O/a 5-25-88

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,880

GOLDOME SAVINGS BANK,

Petitioner,

v.

HOWARD E. WULSIN,

Respondent

RESPONDENT'S ANSWER BRIEF

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RESPONDENT'S STATEMENT OF THE CASE AND FACTS

The Petitioner, Goldome Savings Bank ("Goldome"), has summarized the procedural history of this matter with reasonable accuracy. Certain facts, however, concerning the relationship of the parties, the mortgage transaction, and the general partners' waiver of the limited partnership's affirmative defenses and dismissal of its counterclaim require brief comment by the respondent, Howard E. Wulsin ("Wulsin").

THE ENTRY OF THE FINAL ORDER

In support of its motion for summary judgment, Goldome submitted no affidavit or other sworn testimony. [R 467-69]. It merely pointed to the signature page of the mortgage contract and promissory note, and argued that since FRG (Florida), Inc. ("FRG") was the signator and named obligor, only FRG was entitled to raise the defense of usury.

In opposition to the Motion for Summary Judgment and in support of his Motion for Leave to Intervene, Wulsin urged the trial court to identify the true obligor by examining the mortgage contract in light of its purpose and in light of the relationships among the parties. [R 527-47].

THE PARTIES AND THE MORTGAGE TRANSACTION

FRG was formed in 1981 by the real estate syndication team of Peter Peggs, Peter Hutchings, and Roy Guilbault [R 53-58

(Guilbault dep. tr. at 16-21)]. In order to facilitate one of this team's syndication projects, in August of 1982, FRG signed a promissory note and mortgage to Goldome covering thirty-seven Beacon Reef units. [R 1080-1084; (Kauffman dep. tr. 65-69; R 108-112) (Guilbault dep. tr. at 71-75)].

The syndication program anticipated that title to the condominium units would be held by a limited partnership. Accordingly, FRG purchased the property as agent for the limited partnership to be formed. [R 539-45; R 1206 (Cookerly dep. tr. at 20)]. In addition, the syndication plan anticipated that in exchange for an ownership interest in the limited partnership's real property assets, investors in the limited partnership would pay interest and carrying costs on the mortgage [R 141-142 (Guilbault dep. tr. 104-105)]. Through its officers, who negotiated the mortgage on the Beacon Reef units, Goldome was aware that FRG proposed to treat the mortgaged real estate in this manner. [R 1080-1084; Kauffman dep. tr. at 65-69; R 162-163 (Guilbault dep. tr. at 125-126)].

The three principals of FRG became the limited partnership's general partners. Wulsin was the limited partnership's only limited partner. He invested nearly two million dollars through cash, letter of credit, and promissory note contributions. [R 141-143 (Guilbault dep. tr. at 104-106); R 209-212]. To secure his letter of credit contribution, he took a mortgage on the partnership's only significant assets, the

thirty-seven Beacon Reef condominium units. [R 327-329; R 142-143 (Guilbault dep. tr. at 105-106)].

THE GENERAL PARTNERS' WAIVER OF AFFIRMATIVE DEFENSES AND DISMISSAL OF COUNTERCLAIM

Shortly after the complaint below was filed, Wulsin filed a lawsuit against FRG, Peter Peggs, Peter Hutchings and Goldome in the United States District Court for the Middle District of Florida [See Wulsin, et al. v. Goldome Sav. Bank, et al., Case No. 84-1449-Civ-T-15]. In that case, he alleged that in connection with the syndication of the Beacon Reef units, the defendants committed securities fraud, as well as wire fraud, mail fraud and usury in violation of federal and state anti-racketeering laws. In addition, he alleged that Messrs. Peggs and Hutchings, as general partners in the Beacon Reef Limited Partnership, had breached their fiduciary obligations to him by commingling and wrongfully diverting the limited partnership's funds.

The attorney who appeared on behalf of FRG, Peggs and Hutchings in the federal lawsuit was eventually substituted as counsel for FRG and the limited partnership in the foreclosure proceeding below. [R 550]. Thus, ostensibly on behalf of the limited partnership, counsel for the individual general partners as defendants in the federal litigation filed a waiver of the limited partnership's usury claim in the proceeding below. The waiver occurred only four months after one of the general partners, Peter Peggs, had submitted a sworn affidavit in

opposition to Goldome's first motion for summary judgment in which he verified the limited partnership's allegations of usury. [R 261-263].

Goldome's first motion for summary judgment was denied [R 431]. But when Goldome "bought out" Wulsin's partners by giving them personal releases [R 578-80] Goldome filed another motion for summary judgment. The general partners abandoned the usury defense and counterclaim as part of their agreement with Goldome, leaving Wulsin's two million dollar investment exposed to the foreclosure of a criminally usurious mortgage.

Although Wulsin submitted these uncontested facts for consideration by the trial court below, on October 9, 1985, the court ruled against Wulsin on both his Motion to Leave to Intervene and Goldome's Motion for Summary Judgment. [R 549-605].

SUMMARY OF ARGUMENT

I. Finality

This Court has not accepted jurisdiction to review this issue because it does not conflict with any other appellate decision. In any event, however, the Third District Court of Appeal properly exercised its appellate jurisdiction and considered the issue of the right of a limited partner to bring a derivative action on behalf of a limited partnership. The order of the trial court denying Wulsin's motion to intervene was not final because Wulsin and the partnership on whose behalf he sought to intervene remained before the trial court. The order failed to meet the test for finality because the trial court's judicial labor was not complete and the dispute between the parties not final until entry of the final judgment of foreclosure. The substantive effect, not the title, of an order determines whether it is final. Furthermore, an appeal of a final judgment permits the plenary review of all prior orders affecting the appellant's claims and interests.

II. Derivative Action

A limited partner has the right to assert a derivative action on behalf of the limited partnership under Florida partnership law. Neither the Supreme Court of Florida nor the Fourth District Court of Appeal has decided the issue of whether a limited partner may bring a derivative action on behalf of the limited partnership where the general partner wrongfully refuses

to pursue a claim or defense, in breach of his fiduciary duty to the limited partner. Neither section 620.26 of the Florida Statutes, which prohibits direct actions by limited partners, nor the aggregate theory of partnerships, developed before the advent of limited partnerships, reaches the issue. By analogy to shareholders and cestuis que trust, who share similar interests with limited partners, the law of corporations and trusts supports the right of limited partners to bring derivative actions. Furthermore, equity demands that limited partners be allowed access to the courts where general partners wrongfully refuse to protect the partnership interests and the investment of the limited partners. Notwithstanding the aggregate theory of partnerships, a partnership entity has standing to sue in its name pursuant to Florida statute and in derogation of the common law where the partnership owns real property. A limited partner has standing to sue derivatively on behalf of a limited partnership where the transaction of which he complains has continued during the period of his membership and the general partners have wrongfully refused to bring or pursue a meritorious claim or defense of the limited partnership in breach of his fiduciary duty to the limited partner.

STATEMENT OF THE ISSUES

I. WHETHER AN ORDER DENYING A MOTION TO INTERVENE IS A FINAL ORDER WHERE THE INTERVENOR REMAINS A PARTY TO THE SUIT, THE CLAIM IS INTERRELATED TO REMAINING ISSUES DECIDED IN THE FINAL JUDGMENT, AND THE CLAIMS AROSE FROM THE SAME TRANSACTION?

II. WHETHER A LIMITED PARTNER CAN ASSERT A DERIVATIVE ACTION ON BEHALF OF THE LIMITED PARTNERSHIP TO PROTECT HIS INTEREST WHERE THE GENERAL PARTNER REFUSED TO PURSUE THE ACTION BECAUSE OF SELF-INTEREST, IN BREACH OF HIS FIDUCIARY DUTY TO THE LIMITED PARTNER?

ARGUMENT

I. AN ORDER IS NOT FINAL UNLESS JUDICIAL LABOR IN THE TRIAL COURT IS COMPLETED AND NOTHING REMAINS TO BE DONE TO TERMINATE THE DISPUTE BETWEEN THE PARTIES.

An Order is not final unless it meets the test for finality enunciated by the Supreme Court of Florida in S.L.T. Warehouse Co. v. Webb, 304 So.2d 97 (Fla. 1974). The Court held that the test to determine the finality of an order or judgment is "whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be

done by the court to effectuate a termination of the cause between the parties directly affected." Id. at 99. To be final, an order must dispose of all the issues or causes in the case which are interrelated with remaining claims pending in the trial court. Id.; see also Miami-Dade Water & Sewer Auth. v. Metropolitan Dade County, 469 So.2d 813 (Fla. 3d DCA 1985) (finality depends upon whether the order constitutes an end to judicial labor and nothing further remains to terminate the dispute between the parties).

An order is appealable as final, as an exception to the general rule, only where it presents a separate and distinct cause of action which is not interdependent with other pleaded claims. Miami-Dade Water & Sewer Auth. v. Metropolitan Dade County, 469 So.2d at 814. This exception is inapplicable where, as here, Wulsin remained a party in the lawsuit and the issue of whether the Beacon Reef Limited Partnership could assert the usury defense was not decided until entry of the Summary Judgment of Foreclosure by the trial court. [R 963] See Ralston, Inc. v. Miller, 357 So.2d 1066 (Fla. 3d DCA 1978). Piecemeal appeals will not be permitted where claims are legally and factually interrelated and intertwined, involve the same transaction, and the same parties remain in the lawsuit. Id.

The order denying Wulsin's Motion for Leave to Intervene failed to meet either the test set forth by the Supreme Court of Florida in S.L.T. Warehouse Co., or the requirements of the exception to that test, because issues remained to be decided

by the trial court that substantively affected the parties, who remained in the lawsuit. [R 962]

A. This Court Did Not Accept Jurisdiction To Review This Issue Because It Does Not Conflict With Any Other Appellate Decision

The petitioner applied to this Court for review of the decision below under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(IV). This Rule effectuates section 3(b)(3) of article V of the Florida Constitution, which confers discretionary jurisdiction on this Court to review any decision "that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Art. V, § 3(b)(3), Fla. Const. (1980) (emphasis supplied). See Jenkins v. State, 385 So.2d 1356 (Fla. 1980) (full discussion of the history of section 3 of article V, as amended).

The supreme court's discretionary review of intermediate appellate court decisions is constitutionally limited, because the district courts of appeal are not intended to be intermediate courts. Id. at 1363 (England, C.J., specially concurring). Unless district court decisions are final in most instances, the number of cases the supreme court would have to review would delay the administration of justice. Id. at 1357 (quoting Ansin v. Thurston, 101 So.2d 808 (Fla. 1958)). To give finality to the decisions of the district courts of appeal and to enable the supreme court to confine its review to a manageable number of cases, section 3(b)(3) was amended in 1980 to restrict

conflict jurisdiction to only those decisions of the courts of appeal that expressly and directly conflict with other appellate decisions, based on the "statewide importance of legal issues and the relative availability of the Court's time to resolve cases promptly." Id. (England, C.J., specially concurring).

Notwithstanding the general principle that once jurisdiction vests, the Court retains jurisdiction for all purposes to avoid needless litigation, this issue should not be considered in this appeal because no conflict exists with other appellate decisions and it will not spawn additional litigation. See Marley v. Saunders, 249 So.2d 30, 33 (Fla. 1971). This issue involves only the well settled rule of what constitutes a final order. See S.L.T. Warehouse Co. v. Webb, 304 So.2d 97 (Fla. 1974); Alderman v. Puritan Dairy, Inc., 145 Fla. 292, 199 So. 44 (Fla. 1940). Furthermore, the Third District's decision is silent on this issue. Not only does this issue fail to meet the constitutional requirement for review that it be in express and direct conflict with another appellate decision, but also it fails to create any discord whatsoever in decisional law. Because the Third District did not deal in its decision with whether the order denying Wulsin's motion to intervene was final, the decision lacks any precedential value on the issue. Mystan Marine, Inc. v. Harrington, 339 So.2d 200 (Fla. 1976) (decision lacking precedential value does not create conflict and is beyond scope of supreme court's jurisdiction). Only those issues expressed in the opinion have precedential value and, therefore,

have the ability to create an express and direct conflict with another appellate decision. The scope of this appeal should be limited to those issues expressly and directly decided by the Third District Court of Appeal in its published opinion.

B. An Order Denying A Motion To Intervene Is Not Final Where The Party Remains Before The Court.

Goldome contends that every order denying a motion to intervene is final. (Petitioner's Brief at 9). In support of its contention, Goldome cites decisions which state, without more, that the appellant had appealed a final order denying a motion to intervene. See Blue Cross & Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985), rev'd on other grounds, 498 So.2d 421 (Fla. 1986); Naples Community Hosp., Inc. v. Department of Health & Rehabilitative Servs., 463 So.2d 375 (Fla. 1st DCA 1985); Citibank v. Blackhawk Heating & Plumbing Co., 398 So.2d 984 (Fla. 4th DCA 1981). In each case cited by Goldome, the intervenor was no longer before the court in the pending lawsuit after entry of the order denying its motion to intervene. In those cases, in fact, judicial labor had ended as to those parties so that those orders met the test for finality as set forth in S.L.T. Warehouse Co.

In the proceeding below, however, Wulsin and the Beacon Reef Limited Partnership, on whose behalf he sought to intervene, remained parties to the foreclosure proceeding. Issues remained to be decided as to the partnership, on whose behalf Wulsin

attempted to assert, derivatively, the usury defense. It was not until entry of the Summary Judgment of Foreclosure that the trial court disposed of the issue of whether the usury defense was personal to FRG, or whether the Beacon Reef Limited Partnership could assert the defense as the real party in interest in the foreclosure proceeding. [R 963].

Unless an order denying a motion to intervene meets the test for finality, as set forth by the Supreme Court of Florida in S.L.T. Warehouse Co., it is not a final order. Braddon v. Doran Jason Co., 453 So.2d 66 (Fla. 3d DCA 1983) (citing Alderman v. Puritan Dairy, Inc., 145 Fla. 292, 199 So. 44 (Fla. 1940)). An order is not final merely by virtue of its title. Chipola Nurseries, Inc. v. Division of Admin., Dep't of Transp., 335 So.2d 617 (Fla. 1st DCA 1976). It is the effect of the order, rather than its title, which determines whether it is a final appealable order. Schwenck v. Jacobs, 160 Fla. 33, 33 So.2d 592 (1948). Here, where Wulsin and the limited partnership remained parties in the proceeding after denial of his motion and the trial court had not ruled upon whether the usury defense was personal to FRG, the order denying Wulsin's Motion for Leave to Intervene was not a final appealable Order, as defined in S.L.T. Warehouse Co. and Miami-Dade Water & Sewer Authority. [R 963] Duffy v. Realty Growth Investors, 466 So.2d 257 (Fla. 5th DCA 1985) (interrelationship of claims and same parties); Ralston, Inc. v. Miller, 357 So.2d 1066 (Fla. 3d DCA 1978) (rule of interrelationship of parties and claims). On these facts,

Wulsin's motion to intervene is akin to a motion to amend his claims in the case, the denial of which would not be a final order.

The Motion for Leave to Intervene [R 455-466] and Motion for Summary Judgment [R 467-469], in fact, were argued simultaneously. [R 549-605]. The order denying the Motion for Leave to Intervene did not dispose of all of the issues discussed at the hearing as reflected in the preamble to the Summary Judgment:

> This matter having been called up for hearing on the Motion for Summary Judgment filed by Plaintiff PALMETTO FEDERAL SAVINGS & LOAN ASSOCIATION, and the Court having considered the motions and pleadings as filed, together with argument of counsel, and the parties having stipulated that the only remaining issues for determination are the right of Plaintiff to foreclose the Mortgage and the defense of usury advanced by Defendant WULSIN; and the Court having determined that Defendant WULSIN is a limited partner of Defendant BEACON REEF LIMITED PARTNERSHIP and appeared as a mortgagee of record; that Defendant BEACON REEF LIMITED PARTNERSHIP is itself not the maker of either the Note or the Mortgage, so that Defendant WULSIN is barred from asserting the defense of usury, the same being a personal defense of F.R.G. (FLORIDA), INC. as the maker of the Note and Mortgage; ...

[R 963; App. at 5]. This Court has admonished trial courts to exercise care to avoid unnecessary successive appeals. S.L.T. Warehouse Co. v. Webb, 304 So.2d at 99; see also Ralston, Inc. v. Miller, 357 So.2d at 1067.

If a partial final judgment disposes of an entire case as to any party, the final judgment meets the finality test. Fla. R. App. P. 9.110(k), cited in Miami-Dade Water & Sewer Auth., 469 So.2d at 814; see also Bay & Gulf Laundry Equip. Co.

v. Chateau Tower, Inc., 484 So.2d 615 (Fla. 2d DCA 1985); Duffy v. Realty Growth Investors, 466 So.2d at 258 n.1 (Fla. 5th DCA 1985). Similarly, where an order denying a motion to intervene disposes of the entire case as to the party seeking intervention, then, that order may be final. See Bay & Gulf Laundry Equip. Co. v. Chateau Tower, Inc., 484 So.2d at 616. Where, however, as here, the party who sought to intervene, and the party on whose behalf he sought to intervene, remained, in fact, parties in the suit and issues remained to be decided by the trial court which affected the dispute among all remaining parties, the order failed to meet the test for finality set forth by the Supreme Court of Florida in S.L.T. Warehouse Co. See Duffy v. Realty Growth Investors, 466 So.2d 257 (Fla. 5th DCA 1985); Ralston, Inc. v. Miller, 357 So.2d 1066 (Fla. 3d DCA 1978). It is the substance, rather than the form or title, of an order that determines whether or not it is final.

C. An Appeal Of A Final Judgment Opens All Preceding Orders.

An appeal from a final decree or judgment "opens up all preceding orders for review." Eristavi-Tchitcherine v. Miami Beach Fed. Sav. & Loan Ass'n, 154 Fla. 100, 106, 16 So.2d 730, 734 (Fla. 1944) (quoting Hollywood, Inc. v. Clark, 153 Fla. 488, 15 So.2d 175 (Fla. 1943)). Petitioner contends that the Third District Court of Appeal lacked jurisdiction to consider the issue of whether a limited partner has the right to file a derivative action on behalf of a limited partnership. The

District Court, however, had jurisdiction to consider all preceding orders upon Wulsin's appeal of the final judgment. Id.

Wulsin's Notice of Appeal properly included the Summary Judgment of Foreclosure, which gave the District Court jurisdiction to consider all preceding orders, and the Order Denying the Motion to Vacate, a supplemental order outside the scope of the final order. [R 1397-1398] Id.

II. A LIMITED PARTNER HAS THE RIGHT TO ASSERT A DERIVATIVE ACTION ON BEHALF OF THE LIMITED PARTNERSHIP UNDER FLORIDA PARTNERSHIP LAW.

Where the general partner has wrongfully refused to pursue an action belonging to the limited partnership because of self-interest, in breach of his fiduciary duty to the limited partner membership, neither the common law aggregate theory of partnerships nor section 620.26 of the Florida Statutes bars a limited partner from bringing a derivative action on behalf of the limited partnership.

A. Neither The Florida Supreme Court Nor The Fourth District Court Of Appeal Has Decided The Issue Of Whether A Limited Partner May File A Derivative Action On Behalf Of The Partnership.

Goldome contends that the Supreme Court of Florida decided, in effect, the issue of whether a limited partner may bring a derivative action on behalf of a limited partnership when

it adopted the common law aggregate theory of partnerships. (Petitioner's Brief at 11-12) See I. Epstein & Brothers v. First Nat'l Bank of Tampa, 92 Fla. 796, 110 So. 354 (1926) (Brown, C.J., concurring). At common law, the partnership entity could not sue because it was not regarded as a separate legal entity apart from its members. Id. Limited partnerships, however, are creatures of statute, as are corporations, and were unknown at common law. Strain v. Seven Hills Assocs., 75 A.D. 2d 360, 429 N.Y.S.2d 424 (N.Y. App. Div. 1980).

Florida adopted the Uniform Limited Partnership Act ("ULPA") in 1943, seventeen years after the Supreme Court decided I. Epstein & Brothers. Ch. 21887, Fla. Laws (1943). Thus, in adopting the aggregate theory of partnerships in the context of general partnerships, it is unlikely that the Court contemplated the limited partnership, a form of business organization created by statute with a unique hybrid character, part partnership and part corporation. See Klebanow v. New York Produce Exch., 344 F.2d 294 (2d Cir. 1965); Vulcan Furniture Mfg. Corp. v. Vaughn, 168 So.2d 760, 764 (Fla. 1st DCA 1964); Ruzicka v. Rager, 305 N.Y. 191, 111 N.E.2d 878 (1953); Strain v. Seven Hills Assocs., 75 A.D.2d 360, 429 N.Y.S.2d 424 (N.Y. App. Div. 1980). The Third District properly considered the unique attributes of a limited partnership in holding that in certain circumstances, as where the general partners breach their fiduciary duty to the limited partners, the necessity of protecting partnership rights justifies remedies similar to those available to shareholders and

trust beneficiaries. Wulsin v. Palmetto Fed. Sav. & Loan Ass'n, 507 So.2d 1149, 1151 (Fla. 3d DCA 1987).

The Fourth District Court of Appeal, in holding that section 620.26, Florida Statutes, prohibits direct suits by limited partners, harmonized the common law with the ULPA. Amsler v. American Home Assurance Co., 348 So.2d 68 (Fla. 4th DCA 1977). In Amsler, a case upon which Goldome heavily relies, the Fourth District observed that Florida adopts the aggregate theory of partnerships. 348 So.2d at 71. The court reasoned that only a general partner, not an individual limited partner, would have the right to institute a cause of action for breach of a duty owed to the entire limited partner membership. Id. The Third District Court of Appeal in the decision below merely took this notion one step further. It held that a limited partner may bring a derivative action on behalf of the limited partnership to protect the entire limited partner membership where the general partner wrongfully refuses to do so, for whatever reason, in breach of his fiduciary duty to the limited partners. Wulsin v. Palmetto Fed. Sav. & Loan Ass'n, 507 So.2d 1149, 1151 (Fla. 3d DCA 1987).

In Amsler, the Fourth District Court of Appeal neither addressed nor determined the issue presented in this appeal. There, certain limited partners proceeded against the partnership's attorney directly, in their own right, rather than in the right of the partnership client. Moreover, the limited partners in Amsler never alleged wrongful refusal of the general

partner to bring the action on behalf of the partnership as a whole. There, the District Court applied the aggregate theory to protect the limited partner membership by interpreting section 620.26 as precluding individual limited partners from suing to recover individually for damages suffered by the entire membership. Such an application of the aggregate theory of partnerships and section 620.26 where the self-interested general partners have abandoned a meritorious claim or defense belonging to the limited partnership in breach of their fiduciary duty, not only fails to protect limited partners, but also compromises their investment. Such a result is alarming and far-reaching. To preclude derivative actions under these circumstances would effectively bar the limited partnership, and possibly the limited partners, from obtaining judicial relief for a general partner's breach of his fiduciary duty. Smith v. Bader, 458 F. Supp. 1184, 1186 (S.D.N.Y. 1978). Certainly, no judicial theory or legislative enactment of Florida supports such a result.

Neither the Supreme Court of Florida nor the Fourth District Court of Appeal has decided the issue of whether a limited partner may bring a derivative action on behalf of the limited partnership where the general partners wrongfully refuse to pursue a claim or defense, in breach of their fiduciary duty to the limited partner. Neither section 620.26 of the Florida Statutes, which prohibits direct actions by limited partners, nor the aggregate theory of partnerships, developed before the advent of limited partnerships, reaches the issue. Furthermore, equity

demands that limited partners be allowed access to the courts where general partners wrongfully refuse to protect the partnership interests and the investment of the limited partners.

B. The Purpose of the Uniform Limited Partnership Act Is To Achieve Uniformity Among States.

The purpose of the ULPA is "to make uniform the law with respect to the subject of this [Act] among states enacting it." Uniform Limited Partnership Act, 6 U.L.A. § 1101 (Supp. 1987); see also § 620.184(1), Fla. Stat. (1987). Nonetheless, Goldome suggests that the Third District Court of Appeal inappropriately relied upon New York Law in deciding whether a limited partner has the right to file to a derivative action on behalf of the limited partnership in Florida. (Petitioner's Brief at 14). In fact, because no Florida court had considered or determined whether a limited partner may bring a derivative action under Florida law, the Third District appropriately reviewed the law of not only New York, in Klebanow v. New York Produce Exchange, 344 F.2d 294 (2d Cir. 1965), but also of: Maryland, in McCully v. Radack, 27 Md. App. 350, 340 A.2d 374 (Md. Ct. Spec. App. 1975); Pennsylvania, in Engl v. Berg, 511 F. Supp. 1146 (E.D. Penn. 1981); Colorado, in Moore v. 1600 Downing Street, Ltd., 668 P.2d 16 (Colo. Ct. App. 1983); Hawaii, in Phillips v. Kula 200, Wick Realty, Inc., 2 Haw. App. 206, 629 P.2d 119 (Haw. Ct. App. 1981); California, in Smith v. Bader, (S.D.N.Y. 1978) (applying Cal. Corp. Code § 15529); Ohio, in

Strain v. Seven Hills Assocs., 75 A.D.2d 360, 429 N.Y.S.2d 424 (N.Y. App. Div. 1980) (construing Ohio Rev. Code Ann. §§ 1781.01-.27 (current version at §§ 1782.01-.27)); and, Michigan, in Jaffe v. Harris, 109 Mich. App. 786, 312 N.W.2d 381 (Mich. Ct. App. 1981). See Wulsin v. Palmetto Fed. Sav. & Loan Ass'n, 507 So.2d at 1150. These states, which have considered the issue, concluded that the common law allows a limited partner to bring a derivative action, notwithstanding section 26 of the ULPA. The Third District followed these decisions by adopting the reasoning in Klebanow that section 26 of the ULPA, adopted in Florida as section 620.26 of the Florida Statutes, prohibits only direct actions by limited partners, which would interfere with the management of the partnership by the general partners.

The Third District's interpretation of this section is consistent with the rule of construction in the ULPA adopted by Florida in 1943, which provided:

> (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this part.
>
> (2) This part shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it. ...

§ 620.28, Fla. Stat. (1985). The rule of construction in the revised Limited Partnership Act of 1976, adopted in Florida in 1986, provides:

> This [Act] should be so applied and contrued to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Uniform Limited Partnership Act, 6 U.L.A. § 1101 (Supp. 1987); see also § 620.184(1), Fla. Stat. (1987).

Furthermore, section 29 of the ULPA, adopted in Florida in 1943 in section 620.29 of the Florida Statutes, provides that, "in any case not provided for in this part the rules of law and equity, including the law merchant, shall govern." § 620.29, Fla. Stat. (1985); Uniform Limited Partnership Act, 6 U.L.A. § 29 (1969); see § 620.186, Fla. Stat. (1987). Because the ULPA, prior to the 1975 revisions, adopted in Florida in 1986, did not address the issue of whether limited partners have the right to file derivative actions on behalf of the limited partnership, the rules of law and equity govern the issue here on appeal, not section 26 of the ULPA.

The Third District Court of Appeal appropriately reviewed the law of other states in determining whether, under the ULPA, or at law or in equity, limited partners may bring a derivative action. Only through a survey of the law of other states that have addressed the issue, can Florida realize the purpose for which it enacted the ULPA, that is, to make uniform the limited partnership law among those states which have enacted it. § 620.184(1), Fla. Stat. (1987).

C. Section 620.26, Florida Statutes, Did Not Bar Derivative Actions By Limited Partners.

Florida adopted the ULPA in 1943. Ch. 21887, Fla. Laws (1943). Section 620.26 of the Florida Statutes, which the legislature repealed in 1986 with the adoption of the revised ULPA, provided:

> A contributor, unless he is a general partner, is not a proper party to proceedings by or against the partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

§ 620.26, Fla. Stat. (1985).

Goldome argues that this statutory provision prohibits derivative actions by limited partners. The manifest weight of case authority, however, argues otherwise. Most courts addressing the issue under similar or identical statutory provisions have held that the right of a limited partner to bring a derivative action on behalf of the limited partnership is not barred by the statute. See, e.g., Klebanow v. New York Produce Exch., 344 F.2d 294 (2d Cir. 1965); Moore v. 1600 Downing Street, Ltd., 668 P.2d 16 (Colo. Ct. App. 1983); Phillips v. Kula 200, Wick Realty, Inc., 2 Haw. App. 206, 629 P.2d 119 (Haw. Ct. App. 1981); Jaffe v. Harris, 109 Mich. App. 786, 312 N.W.2d 381 (Mich. Ct. App. 1981); Riviera Congress Assocs. v. Yassky, 16 N.Y.2d 340, 277 N.Y.S.2d 386, 223 N.E.2d 876 (N.Y. 1976). But see American Discount Corp. v. Saratoga West, Inc., 13 Wash. App. 890, 537 P.2d 1056, review denied, 86 Wash. 2d 1006 (Wash. Ct. App. 1975); Lieberman v. Atlantic Mutual Ins. Co., 62 Wash. 2d 922, 385 P.2d 53 (1963). These courts have concluded, as did the

Third District, that the ULPA is simply not intended to limit the rights of limited partners to assert partnership claims which have been wrongfully abandoned by those trusted to pursue them. Otherwise, limited partners would be forced to sit idly by and watch their investments disappear while general partners, undeterred, protected their own self-interests, to the detriment of the limited partnership and limited partners. This simply cannot be the result intended by the Florida Legislature in enacting section 26 of the ULPA.

In Riviera Congress Associates v. Yassky, the court applied a New York statutory provision identical to section 620.26 of the Florida Statutes. 18 N.Y.2d 540, 277 N.Y.S.2d 386, 223 N.E.2d 876 (N.Y. 1976). As here, general partners had executed a self-serving release of a partnership claim. In the Riviera case, limited partners in a real estate syndication sought to bring a derivative action for rent due under a lease of partnership property. The tenant was another limited partnership organized and operated by the same individuals who served as the syndication's general partners. The defendant general partners asserted defensively that they had signed a release relieving the related lessor-partnership of any liability to pay the rent alleged to be due. In response, the limited partners asserted that the execution of this release amounted to self-dealing and breach of fiduciary duty because the general partners had essentially released themselves when they released the entity from the debt owed to this syndication.

The court in Riviera held that the statute did not bar the derivative action brought by the limited partners, because "the purpose of the statute is solely to restrain limited partners from interfering with the right of the general partners to carry on the business of the partnership." 18 N.Y.2d at 547, 277 N.Y.S.2d at 391, 223 N.E.2d at 879. Logically, the statute is inapplicable where the basis of the lawsuit is that the general partners have declined to carry on the business of the partnership by wrongfully refusing to enforce a partnership claim. Id.

Similarly, it would be illogical to interpret section 620.26 of the Florida Statutes, designed to prevent unwarranted interference in partnership litigation by a limited partner, to preclude Wulsin on behalf of the Beacon Reef Limited Partnership from pursuing a usury claim with which the general partners have wrongfully interfered by filing a self-serving waiver. The language of the statute does not dictate such a result.

The same rationale has been applied to allow intervention by a limited partner in a proceeding against the limited partnership. In Linder v. Vogue Investments, Inc., limited partners sought to intervene in an action on a debt alleged to be owed by the limited partnership. 239 Cal. App. 2d 338, 48 Cal. Rptr. 633 (Cal. Dist. Ct. App. 1966). At the same time, the limited partners sought to vacate a default judgment which had been entered when the general partner failed to appear and defend the lawsuit. The intervenors asserted that the debt

was personal to the general partner, and not owed by the limited partnership. Interpreting a California statutory provision identical to sections 620.26 of the Florida Statutes, the California appellate court reversed the lower court's denial of leave to intervene. The court reasoned:

> The statement in section 15526 of the Corporations Code that a limited partner is not a proper party in an action against the limited partnership is certainly not the equivalent of a statement that a limited partner may not, in a proper case, intervene in such an action. We know of no rule which equates the right to intervene on behalf of a defendant with being a proper party whom the plaintiff could have sued had he chosen to do so.
>
> We do not believe the that Uniform Limited Partnership Act and particularly section 15510 purport to state all of the rights of limited partners, under all circumstances. We are encouraged in this belief by section 15529 of the Corporations Code, reading as follows: "In any case not provided for in this Act the rules of law and equity, including the law merchant, shall govern." If it were the law 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 defend an unmeritorious or collusive action against the partnership, something would have to be done about it.

239 Cal. App. 2d at 340-41, 48 Cal. Rptr. at 635 (Footnote omitted and emphasis supplied); see also Kobernick v. Shaw, 70 Cal. 3d 914, 139 Cal. Rptr. 188 (Cal. Ct. App. 1977) (limited partner permitted to cross-claim for fraud against foreclosure plaintiffs where cross-claim alleged collusion between plaintiffs and general partner, who had left state and refused to defend).

It is precisely this sort of inequitable result feared by the court in Linder which the Third District averted by its reversal of the trial court's entry of summary judgment in this case. Wulsin had been forced to sit idly by and watch his

partnership investment disappear while Goldome, undeterred, enforced an unenforceable mortgage and the general partners happily walked away from any individual obligations under the mortgage contract. This inequitable result, which would defeat the investment incentives of limited partnerships, simply cannot have been intended by the Florida Legislature in enacting section 620.26 of the Florida Statutes. In fact, the legislature amended the ULPA expressly to allow derivative actions in 1986. See § 620.163, Fla. Stat. (1987). Although Goldome suggests that this signaled a change in Florida, such an amendment "does not necessarily indicate that the legislature intended to change the law. Statutory changes may be designed to clarify what was 'doubtful and to safeguard against misapprehension as to existing law.'" Fischer v. Metcalf, 12 F.L.W. 2846 (Fla. 3d DCA December 18, 1988) (quoting Dade County v. AT&T Information Sys., 485 So.2d 1302, 1304-05 (Fla. 3d DCA), review denied, 494 So.2d 1150 (Fla. 1986)); see also State ex rel. Szabo Food Serv., Inc. of N. C. v. Dickinson, 286 So.2d 529 (Fla. 1974).

D. Common Law Principles Dictate That A Limited Partner Be Permitted To Bring A Derivative Action On Behalf Of the Partnership.

Furthermore, the result sought by Goldome offends the established principles of the common law. Courts examining the issue of limited partner standing have often resolved the issue by analogy to the common law of trust. In the Riviera case, for example, the court reasoned that because the general partner is

bound in a fiduciary relationship to a limited partner, the latter is analogous to the beneficiary of a trust. Riviera Congress Assocs. v. Yassky, 18 N.Y.2d at 547, 277 N.Y.S.2d at 392; see also Klebanow v. New York Produce Exch., 344 F.2d 294 (2d Cir. 1965); Jaffe v. Harris, 109 Mich. App. 786, 312 N.W.2d 381, 384 (Mich. Ct. App. 1981). It is settled law that trust beneficiaries are permitted to bring or defend actions relating to the trust property where the trustee fails to do so. Cowen v. Knott, 252 So.2d 400 (Fla. 2d DCA 1971); Restatement (Second) of Trusts § 282(2) (1959). By analogy, then, limited partners should be permitted to bring derivative actions on behalf of the limited partnership where the general partner breaches his fiduciary duty by failing to assert or pursue a meritorious cause of action or defense. See Klebanow v. New York Produce Exch., 344 F.2d at 297-98.

Similarly, the standing of a limited partner to bring a derivative action is supported by analogy to the law of corporations. Courts reason that a limited partner's status is comparable to that of a shareholder in that the limited partner's personal liability for partnership debts is limited to his original investment and he does not manage the business of the partnership. Klebanow v. New York Produce Exch., 344 F.2d 294, 297 (2d Cir. 1965); Vulcan Furniture Mfg. Corp. v. Vaughn, 168 So.2d 760, 764 (Fla. 1st DCA 1964). As summarized by the court in Jaffe v. Harris:

> The substantial similarity between the interests of limited partners, corporate shareholders, and cestuis que

> trust compels the conclusion that a derivative cause of action is available by which limited partners can enforce partnership causes of action. To hold otherwise would, we believe, render unenforceable the rights of limited partners accorded by the [partnership statutes]. Further, the limited partner would be left with the sole remedy of seeking dissolution of the partnership, if the general partner violated his statutory duties to act for the organization.

109 Mich. App. at 793-94, 312 N.W.2d at 385 (citations omitted). If Wulsin is to have the minimal access to the courts necessary to enforce his rights and interest in the limited partnership, he must be permitted to assert in a derivative action the partnership's usury claim and defense where the uncontested record reveals that the general partners have self-servingly waived and declined to do so. [R 455-466] This equitable result is not only essential to preserve the investment incentives of limited partnerships, but also is utterly consistent with the common law of Florida. See Cowen v. Knott, 252 So.2d 400 (Fla. 2d DCA 1971) (derivative action by trust beneficiary); James Talcott, Inc. v. McDowell, 148 So.2d 36 (Fla. 3d DCA 1962) (derivative action by shareholder in corporation).

E. Wulsin's Derivative Claim Complies With The New Statute

Alternatively, Goldome contends even if section 620.26 and the common law do not bar his derivative action, that sections 620.164 and 620.165 of the Florida Statutes, enacted in 1986, preclude Wulsin from bringing a derivative action (Petitioner's brief at 17). Goldome attempts to apply these provisions of Florida's revised ULPA, while simultaneously

arguing that section 620.163 does not even apply to the facts of this case. Under the ULPA in effect at the time and under common law trust and corporation principles, Wulsin has standing to bring a derivative action on behalf of the limited partnership where the general partner has breached his duty to the limited partnership by refusing to pursue meritorious defenses.

Goldome suggests that because Wulsin was not a limited partner at the time the usurious loan was closed, he cannot bring the action (Petitioner's brief at 17-18). Wulsin was a limited partner, however, during the life of the mortgage under the terms of which he alleges Goldome charged and collected a usurious interest rate. See General Capital Corp. v. Tel Serv. Co., 212 So.2d 369 (Fla. 2d DCA 1968), modified on other grounds, 227 So.2d 667 (Fla. 1969) (for usury, the statute of limitation runs from the date the last installment becomes due and payable). To assert that Wulsin is without remedy simply because he was not a limited partner on the date the mortgage was executed, and that he must therefore acquiesce to Goldome's usurious and unlawful interest rate, is inequitable. Such a result would effectively destroy the limited partnership as a mechanism for encouraging investment in Florida. Palmer v. Morris, 316 F.2d 649 (5th Cir. 1963) (adopted as binding precedent by the Eleventh Circuit in Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981)) (standing where payments under the terms of the initial transaction rather than the transaction itself constituted the wrong).

Goldome suggests that the general partners fulfilled their fiduciary duty to the limited partners by raising the defenses and claims, even though they subsequently waived them in a self-interested settlement with Goldome. (Petitioners brief at 18). Wulsin objected to the fact that the general partners reached a self-interested settlement, not that they settled. [R 455-466; App. at 2]. The decision by the Third District does not prevent general partners from ever having authority to settle suits, as Goldome suggests, but rather protects limited partners from self-interested settlements by general partners, as here, in which the limited partners must sit idly by and lose their investment. The Third District decision enables limited partners to protect themselves from bad faith settlements with third parties, but it does not restrict general partners from exercising their business judgment, if in good faith. First Nat'l Bank in Palm Beach v. Underwood, 499 So.2d 60 (Fla. 4th DCA 1986) (estate of deceased shareholder had standing to sue third party in derivative suit); Grandin Indus., Inc. v. Florida Nat'l Bank at Orlando, 267 So.2d 26 (Fla. 4th DCA 1972) (shareholder had standing to sue third-party bank on behalf of the corporation).

Furthermore, Goldome contends that the "opinion by the Third District makes derivative actions by limited partners a matter of right." (Petitioners brief at 17). Goldome casts Wulsin's objection to the self-interested settlement agreed to by the general partners as "a mere difference of opinion."

(Petitioners brief at 16). Wulsin, however, in his Motion for Leave to Intervene alleged much more than mere "difference of opinion" with the general partners settlement and waiver of defenses. [R 455-466; App. at 2]. Wulsin, in fact, alleged that the general partners had acted unconscionably and that the waiver of the affirmative defenses and counter-claim was the result of collusion between Goldome and the general partners, inuring only to their joint and personal benefit. [R 455-466; App. at 2, ¶¶ 7, 9 & 12]. These allegations present sufficiently exceptional circumstances to meet the requirements set forth by the Second Circuit Court of Appeal in Klebanow v. New York Produce Exchange, 344 F.2d 294, 299 (2d Cir. 1965).

F. A Partnership Owning Real Property Has Standing to Bring Suit, Notwithstanding The Aggregate Theory of Partnerships.

Goldome suggests that even if Florida law permits Wulsin to bring a derivative action on behalf of the Beacon Reef Limited Partnership, he can only assert so much of a claim as the limited partnership itself may assert. (Petitioner's brief at 11-12). Goldome reasons that if the limited partnership is a nonexistent entity under the aggregate theory of partnerships, then Wulsin still is without standing to assert a cause of action. Although the aggregate theory of partnerships was developed prior to the evolution of limited partnerships and is arguably inapplicable because of the unique character of limited partnerships, discussed in section II.A. of this brief, Wulsin

and the Beacon Reef Limited Partnership fit within an exception to the common law aggregate theory of partnerships. Where a partnership entity holds title to real property in its partnership name, it may initiate litigation in its name to protect its interest in that property. Irwindale Co., N.V. v. Three Islands Olympus, 474 So.2d 406 (Fla. 4th DCA 1985); Malibu Partners, Ltd. v. Schooley, 372 So.2d 179 (Fla. 2d DCA 1979). Because partnerships are authorized by statute in Florida to acquire and convey real property in the partnership name contrary to the common law rule that a partnership can neither take nor hold legal title to real estate, Florida has abrogated the aggregate theory of partnerships to the extent that a partnership holding title to real property may initiate litigation in the partnership name. Malibu Partners, Ltd. v. Schooley, 372 So.2d at 180. Therefore, the Beacon Reef Limited Partnership has capacity to sue and defend in its own name to protect its interest in the real property which it owns and which is the subject of the foreclosure litigation initiated by Goldome in the case below.

CONCLUSION

The Third District of Court of Appeal properly exercised appellate jurisdiction to review Wulsin's appeal of the final order of the trial court and correctly held that Florida law permits limited partners to bring derivative actions on behalf of limited partnerships. It is respectfully submitted that the opinion of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

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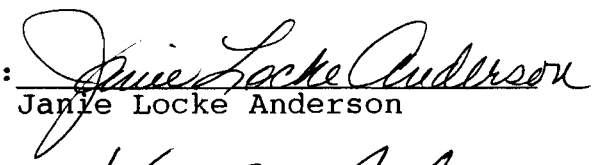
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was furnished by Federal Express to Kimberly A. Bald, Esq., Harlee & Porges, P.A., P.O. Box 9320, Bradenton, FL 34206, and John L. Britton, Esq., Britton & Kantner, P.A., One East Broward Blvd., 12th Floor, Ft. Lauderdale, FL 33301, Co-counsel for Petitioner, on this 18th day of March, 1988.

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