notes this court's disapproval of the valuation of the limited partnership units for the purposes of the merger:

In the Litigation, the plaintiff alleged, among other things, that the consideration offered limited partners in the Merger was unfair and represented a breach of fiduciary duty on the part of the AIMCO Operating Partnership and the general partner. While not deciding the issue, the Court expressed doubt as to whether a merger at liquidation value was at the proper value. PPM at unnumbered 3.

The Private Placement Memorandum addresses the valuation issues of the KTR appraisal even more directly in a section entitled: "What Is the Value of My Units as of a Recent Date?" It clearly states that the limited partners are being offered a price very close to the unit price previously offered in the merger proposal that was based, inter alia, on an appraisal about which this court had expressed doubts:

We are offering to pay the same amount of cash or number of OP units as offered in the Merger plus, with respect to the cash consideration offered, interest thereon at a simple interest rate of 3% per annum from June 29, 2001 to the date payment is dispatched, and we determined the offer consideration and the terms of the offer, including the amount of cash tendered and the exchange ratio for OP Units, without any arms-length negotiations. The terms of the offer and the nature of the securities could differ if they were subject to independent third party negotiations.

In connection with the Merger, we obtained an appraisal (the "Appraisal") effective March 31, 2001 by Koepfel Tener Real Estate Services, Inc., a third party (the "Appraiser"), with respect to your partnership's assets. The appraised market value of the unencumbered fee simple estate of the partnership's property was \$79,750,000 and the appraised liquidation value of the unencumbered fee simple estate of the partnership's property was \$71,780,000. Subject to the special conditions described

in "APPRAISAL" and the other assumptions and conditions set forth in the Appraisal, the appraised liquidation value of the minority ownership interest in the partnership owned by partners unaffiliated with the AIMCO Operating Partnership ("third party partners") was \$81,422 per unit. See "APPRAISAL." In the Litigation, the plaintiff retained another appraiser who did not prepare his own appraisal of the value of the property or the minority ownership interests in the partnership, but who was critical of aspects of the Appraisal and of the valuation conclusions set forth in the Appraisal. A different appraiser might reach conclusions different from the conclusions set forth in the Appraisal. . . .

In the Litigation, the plaintiff alleged, among other things, that the consideration offered limited partners in the Merger was unfair and represented a breach of fiduciary duty on the part of AIMCO Properties, LP and the general partner. While not deciding the issue, the Court expressed doubt as to whether a merger at liquidation value was at the proper value. PPM at 3 (emphasis added).

The defendants thus fully disclosed this court's reservations about the fairness of the unit price proposed by defendants when they were seeking a June 2001 merger. As previously discussed, however, under Delaware law judicial scrutiny of a merger differs from the standard applied to a tender offer. A tender offer is considered voluntary unless it is accompanied by materially false or misleading disclosures or it is coercive. Eisenberg, 537 A.2d at *1056; In re Siliconix, 2001 WL 716787 at *6. As the quoted passage indicates, the Private Placement Memorandum disclosed that the appraisal that had been used for the merger plans was also the

basis of the tender offer price. It revealed that this was not the result of arms-length negotiations and that a different appraiser could come up with a different result. It also informed the limited partners of this court's reservations about the appraisal. See generally Findings of Fact, para. 21.³⁰

The practical effect of the reference to the appraisal, of course, is its relation to the tender offer price. Plaintiff is critical of the reference to the appraisal because it served as an "imprimatur" that the tender offer price was fair. Plaintiff's 11/15/2001 Memorandum at 12 -14. Delaware precedent, however, does not require a controlling shareholder extending a tender offer to offer a particular price or a fair price in the absence of disclosure violations or coercion. Rather, the minority shareholders are free to accept or reject the offer based on their own evaluation of their best interests. In re Siliconix, 2001 WL 716787 at *6. See also In re Marriott Hotel Properties II Ltd. Partnership Unitholders Litigation, 1996 WL 342040, *6 (Del. Ch.

³⁰ In In re Marriott Hotel, 2000 WL 128875 at *16, the Chancery Court refused to impose a duty to establish a fair price for a tender offer based on an independent appraisal absent a contractual provision requiring "an independent valuation process in the event of a tender offer by a General Partner or its affiliate."

1996)("The standard law is that if a tender offer is on full information, and does not entail coercion then the fairness or adequacy of the price is a question left to the business judgment of the parties").³¹

The references in the Private Placement Memorandum to the KTR appraisal and this court's concerns about it were sufficient, therefore, to provide the limited partners with material information as to whether it was in their interest to accept the price offered for their units. If the Memorandum had failed to discuss the appraisal, the plaintiff's criticism of it or this court's reservations about the price offered in the merger context, then the disclosures would have been incomplete.

2. Plaintiff's Criticism of the Failure to Disavow the Significance of the Appraisal, the Reference to

³¹ In Joseph v. Shell Oil Co., 482 A.2d at 341, the court agreed with the general principle that a stockholder should be left free to make his own choice whether to accept a tender offer if there is complete disclosure. It noted, somewhat enigmatically, that there are exceptions to this principle such as "when a maker of a tender offer, who has a fiduciary duty to the offeree, structures the offer in such a way as to result in an unfair price being offered and the disclosures are unlikely to call the unwary stockholder's attention to the unfairness." Id. This "exception" seems but a different formulation of the general principle that a tender offer is deemed voluntary unless there has not been complete disclosure of all material facts with complete candor. In Joseph the court concluded that the tender offer should be enjoined because, inter alia, evidence was presented that the maker of the tender offer withheld essential information about oil reserves from the appraiser.

KTR's "Independence," and AIMCO's Belief that the Price Was Fair

Next, plaintiff invokes the May 29, 2001 Merger Information Statement to assert that it was false and misleading in characterizing KTR as an "independent third party" and in characterizing \$81,422 as a fair price. Plaintiff's 11/15/2001 Memorandum at 16-17. The issue of the adequacy of the disclosures in the May 29, 2001 merger letter and information context was previously resolved on a different basis: the merger was deemed illegal because of the defendants misrepresented that the votes of the limited partners was unnecessary. Wurtzel, slip op. at 19; Complaint, Ex. 6 (May 29, 2001 Merger Information Statement). In fact, this court suggested that as to claims that the price offered was unfair, "damages will be an adequate remedy." Wurtzel, slip op. at 12, n. 11.

Plaintiff seeks to link these merger documents to the Private Placement Memorandum by arguing that the Memorandum is deficient in failing to disavow the KTR appraisal. As previously explained when analyzing the Memorandum language in section II,B,1, the Memorandum does alert the limited partners that the plaintiff had retained an appraiser who was critical of the KTR appraisal and that this court had

expressed criticism of its methodology. See also PPM at 3, 10; 33-36; Findings of Fact, para. 21.

3. Alleged Mischaracterization of Action by This Court

Plaintiff is also critical of the Private Placement Memorandum for allegedly misrepresenting that this court had resolved plaintiff's cross-motion concerning communication with the putative class members when it was actually still pending. 11/15/2001 Memorandum at 18-19. Since plaintiff subsequently withdrew this motion voluntarily, this issue is now moot. Moreover, it is also not clear that the defendants misrepresented the status of this issue when they merely noted that plaintiff's motion for reconsideration had been denied. See PPM at 8 & 36. In any event, it was the plaintiff who withdrew the subtle issues of communication with a putative class prior to certification from this court's consideration.³²

4. Suggestion that the Purpose of the Tender Is to "Accommodate" Limited Partners Rather than an Attempt by AIMCO to Buy Up Interests Cheaply

Another criticism by Plaintiff of the Private Placement

³² At the November 26, 2001 hearing, for instance, plaintiff's counsel was careful to emphasize that the issue of communications between the general and limited partners was not before the court at that time. N.T. at 13. See Findings of Fact, 18.

Memorandum is that it repeatedly states that the offer was tendered to accommodate limited partners who have expressed an interest in selling their units, when the real intent of the offer was to buy out interests cheaply. Plaintiff's 11/15/2001 Memorandum at 19. Delaware Courts have stated that shareholder/ offerees are entitled to a candid explanation of why a tender offer is being made. Eisenberg, 537 A.2d at *1059. Not only does plaintiff present no evidence of the different "real" intent behind the offer, but he oversimplifies the Private Placement Memorandum which warns the limited partners of the potential conflicts of interests and AIMCO's desire to purchase their units at a low price. The Private Placement Memorandum thus provides:

WHAT IS OUR RELATIONSHIP WITH YOUR PARTNERSHIP?
The general partner of your partnership is our affiliate and, therefore, has substantial conflicts of interest with respect to our offer. We are making this offer with a view of making a profit. There is a conflict between our desire to purchase your units at a low price and your desire to sell your units at a high price. . . . The terms of the offer and the nature of the securities could differ if they were subject to independent third party negotiations. PPM at 2 (emphasis added). See also Findings of Fact, para. 21 (f)(g) & (h).

The Memorandum thus adequately discloses that one intent behind the offer was to make a profit. Another stated intent was to accommodate the desire of other limited partners to

sell their units. It was up to the offeree limited partners to decide whether this offer was in their best interests. PPM at 1, 2, 5, 10, 11, 24, 25, 33, 34, 36; Findings of Fact, para. 21 (f)(g) & (h).

5. Suggestion that Partners Have No Realistic Choice

The Private Placement Memorandum, plaintiff asserts, is permeated by the suggestion that the limited partners have no choice but to sell their units. Plaintiff's 11/15/2001 Memorandum at 20.

To support this vague allegation, plaintiff points to statements in Memorandum that "if we acquire sufficient units in this offer, we may have the ability to control most votes of the partners." Id., at 20, n.7 (quoting PPM at 3,6,48). This type of statement, however, is in accord with the obligation of full disclosure since it informs the limited partners of the long range implications of any acceptance of the tender that might be material to their decision about accepting it. In fact, the Delaware Chancery Court has observed that "[a]ccurate descriptions of the consequences of a successful tender offer do not amount to coercion." In re Marriott Hotel, 2000 WL 128875 at *19. On a practical note, the Marriott court observed that "Tender Offers for majority

control regularly occur and have never been found coercive for that reason alone." Id. at *18.

6. Suggestion that the Multi-Million Dollar Capital Expenditure Is Real

Wurtzel also attacks the appraisal for suggesting that \$7,199,573 was improperly identified as a capital expenditure that was factored into the tender offer price. Plaintiff suggests that this figure was insupportable because the property was in good shape and there had been no past history of such large capital improvements. Plaintiff's 11/15/01 Memorandum at 21-22. The Private Placement Memorandum does explicitly state that the appraisal value "takes into consideration \$7,199,573 for Initial Capital Expenditures (ICE). PPM at 33. It also offers the following description of its program of Capital Improvements:

The partnership has an ongoing program of capital improvements, replacements and renovations, including carpet replacement, structural improvements, building refurbishments, general enhancements, parking lot resurfacing and other replacements and renovations in the ordinary course of business. All capital improvements and renovation costs, which are budgeted at \$7,199,573 for 2001, are expected to be paid from operating cash flows or cash reserves, or from short-term or long-term borrowings. Capital improvements to be made during 2001 include roofing, HVAC, side trim fascia soffit, sidewalk, window replacement and retaining wall repairs. PPM at 35.

Plaintiff asserts that this claim for capital expenditures is exaggerated and relies on an affidavit by his expert Reaves

Lukens that the 42 year old property was in good shape³³ as well as on defendants' own documents showing expenditures of approximately \$300,000 for the entire year of 2000.

Plaintiff's 11/15 Memorandum at 21-22.

The Private Placement Memorandum, however, does not state that \$7,199,000 had been spent in 2001 but that capital renovations and improvements of \$7,199,000 had been "budgeted" for 2001. It then outlined the nature of such improvements, including inter alia, roofing, HVAC, etc.

Wurtzel's criticisms as to this figure, however, relates primarily to the fairness of the price offered to the limited partners. Delaware courts have held that such claims can be satisfied by money damages. See, e.g. In re Siliconix, 2001 WL 716787 at *17 (noting that plaintiff's extensive argument about fair price supports the inference that his primary concern is with value, such that "[d]amages can be awarded and, indeed, have been awarded after a trial that followed denial of a preliminary injunction application addressed to

³³ The affidavit of Reaves Lukens, set forth in plaintiff's August Appendix at P-28, concedes: "9. Given the abbreviated time deadline set by the Court, and the fact that the property is not in the control of the party that has retained me, it was not feasible to appraise the property before the scheduled preliminary injunction hearing on July 31." Lukens Affidavit, para. 9, (8/13/2001).

halting a tender offer"); In re Marriott Hotel, 1996 WL 342040 at *6("But even if one were to conclude at trial that the conditions were present to find an obligation to offer a 'fair price' to the class of unitholders, and one were to conclude that the \$150,000 price offered did not represent a fair price given the nature of the financial interest and the projected net cash flows etc., an award of monetary damages would be a perfectly suitable remedy"). But see Eisenberg v. Chicago Milwaukee Corp., 537 A.2d at *1062 (Where the claimed harm is not that the offering price is unfair but that shareholders' were deprived of their right to make an informed, uncoerced decision, injunctive relief is appropriate).

7. Failure to Recommend Against the Tender

Finally, Wurtzel argues that AIMCO breached its fiduciary duty by failing to recommend against the tender offer. Although conceding that the defendant disclosed its conflict of interest in the Private Placement Memorandum, plaintiff asserts that this did not suffice and cites Eisenberg v. Chicago Milwaukee, 537 A.2d 1051 (Del. Ch. 1987) for the proposition that failure to recommend against an transaction may be actionable.

Eisenberg is not dispositive, however, for several reasons. First, as plaintiff acknowledges, the Eisenberg

court did not hold that the defendants were liable for failing to make a recommendation about the tender offer; the court merely noted this decision "with concern." Eisenberg, 537 A.2d at *1060, n. 11. Second, the Eisenberg court recognized that conflicts of interest were inherent in certain tender offers, especially one made by a corporation of its own shares. Id., 537 A.2d at *1057, 1060-62. In such cases, the fact of a conflict of interest must be disclosed:

By its discussion of the CMC directors' potential conflict, the Court does not intend to suggest that those directors, in approving the offer, necessarily acted improperly or placed their individual interests over those of the Preferred stockholders. The only point made here is that in these circumstances, the potential conflict of half of CMC's Board of Directors was a fact that should have been disclosed. Eisenberg, 537 A.2d at *1061 (emphasis added).

The court in In re Siliconix, 2001 WL 716787 at *6-7 likewise, emphasized that conflicts of interests should be revealed but in the absence of coercion or disclosure violations, there is no duty to demonstrate the entire fairness of a proposed tender transaction. In re Siliconix, 2001 WL 716787 at *6-7 & *14 ("Where there are material conflicts, disclosure of information sufficient to allow the shareholders to assess and understand those conflicts is necessary"). The Siliconix court also suggested that in certain cases where specific fiduciary duties were imposed on directors, they had an

obligation to disclose the methodologies used in valuing the tender offer. Id., 2001 WL 716787 at *12. As previously discussed, however, the Private Placement Memorandum did outline its methodology for reaching the tender offer price. See, e.g., PPM at 32-38.

CONCLUSIONS OF LAW

1. The party seeking an injunction bears the burden of proof, *inter alia*, that his right to relief is clear and that he will suffer irreparable harm in the absence of an injunction.³⁴
2. Preliminary injunctions are extraordinary, interim measures that should be granted to preserve the status quo pending a determination of the issues on the merits.³⁵
3. Delaware law applies to the Partnership Agreement at issue in this case and under that agreement, the General Partner "shall at all times act as a fiduciary toward the Partnership and the limited partners." Complaint, Ex. 1, Partnership Agreement, sections 11.6 & 5.2.
4. Under Delaware Law, a tender offer is normally regarded as a voluntary transaction except in cases where there

³⁴ Anchel v. Shea, 762 A.2d 346, *351 (Pa. Super. 2000), app. denied, 782 A.2d 541 (Pa. 2001). Under Delaware law, a party seeking an injunction must show, *inter alia*, "a reasonable likelihood of success on the merits" as well as irreparable harm in the absence of an injunction. Ivanhoe v. Newmont Mining Corp., 535 A.2d 1334, *1341 (Del. 1987). Delaware courts also place the burden of proof on the party seeking an injunction. In re Marriott Hotel Properties II Limited Partnership Unitholders Litigation, 1996 WL 342040, *5 (Del. Ch. 1996) ("It is the burden of the plaintiff to establish that the conditions for the issuance of a preliminary injunction have been satisfied").

³⁵ Cappiello v. Duca, 449 Pa. Super. 100, 672 A.2d 1373, 1376 (1996); New Castle Orthopedic Assocs. v. Burns, 481 Pa. 460, 392 A.2d 1383, *1385 (1978).

are materially false or misleading disclosures in connection with the offer or where the offer is wrongfully coercive. Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051, *1056 (Del. Ch. 1987).

5. Under Delaware law, the standard for disclosure in a tender offer is that corporate directors or majority shareholders owe a fiduciary duty to their shareholders to disclose all facts material to the transaction in an atmosphere of entire candor. Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051, *1057 (Del. Ch. 1987). Similar standards apply to a limited partnership.³⁶
6. A fact is material if there is a "substantial" likelihood that a reasonable shareholder would consider it important in deciding how to vote or whether to tender his shares. Marriott Hotel Properties II Limited Partnership, 2000 WL 128875, *10 (Del. Ch.2000)
7. Where there is a claim of failure to disclose material facts surrounding a tender offer, the plaintiff seeking an injunction has the burden of proving the materiality of the undisclosed fact. In re Siliconix Inc. Shareholders' Litigation, 2001 WL 716787, *9 (Del. Ch. 2001).
8. On the preliminary record presented, Wurtzel failed to establish a clear right to relief because he has not shown that the defendants in the Tender Offer/Private Placement Memorandum breached their fiduciary duty to disclose all facts material to the offer in an atmosphere of complete candor.
9. Although Plaintiff claimed that the Private Placement Memorandum was misleading and deceptive, the record presented did not support those claims as to this Court's

³⁶ Marriott Hotel Properties II Limited Partnership Unitholders Litigation, 2000 WL 128875, *11 (Del.Ch. 2000), citing Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051, 1057 (Del.Ch. 1987). According to the Marriott Hotel court, where there is a tender offer to limited partners, "the general partner owes a duty of full disclosure of material information respecting the business and value of the partnership which is in its possession." Marriott Hotel, 2000 WL 128875 at *10.

negative views of the KTR Appraisal, AIMCO's conflict of interest, the methodology behind the KTR Appriaisal, this court's rulings and the long-term implications of AIMCO's acquisition of more units. See generally Findings of Fact, para. 21.

10. Plaintiff failed to show irreparable harm that could not be compensated by damages as to his claims that the \$81,422 per unit tender offer price was unfair.

DATE: January 11, 2002

BY THE COURT

John W. Herron, J.