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8 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
9 CITY AND COUNTY OF SAN FRANCISCO  
10

11 James D. Nordahl and Janet L. Nordahl, et al., ) No. 973719  
12 Plaintiffs, )  
13 v. )  
14 Crow Family 1991 Limited Partnership, J. McDonald )  
Williams, Barbara Collins, The Williams Family )  
15 Trust, Hayward Commerce #6 L.P., Mill Springs )  
Holdings, Inc., Trammell Crow Foundation, Ltd., )  
16 TCF, Inc., Trammell S. Crow, Trammell Crow, )  
Harlan R. Crow, Trammell Crow Company, )  
17 Trammell Crow Capital Markets, Trammell Crow )  
Asset Management, and Does 1-25, )  
18 Defendants. )  
19 )  
20 \_\_\_\_\_ )

21

22 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO**  
23 **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

24 DATE: September 3, 1999  
25 TIME: 9:30 a.m.  
DEPT: 602  
Hon. Donald Mitchell

26 TRIAL Date: None Set  
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1 **I. INTRODUCTION**

2 More than seventy years ago, Justice Cardozo stated the principles that govern  
3 fiduciaries, and thus this case. His famous words carry no less weight today:

4 Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty  
5 of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting  
6 at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something  
7 stricter than the morals of the market place. *Not honesty alone, but the punctilio of an honor the*  
8 *most sensitive, is then the standard of behavior.* As to this there has developed a tradition that  
9 is unbending and inveterate. *Uncompromising rigidity has been the attitude of courts of equity*  
10 *when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of*  
11 *particular exceptions.* Only thus has the level of conduct for fiduciaries been kept at a level  
12 higher than that trodden by the crowd. It will not consciously be lowered by any judgment of  
13 this court.

10 Meinhard v. Salmon, 249 N.Y. 458, 463-64, 164 N.E. 545 (N.Y. 1928)(emphasis added) (citations  
11 omitted). The Crow Defendants' motion for summary judgment should be denied because they fell short  
12 of the honesty and undivided loyalty that the law demanded of them.

13 **II. STATEMENT OF FACTS**

14 **A. The Partnerships and Parties**

15 The six named Plaintiffs represent an as-yet uncertified class of limited partners in five  
16 San Francisco Bay Area limited partnerships (the “Bay Area Partnerships” or “Plaintiffs’ Partnerships”)  
17 in which various Trammell Crow-related entities were general partners. Complaint ¶¶4-10. The Bay  
18 Area partnerships were originally sold as tax shelters, before the 1986 tax reform act. Statement of  
19 Undisputed Material Facts in Opposition to Motion for Summary Judgment (“Opp. SUF”) 219. The  
20 Bay Area Partnership’s Limited Partnership Agreements (the “LPAs”) are, in most material respects,  
21 similar; copies are attached to the Declaration of R. Byron Carlock (“Carlock”), submitted in support  
22 of Defendants’ motion.

23 Defendants are Crow-related persons and entities who either were general partners in the  
24 Bay Area partnerships, or discharged the general partners’ duties. Complaint ¶¶ 11-23. James Pollock  
25 (“Pollock”) is a financial and insurance planner who brought Plaintiffs and Crow together.<sup>1</sup> Complaint  
26 ¶¶29.

27 \_\_\_\_\_  
28 <sup>1</sup> The SCI Transaction (described in the next section) actually involved six limited partnerships  
with Pollock clients as investors, but one such partnership is not involved in this litigation and its  
limited partners are not parties.

1 **B. The SCI Transaction**

2 The SCI Transaction was a complex deal by which Defendants sold the real estate  
3 projects owned by 43 limited partnerships located across the country to a real estate investment trust  
4 (“REIT”) sponsored by Security Capital Industrial (“SCI”). The five Bay Area partnerships in which  
5 Plaintiffs were limited partners were included among these 43 partnerships; of the other 38 partnerships,  
6 15 were owned entirely by Crow-related entities. Szurek Declaration ¶4; Ross Declaration ¶4; Opp.  
7 SUF 117, 122, 123, 164.

8 The SCI Transaction had two parts: a “contribution” component and a “sale” component.  
9 In the case of 23 partnerships, Defendants and SCI entered into a “Contribution Agreement” pursuant  
10 to which the partnership interests of Defendants were contributed to a Master Limited Partnership  
11 (“MLP”), and Defendants received as consideration units of the MLP, which were priced at \$11 per unit.  
12 The MLP was owned principally by the SCI REIT. One advantage of this structure, known as an  
13 “UPREIT”, was that the receipt of MLP units was not a taxable event. Defendants had the right at a  
14 future date to exchange each MLP unit for a REIT share, and SCI committed to submit a Registration  
15 Statement to the Securities Exchange Commission so that Defendants’ REIT shares could be sold to the  
16 public. Opp. SUF 1-11, 16, 21, 31, 32, 41, 57, 80, 116-26.

17 Defendants began discussing an UPREIT with SCI as early as March, 1993. During  
18 negotiations, SCI was not a proponent of the complicated UPREIT structure: it would have preferred  
19 an all-cash transaction. Defendants, however, were interested in the tax advantages presented by an  
20 UPREIT, and persuaded SCI to accommodate their desires. The UPREIT provided numerous benefits  
21 to Defendants: (1) greater diversification offered by shares in a broader-based REIT; (2) the opportunity  
22 to obtain such diversification without triggering an immediate taxable event; (3) the opportunity to profit  
23 from the expected appreciation in the value of the REIT’s stock after the REIT’s initial public offering  
24 (“IPO”), which was planned for (and in fact took place) at the end of the first quarter of 1994; and (4)  
25 the increased liquidity of ownership of publicly traded REIT shares compared to private limited  
26 partnership units.<sup>2</sup> Opp. SUF 1-22.

27 The sales component of the SCI Transaction involved 20 projects that were sold to the

28 <sup>2</sup> In addition to these advantages of the UPREIT, Defendants also hoped to expand their property management business into projects owned by the REIT. Opp. SUF 14, 58.

1 REIT for cash. These projects were owned by limited partnerships that had non-Crow-related limited  
2 partners. All of the Bay Area partnerships in which Plaintiffs invested were included in the sale  
3 component, and represented 47.4% of the total value of that part of the transaction. Defendants,  
4 however, found the prospects of the REIT so attractive that they negotiated the right to use their cash  
5 proceeds from the “sale” partnerships to purchase up to 350,000 additional REIT shares at a price of \$11  
6 per share. This agreement was documented by a “Subscription Agreement.”<sup>3</sup> Opp. SUF 52-54, 57, 94-  
7 95, 116, 120, 122-26.

8           The \$11 price that Defendants negotiated for both the REIT shares to be purchased under  
9 the Subscription Agreement and the MLP units received under the Contribution Agreement was a  
10 bargain. Both SCI and Defendants fully expected that the REIT’s IPO in early 1994 would be priced  
11 at \$14 per share or more, and that it was likely to appreciate even further. Defendant referred to the  
12 expectation that the market price would significantly exceed the bargain price of \$11 as the benefit from  
13 the “IPO Pop.” The profit from the IPO Pop was an important factor in making the SCI Transaction  
14 attractive to Defendants. Opp. SUF 8, 13, 46, 48-54, 70-73, 87, 88, 120, 121, 125, 126, 205, 210-13.

15 **C. Defendants Failed to Make Complete Disclosure Regarding the SCI Transaction**

16           Defendants claim in their moving papers that there can be no dispute that they made full  
17 disclosure regarding the SCI Transaction. Nothing could be further from the truth.

18           First, Defendants failed to inform Plaintiffs that the SCI Transaction involved not just  
19 the Bay Area Partnerships in which Pollock clients had invested, but 37 additional properties, of which  
20 15 were solely owned by Defendants and their affiliates. Pollock was flabbergasted when he discovered  
21 this crucial fact just before the closing and too late to seek any remedy. To Pollock, this fact, by itself,  
22 cast significant doubt on whether the transaction was in the best interests of Plaintiffs. The involvement  
23 of so many other properties meant that Defendants’ interests were not necessarily identical to Plaintiffs’  
24 interests. Such a conflict of interest presented a risk that Plaintiffs were not being treated fairly across  
25 the entire transaction, and in Pollock’s view required further inquiry. Defendants, however, did not  
26 permit further inquiry before closing the transaction on February 15, 1994. Opp. SUF 109-15, 128-76,

27 \_\_\_\_\_  
28 <sup>3</sup> Paul Szurek, SCI’s chief negotiator, testified that it was Defendants’ idea to include the  
Subscription Agreement in the transaction. Moreover, Szurek would have been willing to consider  
extending similar terms to Plaintiffs, but Defendants never asked him to do so. Opp. SUF 55.

1 223.

2           Second, Defendants did not disclose, until barely two days before the transaction closed,  
3 that Defendants were receiving MLP units as consideration for the other partnerships involved in the  
4 transaction. Opp. SUF 113, 164-65. Defendants’ failure to disclose this tax-driven aspect of the  
5 transaction was particularly galling, because Plaintiffs’ objections to the sale had been based, in part,  
6 on the large tax hit that Plaintiffs would take.<sup>4</sup> Nordahl Decl. ¶ 5. When Plaintiffs learned about the  
7 UPREIT, they realized that, while Defendants had taken no account of Plaintiffs’ tax situation before  
8 proceeding with the sale, they had carefully studied their own tax situation and had protected their self-  
9 interest by structuring the transaction to provide a tax deferral to themselves. Opp. SUF 165.

10           Third, Defendants failed to tell Plaintiffs about the Subscription Agreement, by which  
11 they negotiated the right to use the cash proceeds from the sale of their interests in the Bay Area  
12 Partnerships to buy 350,000 REIT shares at the bargain price of \$11. Nor did Defendants tell Plaintiffs  
13 that they had made no attempt to negotiate a similar opportunity for Plaintiffs. Opp. 55, 56, 114.

14           Fourth, Defendants never disclosed that Defendants were being allowed to “buy into”  
15 the REIT at a bargain price, thereby generating a secret profit to Defendants. With respect to the  
16 Plaintiffs’ partnerships, this secret arrangement meant that Defendants expected to receive more in  
17 consideration attributable to the sale of Plaintiffs’ limited partnerships than Plaintiffs would receive.  
18 Opp. SUF 48-50, 70, 86, 111.

19 **D. The Consents and Waivers Executed by Defendants Set Forth the Facts that Should Have**  
20 **Been Disclosed to Plaintiffs**

21           Ironically, Defendants *were* careful to make a full disclosure to certain Crow-related  
22 limited partners in Plaintiffs’ partnerships. They made this disclosure by way of a document called a  
23 “Consent and Waiver”, *which every partner in every partnership received and executed -- except*  
24 *Plaintiffs.*<sup>5</sup> Opp. SUF 180-204.

25 \_\_\_\_\_  
26 <sup>4</sup> Nordahl and other Plaintiffs had negative capital balances. As a result, they were taxed on  
27 “phantom income” -- that is, they paid tax on a larger sum than they actually received from the  
28 transaction, significantly decreasing the amount of funds available for reinvestment. Defendants  
structured the transaction to mitigate the tax impact on themselves. Opp. SUF 41, 42, 220-22.

<sup>5</sup> The Bay Area Partnerships had Class A Limited Partners and Class B Limited Partners. The  
Plaintiffs were Class B Limited Partners. The Class A Limited Partners were associates of Crow who  
at one time had been general partners but had been reclassified as limited partners. These Class A

1           The Consent and Waiver for Mr. Nordahl’s partnership discloses: (1) the existence of  
2 the Subscription Agreement; (2) that Defendants intended to fund the Subscription Agreement purchase  
3 with “distributions from transactions contemplated by the Purchase Agreement”; (3) that those  
4 purchasing REIT shares under the Subscription Agreement could receive greater consideration from  
5 distributions to them under the Purchase Agreement than other partners; (4) that the SCI REIT would  
6 use a Crow-related entity to manage and operate the property being sold; and (5) that the property was  
7 “part of a larger transaction between various partnerships affiliated with the Trammell Crow Company  
8 . . . and Security Capital Industrial Trust.” Opp. SUF 204. Defendants executed this document, which  
9 constitutes an admission as to the facts set forth. Why didn’t Defendants, as fiduciaries, make this  
10 disclosure to Mr. Nordahl?

11 **E. Defendants Structured the SCI Transaction to Avoid Full Disclosure**

12           Defendants went to considerable lengths to structure the SCI Transaction in a manner  
13 that would make it difficult for Plaintiffs to discover the truth. At the same time that Defendants began  
14 negotiating with SCI for an UPREIT transaction that would also permit Defendants to profit from an  
15 IPO Pop, they drafted asset plans for the Bay Area Partnerships that indicated that their strategy was to  
16 hold the properties for long-term appreciation. Opp. SUF 36-38. Defendants met with Pollock on July  
17 12, 1993, in Palo Alto, California to discuss the Bay Area Partnerships, but did not disclose that they  
18 were discussing a transaction with SCI in which Defendants would obtain REIT securities at a bargain  
19 price, as well as tax deferral. Opp. SUF 24-27.

20           When Defendants finally made a disclosure about the SCI Transaction, it was carefully  
21 crafted to avoid revealing the true scope and nature of the deal. In a letter dated September 21, 1993,  
22 James Hendricks, Managing Director of Trammell Crow Asset Management, informed Pollock that  
23 Defendants were negotiating with SCI, and represented that he had enclosed an analysis of expected  
24 proceeds *"on each of the assets being considered for inclusion in the portfolio sale."* But the enclosed  
25 analysis did *not* include all assets being considered for sale: it omitted the 37 partnerships in which  
26 Pollock clients had no ownership interest. Opp. SUF 59-63.

27 \_\_\_\_\_  
28 limited partners received the full disclosure outlined in the text; Plaintiffs, as Class B limited partners,  
received no disclosure. Opp. SUF 204. Defendants apparently believe that they had less duty to  
disclose to their beneficiaries than to their cronies.

1           By contrast, SCI saw the transaction as an integrated whole. So, on September 22, 1993,  
2 when SCI transmitted to Defendants a letter of intent (“LOI”) proposing terms for the transaction, the  
3 LOI encompassed *all* of the properties to be included in the transaction -- both those in which Plaintiffs  
4 had invested *and* the other 37 properties. Opp. SUF 64-68. SCI and Defendants followed with several  
5 draft LOIs that recognized the integrated nature of the transaction. Opp. SUF 84, 89.

6           According to Szurek, *Defendants* first proposed that, instead of one LOI, a *separate* LOI  
7 be prepared to cover *only* the Bay Area properties. Opp. SUF 102. Thus, while the parties continued  
8 to negotiate a global LOI to govern the entire transaction (including the Bay Area Partnerships), they  
9 also documented the Bay Area portion of the deal in a separate LOI. Opp. SUF 90-92. When the global  
10 LOI was finalized on October 14, 1993, the Bay Area Partnerships LOI was “attached hereto, and  
11 incorporated herein by reference.”<sup>6</sup> Opp. SUF 96, 214-218.

12           But Defendants did not provide Pollock with the global LOI. Instead, they sent Pollock  
13 *only* the Bay Area LOI, which was worded in a manner calculated to leave the impression that only the  
14 Bay Area Partnerships were part of the transaction.<sup>7</sup> Pollock understandably was misled, believing that  
15 the letter of intent that he was given was the entire deal. Opp. SUF 103, 105, 106, 112, 135-40, 159.  
16 Yet Defendants did disclose the entire transaction to every other third party partner, even those with no  
17 vote on the sale. Opp. SUF 180-204. Why not to Pollock?

18 **F. Defendants Had Powerful Incentives to Avoid Full Disclosure to Pollock**

19           Although the SCI Transaction contemplated that 43 properties would be sold to the SCI  
20 REIT, both SCI and the Crow Defendants recognized that properties could drop out of the transaction  
21 if required consents were not obtained, environmental issues arose during due diligence, litigation arose,  
22 or a limited partner exercised a right of first refusal. SCI did not want to be obligated to proceed with  
23 a transaction if the best properties had dropped out, leaving only the most under performing assets in  
24 the Defendants’ portfolio. Accordingly, SCI negotiated provisions that permitted it to walk away from  
25

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26           <sup>6</sup> Szurek viewed the October 14, 1993 global LOI as including the Bay Area Partnerships and,  
indeed, he viewed it as continuing to govern certain terms of the Bay Area transaction. Opp. SUF 100.

27           <sup>7</sup> At one point during the negotiation of the Bay Area LOI, a suggestion was made to add a  
28 sentence stating that the LOI would not be effective unless the global transaction failed to close. That  
addition would have made it obvious to Pollock that there was a broader transaction. That addition  
never made it into the Bay Area LOI that was actually sent to Pollock. Opp. SUF 104.

1 the entire transaction if certain properties -- its “A” list -- were not part of the deal. The Bay Area  
2 Partnerships were all on the “A” list. Opp. SUF 81, 82, 91-93, 98, 99, 127.

3           Indeed, Joel Ross, who at the time of the transaction was the general counsel of Trammell  
4 Crow Company, candidly admitted at his deposition that Defendants were concerned that Pollock had  
5 “lost control” of the investors in the Bay Area partnerships and could not guaranty that he could deliver  
6 their consent to the transaction. Opp. SUF 115.<sup>8</sup> Both Szurek and Carlock admitted at deposition that  
7 if just one partner in the Bay Area partnerships had brought a lawsuit, or had exercised a right of first  
8 refusal, SCI would have had the right to walk away from the entire transaction. Opp. SUF 127. Had  
9 that happened, Defendants would have lost the opportunity to defer taxes or to enjoy the benefit from  
10 their undisclosed bargain purchase of securities.

11           In short, Defendants had placed themselves in a position where it was to their benefit not  
12 to make the full disclosure mandated by their fiduciary obligations.

13 **G. Defendants Continued to Conceal the Truth Even When Questioned**

14           Upon receipt of the Bay Area partnership letter of intent, Pollock hired an entity called  
15 Realty Investors Assurance (“RIA”) as consultants to evaluate whether the proposed sale was in the best  
16 interests of the limited partners. Thereafter, Pollock and RIA repeatedly asked Defendants for full  
17 information concerning the SCI Transaction.<sup>9</sup> Opp. SUF 128-76. Of course, Pollock thought that the  
18 transaction only involved six partnerships in which clients of his had invested. Opp. SUF 159.

19           Even as to those six partnerships, however, Defendants were curiously reluctant to  
20 provide the requested information. Repeated inquiries were ignored. Within 10 days of receipt of the  
21 Bay Area Partnerships LOI, RIA wrote to Carlock and complained that they still had not received the  
22 information that they needed to evaluate the SCI offer, and stated their position that the 10-day period  
23 for investors to make a decision accordingly had not yet begun to run.<sup>10</sup> Opp. SUF 141-46. By

24 \_\_\_\_\_  
25 <sup>8</sup> To address that concern, SCI and Defendants discussed whether SCI would provide financing  
to buy out any “renegade” partner who objected to the transaction. Opp. SUF 79.

26 <sup>9</sup> Pollock always insists on receiving full information before he makes any report to his clients  
27 concerning their investments. Full information should include “general partner fees and other projects  
that could potentially be included in the transaction.” Opp. SUF 129, 134.

28 <sup>10</sup> RIA also told Carlock that they wished to ballot the limited partners about the transaction as  
a “sound business practice.” Carlock took the position that no investor consent was required and that  
polling of the limited partners was unjustified. Opp. SUF 142-43.

1 November 30, 1993, Pollock grew sufficiently concerned that he warned Defendants that they were  
2 headed for an “investor relations nightmare.” Opp. SUF 148-50. In that same letter, Pollock noted that  
3 he had been informed that the Crow Defendants were charging a sales commission, although the Bay  
4 Area Partnerships’ LOI recited that no commission was being charged. Opp. SUF 107, 108. Pollock  
5 asserted that the Bay Area Partnerships’ limited partners should vote on whether Defendants would  
6 receive any additional fees. Opp. SUF 151-53.

7 Carlock responded by letter dated December 2, 1993, in which he conceded, for the first  
8 time, that Defendants intended to charge a sales fee. Carlock did not provide any authority for the sales  
9 fee. Carlock also continued to omit any reference to the 37 additional properties involved in the  
10 transaction. Opp. SUF 156-58, 160, 161.

11 On February 8, 1994, RIA heard from another source that the SCI Transaction involved  
12 several non-Pollock properties. The next day, RIA requested information about all of the other projects  
13 involved in the SCI Transaction, so that they could evaluate the fairness of the relative pricing for all  
14 properties. Opp. SUF 162, 163. By reply letter dated February 12, 1994, Carlock acknowledged for the  
15 first time that there were 43 properties in total involved in the transaction. He also revealed, for the first  
16 time, that “certain Crow investors will receive a combination of cash and securities (stock and limited  
17 partnership units) for some of the properties.” SUF 164, 165.

18 The latter disclosure was yet another bombshell. Plaintiffs realized for the first time that  
19 Defendants had structured the transaction to minimize the tax impact on themselves, while leaving  
20 Plaintiffs fully exposed. On February 15, 1994, Ralph Walker of Orrick, Herrington & Sutcliffe, who  
21 was then representing Mr. Nordahl, wrote to Defendants’ lawyer, emphasizing that in negotiating a  
22 better deal for themselves than for the Plaintiffs, Defendants had breached their fiduciary duty:

23 For Crow to negotiate a transaction which permits it to obtain securities of the  
24 REIT, or a partnership owned by the REIT, and not to make available this very  
25 attractive alternative to individual investors, like Mr. Nordahl, who will  
immediately realize a large taxable gain and lose a valuable income-producing  
asset, is an egregious breach of Crow’s fiduciary duty to them.

26 SUF 165. *But the transaction had closed the same day, February 15, 1994.* Hughes Decl. Ex. 61.

27 Defendants’ lawyer tried to mollify Plaintiffs’ concerns by representing that Defendants  
28 were not receiving securities in consideration for their interests in *Plaintiffs’* partnerships:

1 [Y]ou might also explain to your client that the Crow interests are not receiving  
2 any partnership units for the properties sold by Pollock partnerships (and will  
3 have the same tax consequences as the non-Crow investors with respect to those  
properties), in large part because they thought it unfair to engage in the sort of  
self dealing that you would impute to them.

4 SUF 166. But the insinuation that Defendants were being treated the same as the Plaintiffs, at least in  
5 the Bay Area Partnerships, was also false, because Defendants had negotiated the Subscription  
6 Agreement right to use the proceeds from the sale of Plaintiffs' projects to purchase REIT shares at a  
7 below-market price, and thus stood to receive more for their interests in the Plaintiffs' partnerships than  
8 was received by Plaintiffs.

9 **H. Defendants Received Secret Profits**

10 By virtue of putting their own interests ahead of Plaintiffs, Defendants profited  
11 handsomely. Under the Subscription Agreement, Defendants purchased 310,000 shares at \$11 per  
12 share. They later sold those shares for over \$16 per share, for a profit of in excess of \$1,600,000.  
13 Under the Contribution Agreement, Defendants acquired 405,765 REIT shares at the same price of \$11,  
14 permitting them to earn further additional profit of in excess of \$2,000,000. Opp. SUF 210-13.

15 **I. Defendants Paid Themselves a Sales Commission Without Approval**

16 Defendants also paid themselves a sales fee in connection with the SCI Transaction. The  
17 fee allocated to the Plaintiffs totaled \$242,553 (which was 69% of the charge to all third party partners).  
18 Defendants have never justified the fee as authorized by the partnership agreements, nor did they obtain  
19 consent for the charge from the limited partners.<sup>11</sup> Opp. SUF 179, 206-09, 225.

20 **J. No Fairness Opinion**

21 Despite the complex nature of the transaction, and the Defendants' negotiation of terms  
22 that benefitted themselves and not all partners, they made no attempt to obtain a fairness opinion from  
23 a disinterested third party expert. Opp. SUF 40.

24 **III. ARGUMENT**

25 Defendants' motion suggests that they still fail to grasp what it means to be a fiduciary.  
26 Plaintiffs assert that Defendants had a duty, as fiduciaries, to make full and complete disclosure  
27

---

28 <sup>11</sup> These Plaintiffs were not the only ones to object to the charge. Liquidity Fund, a sophisticated investor that purchases and sells limited partnership units (in a sense "making a market" in such securities) also complained to the Crow Defendants about the charge. Opp. SUF 209.

1 concerning the SCI Transaction, to refrain from favoring their own interests over Plaintiffs' interests,  
2 to avoid taking any secret profit or other undisclosed consideration, and to ensure that the SCI  
3 Transaction was in the Plaintiffs' best interests considering all relevant facts, including the tax impact  
4 on Plaintiffs. There is more than enough evidence for a reasonable jury to conclude that Defendants  
5 failed to discharge these obligations, and Defendants' motion should be denied.

6 **A. Texas Law Demands Strict Adherence to Fiduciary Duties**

7 A fiduciary under Texas law cannot govern his conduct by the rules of the market place,  
8 but instead must act with the utmost honesty, fidelity and good faith. In Miller v. Kendall, 804 S.W.2d  
9 933, 937 (Texas Ct. App. 1990), the court upheld the following jury instruction:

10 Each partner in a partnership is in a fiduciary relationship, one to another. Each must  
11 act fairly, honestly, and make disclosure of all material information to the partnership  
12 and partners. A fiduciary is obligated to serve the partnership and other partners' interest  
13 with undivided loyalty and in the utmost good faith. If one of the parties to the  
14 relationship obtains an advantage over the other, an unfairness may arise. *That party has  
15 an obligation to demonstrate that the transaction was fair.* (emphasis added)

16 Texas courts have repeatedly come to this conclusion. Kinzbach Tool Co. v. Corbett-Wallace  
17 Corporation, 160 S.W.2d 509, 514 (Texas 1942) ("One occupying a fiduciary relationship to another  
18 must measure his conduct by high equitable standards, and not by the standards required in dealings  
19 between ordinary parties"); Russell v. Truitt, 554 S.W.2d 948, 951 (Texas Civ. App. 1977) ("An agent  
20 is held to *uberrima fides* in his dealings with his principal; and, if he acts adversely to his employer in  
21 any part of the transaction, or omits to disclose any intent which would naturally influence his conduct  
22 in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit  
23 any right to compensation for services.").<sup>12</sup>

24 Indeed, Texas law treats fiduciary obligations so seriously that it holds that a breach  
25 occurs once the fiduciary places himself in a conflict position where it would be to his benefit to violate

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26 <sup>12</sup> See also, Anderson v. Griffith, 501 S.W.2d 695, 700 (Texas Civ. App. 1973) ("it is said that  
27 one who occupies such a fiduciary relationship to another must measure his conduct by high equitable  
28 standards and not by the standards commonly required in business dealings between ordinary persons.  
Consequently, an agent has the duty of imparting to his principal every material fact relating to  
transactions within the scope of the agency on becoming aware of such facts during the course of the  
transaction. Good faith, honesty, and fair dealing should always prevail in any transaction in which one  
person is acting as the agent of another, and there should never be any concealment of matters that might  
tend to influence the agent's actions, to the prejudice of his principal."); Huffington v. Upchurch, 532  
S.W.2d 576, 579 (Texas 1976)("As managing partner . . . Roy Huffington owed to his copartners one  
of the highest fiduciary duties recognized in the law").

1 his trust. Crenshaw v. Swenson, 611 S.W.2d 886, 890 (Texas Civ. App. 1980)("Not only is it his duty  
2 to administer the partnership affairs solely for the benefit of the partnership, he is not permitted to place  
3 himself in a position where it would be for his own benefit to violate this duty."); Hawthorne v.  
4 Guenther, 917 S.W.2d 924, 934 (Texas Ct. App. 1996)("A managing partner has a duty to administer  
5 the partnership affairs solely for the benefit of the partnership. A managing partner may not place  
6 himself in a position where it benefits him to violate this duty")(citations omitted). Further, because  
7 courts are ill-equipped to evaluate the extent to which a conflict of interest affected the actions of a  
8 fiduciary,<sup>13</sup> once Plaintiff has presented facts that could support a finding of fiduciary breach, Texas law  
9 places the burden on the fiduciary to show that he acted fairly and disclosed all material facts.  
10 Huffington, 532 S.W.2d at 579; Miller v. Kendall, 804 S.W.2d 933, 939 (Texas Ct. App. 1990) ("When  
11 a fiduciary relationship is pleaded and proved, the burden of proving the fairness of a transaction  
12 between the parties shifts from the plaintiff to the defendant"). If the fiduciary cannot meet that burden,  
13 he is strictly liable for all profit or consideration received in the transaction, regardless of whether he  
14 intended wrongdoing, and regardless of whether the breach caused the beneficiary out-of-pocket  
15 damage. See Section III.C., infra.

16 Nor does Texas law require a breach of contract in order to find a breach of fiduciary  
17 duty, as Defendants argue in their moving papers. A fiduciary must make full disclosure, and must act  
18 solely in the interest of the beneficiary, regardless of whether any contract expressly imposes such  
19 restrictions. Otherwise the law of fiduciaries would be meaningless, because all disputes could be  
20 decided under contract law. Not surprisingly, the cases that Defendants cite for the proposition that a  
21 breach of contract is a prerequisite to a breach of fiduciary duty do not so hold. In Murphy v. Seabarge,  
22 868 S.W.2d 929 (1994), the principal allegation was that the defendant general partner breached his  
23 fiduciary duty because he paid himself fees in excess of what was authorized under the partnership  
24 agreement. In those circumstances, of course, a breach fiduciary duty would also be a breach of the  
25 partnership agreement. But Murphy does *not* hold that there can be no fiduciary breach absent a breach  
26

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27 <sup>13</sup> "[C]onduct must be measured by standards exacting the utmost fidelity from a general partner  
28 who is in complete control of assets and affairs of a limited partnership. Courts of necessity must exact  
this high standard of fiduciary fidelity. Not only are the unequal positions of the parties inconsistent  
with any other standard, courts are ill-equipped to discern the extent a conflict of interest may have  
affected the outcome of any given transaction." Crenshaw, 611 S.W.2d at 891.

1 of the partnership agreement. Texas law has no such requirement.<sup>14</sup>

2 As discussed in the following sections, under strict Texas law governing fiduciaries,  
3 Defendants cannot show that they are entitled to judgment as a matter of law.

4 **B. Issues of Fact Exist Concerning Defendants' Failure to Make Full Disclosure**

5 Defendants' failure to disclose to Plaintiffs numerous facts about the SCI Transaction.  
6 raises triable issues as to each of Plaintiffs' claims.

7 Under Texas law, a failure to disclose all aspects of a transaction is, by itself, a breach  
8 of fiduciary duty, as well as fraud. Russell v. Truitt, 554 S.W.2d at 954 ("Alternatively, we hold that  
9 the mere failure to disclose to plaintiffs all aspects of the transaction is in itself a breach of agent Russell  
10 Company's and co-venturer Russell's fiduciary duty"); Anderson v. Griffith, 501 S.W.2d 695, 700  
11 (1973)("An agent in dealing with a principal on his own account owes it to the principal not only to  
12 make no misstatements concerning the subject matter of the transaction, but also to disclose to him fully  
13 and completely all material facts known to the agent which might affect the principal; and that unless  
14 this duty on the part of the agent has been met, the principal cannot be held to have ratified the  
15 transaction"). As Pollock has testified, and as is obvious from the circumstances, the facts that  
16 Defendants either disclosed belatedly, or not at all, were material to the Plaintiffs' consideration of what  
17 steps to take in response to the SCI offer.<sup>15</sup> Certainly it cannot be said as a matter of law that the

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<sup>14</sup> Defendants also cite Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480 (5th Cir.  
19 1984) for the proposition that "The duties owed by a general partner to a co-partner are those of loyalty  
20 and good faith and honesty; however, this duty does not extend so far as to create duties in derogation  
21 of the express terms of the agreement." See Op. Br. at 12. But Domed Stadium contains no such  
22 holding. The case involved a dispute between a franchisor and a franchisee (not partners), and it  
23 expressly held that the relationship between the parties did *not* involve fiduciary obligations. 732 F.2d  
24 at 485 ("Nothing in this case suggests that the Superdome Hotel and Holiday Inns' relationship was  
anything other than that of two business entities dealing at arms' length"). The Court did hold that the  
implied covenant of good faith and fair dealing could not be used to imply duties in conflict with those  
expressly set forth in the contract. That unremarkable conclusion has nothing to do with fiduciary  
duties. In any event, the partnership agreements at issue here did not authorize the Defendants to  
conceal material facts or to negotiate better terms for themselves than for Plaintiffs.

25 <sup>15</sup> Exercising their right of first refusal was just one of the actions that Plaintiffs might have  
26 taken. Full disclosure about the transaction would have led to negotiation of better terms for Plaintiffs.  
27 For example, Szurek testified that Defendants never asked SCI whether the Plaintiffs could have an  
28 opportunity to use proceeds from the transaction to buy REIT shares at the discounted price of \$11 per  
share, as was offered to Defendants in the Subscription Agreement. Szurek further testified that SCI  
would have considered making that opportunity available to Plaintiffs. Alternatively, full disclosure of  
the transaction would have given the Plaintiffs the opportunity to take legal action to block the closing  
until the terms were made more fair to Plaintiffs.

1 undisclosed facts were immaterial.

2 Defendants' failure to disclose also constituted breach of contract. The LPAs provide  
3 that Defendants could sell the Plaintiffs' projects only if, after receiving an offer from a third party, (1)  
4 they delivered the offer to Pollock, and (2) the Plaintiffs did not elect within 10 days of receipt of the  
5 offer to exercise their right of first refusal. But Defendants *never delivered the complete SCI offer to*  
6 *Pollock*. Opp. SUF 177-78. Nor does Defendants' disingenuous tactic of creating a separate LOI for  
7 the Bay Area Partnerships make the overall terms of the deal immaterial.

8 The SCI Transaction was a closely integrated transaction, of which the Plaintiffs'  
9 properties were an inseparable part. Opp. SUF 214-18. In evaluating whether Defendants achieved the  
10 best possible price and terms for Plaintiffs, the side deals that Defendants struck with SCI were clearly  
11 material. The Subscription Agreement increased the amount of consideration flowing to Defendants  
12 for their interests in the Plaintiffs' properties -- which bears directly on the value of the offer.<sup>16</sup>  
13 Defendants' negotiation of a transaction structure that provided them with tax deferral and allowed them  
14 to benefit from the "IPO Pop" placed Defendants in a conflict position, which, as Pollock testified,  
15 raised significant questions about whether Defendants obtained the best possible results for Plaintiffs,  
16 rather than just themselves.

17 Plaintiffs' right of first refusal was designed to provide Plaintiffs with full disclosure of  
18 all material terms of a proposed sale, so that they could evaluate whether Defendants, as the managing  
19 general partner, had properly discharged their fiduciary duties. The provision guards against Defendants  
20 putting their own interests first. But to fulfill its purpose there must be the full disclosure required of  
21 fiduciaries. When Defendants failed to make full disclosure, they frustrated the purpose of the right of  
22 first refusal and breached the LPAs. Moreover, Defendants' breach means that the 10-day window for  
23 Plaintiffs to evaluate the offer *was never triggered*. Accordingly, the sale was in breach of Section 11  
24 of the LPAs.

25 This conclusion fully comports with rules of contract interpretation. In construing both

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27 Of course, under Texas law Plaintiffs are not required to make any showing of causation:  
28 Defendants are strictly liable to Plaintiffs for any gain enjoyed by Defendants in connection with the  
breach of duty, and whether Plaintiffs were otherwise damaged is irrelevant.

28 <sup>16</sup> The Consent and Waiver signed on behalf of Defendants admits that they were receiving  
consideration that could exceed that received by the other partners.

1 the LPAs and the SCI Offer, the court should “consider the entire writing, seeking as best [it] can to  
2 harmonize and to give effect to all the provisions of the contract so that none will be rendered  
3 meaningless.” Maples v. Erck, 630 S.W.2d 488, 490 (1982). Construing the SCI offer as a whole,  
4 Plaintiffs’ Partnerships were a crucial part of the whole transaction, and any evaluation of the terms of  
5 the offer for the Plaintiffs’ Partnerships requires consideration of the entire transaction, including not  
6 only the Subscription Agreement, but the tax deferral and IPO profit being obtained by the Crow  
7 Defendants in the rest of the transaction. In the same way, reading the LPAs as a whole, it is clear that  
8 the right of first refusal provision, read in the context of the entire LPA, is a safeguard to ensure that  
9 Defendants, who otherwise have complete management of the partnership, do not engage in a  
10 transaction that benefits themselves at the expense of the Plaintiffs, or that fails to obtain the best  
11 possible financial result for the Plaintiffs. In order for that safeguard to work as intended, it was  
12 essential that Defendants disclose all terms of the transaction, and not be permitted to pick and choose  
13 which terms should be revealed.<sup>17</sup>

14           Moreover, once Defendants, as fiduciaries, undertook to sell all assets of Plaintiffs’  
15 Partnerships, they had a duty owed directly to Plaintiffs to proceed with reasonable care to obtain a  
16 result that was in the best interests of Plaintiffs. Defendants’ claim that they had no duty of care, when  
17 they were fiduciaries with complete management control, is absurd. A jury could find that Defendants  
18 acted negligently by failing to seek a better deal, or more options, for Plaintiffs.

19           Defendants also contend that Pollock balloted the limited partners and that a majority  
20 were in favor of the sale. But the limited partners “voted” without knowing all of the material facts.  
21 The “ballot” is therefore entirely meaningless. See Anderson, 501 S.W.2d at 700 (“unless this duty [of  
22 full disclosure] on the part of the agent has been met, the principal cannot be held to have ratified the  
23 transaction.”), quoting Allison v. Harrison, 156 S.W.2d 137, 140 (Texas Com. App. 1941); Johnson  
24 v. J. Hiram Moore, Ltd., 763 S.W.2d 496 (1988) (affirming judgment for actual and punitive damages  
25 against general partner who collected secret profit despite intervention of 19 limited partners on the side  
26 of general partner); cf. Phillips v. Kula 200, 629 P.2d 119 (Hawai’i App. 1981) (fiduciary breach in  
27 limited partnership could not be waived by vote of holders of 78 percent of interests).

28           <sup>17</sup> To the extent that Defendants contend that the applicable provisions of the LPAs do not  
require such disclosure, consideration of extrinsic evidence (and further discovery) is required.

1 **C. Defendants' Secret Profits Preclude Summary Judgment**

2 Defendants negotiated terms that generated additional profit to them from investments  
3 in the SCIREIT. These secret profits resulted in the Crow Defendants' receiving more in consideration  
4 for their partnership interests than were received by Plaintiffs and other limited partners (as the Consents  
5 and Waivers effectively admit). Defendants' receipt of a better deal than Plaintiffs creates triable issues  
6 that preclude summary judgment.

7 In Miller v. Kendall, 804 S.W. 2d 933 (1990), the parties were partners in a business that  
8 owned a high-end computer. They agreed to lease the computer to a new venture owned entirely by  
9 Miller, and that the consideration for such lease would be shares in the new venture. Miller, however,  
10 arranged that he would be granted five times as many shares in the new venture as was Kendall. When  
11 Kendall discovered this fact, he brought an action for breach of fiduciary duty. The court of appeal held  
12 that, because Miller owed fiduciary obligations to Kendall, the burden shifted to Miller to prove that the  
13 transaction was fair, and he was accountable for "any profits derived by him without the consent of the  
14 other partners from any transaction connected with the formation, conduct, or liquidation of the  
15 partnership or from any use by him of its property." 804 S.W.2d at 939.

16 Indeed, a fiduciary breaches his duties to his beneficiaries simply by taking a position  
17 where his interests and the beneficiaries are potentially in conflict. See Russell v. Truitt, 554 S.W.2d  
18 at 953-54 ("Although the alleged secret agreement may have put Defendant Rubaco Builders in a better  
19 position to look after the interests of the Plaintiffs it also put defendants in a position to make an  
20 additional profit which Plaintiffs would not share. There was testimony that the agreement created a  
21 situation in which it would have been in Defendant Rubaco Builders' interest to cut materials and labor  
22 costs in order to increase its profit.") (affirming judgment for plaintiff on ground that manager of joint  
23 venture breached fiduciary duty by engaging construction company that he owned without informing  
24 his co-venturers).

25 A good example of a fiduciary's liability for taking a secret profit in a transaction that  
26 involves his beneficiary is set forth in Anderson v. Griffith, 501 S.W.2d 695 (1973). In Anderson, the  
27 defendant, a real estate broker representing the plaintiffs, contracted to purchase the plaintiffs' property  
28 himself for \$5,000 acre, without revealing that he had already agreed to sell the property to a third party

1 for \$10,000 an acre. In the trial court, judgment was entered against the broker in the amount of the  
2 commission that he had been paid, plus the amount of his profit in the sale to the third party. The court  
3 of appeal affirmed, holding that the broker’s fiduciary obligations to the plaintiffs imposed on him the  
4 duty of utmost loyalty and full disclosure, and precluded him from entering into any relationship that  
5 would create a conflict of interest with his clients. The broker’s failure to disclose his secret profit  
6 breached his fiduciary duty, and *it did not matter that the plaintiffs received all that they had bargained*  
7 *to receive in their sale:*

8           It is the law that when an agent breaches his fiduciary obligation to his principal,  
9           he forfeits all compensation for his services as agent, and he must also account  
10           to his principal for every profit, benefit or advantage that he received out of the  
11           transaction.

11 *Id.* at 702.<sup>18</sup> See also Johnson v. J. Hiram Moore, 763 S.W.2d at 503 (developer who took secret  
12 “developer’s fee” that was not authorized by the partnership agreement violated his fiduciary duty; “[i]n  
13 so doing, [the developer] acted entirely in his own interest and followed the morals of the market place  
14 instead of the strict loyalty demanded of a fiduciary.”).

15           A jury should decide whether the Crow Defendants’ taking of a secret profit through the  
16 Subscription Agreement and the Contribution Agreement similarly violated their fiduciary duties to  
17 Plaintiffs and, if so, whether the Crow Defendants should be held liable in the amount of such profit.<sup>19</sup>

18 **D. Defendants’ Unauthorized Sales Fee Precludes Summary Judgment**

19           In addition to taking a secret profit through purchase of REIT shares at a below-market,  
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21 <sup>18</sup> The court further stated as follows:

22 The following is from Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation, 138 Tex. 565, 160  
23 S.W.2d 509 (1942): ‘. . . A fiduciary cannot say to the one to whom he bears such relationship: You  
24 have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and  
25 therefore you are without remedy. It would be a dangerous precedent for us to say that unless some  
26 affirmative loss can be shown, the person who has violated his fiduciary relationship with another may  
27 hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances  
28 if the fiduciary ‘takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest  
adverse to his principal, without a full disclosure, it is a betrayal of his trust and a breach of confidence,  
and he must account to his principal for all he has received.’

29 *Id.* at 702 (citations omitted).

30 <sup>19</sup> For similar reasons, the Crow Defendants’ taking of a secret profit creates issues of fact under  
Plaintiffs’ other claims. Such conduct is not authorized by, and a reasonable jury could find it in breach  
of, the LPAs. A jury could also find it to be actionable concealment, or that it violated Defendants’ duty  
of care, owed to Plaintiffs as their beneficiary.

1 bargain price, the Crow Defendants charged Plaintiffs a sales fee of \$242,553, despite the objections  
2 voiced by Pollock and Liquidity Fund that no such fee was authorized by the LPAs and hence could not  
3 be collected absent consent of the limited partners.

4 A general partner’s unilateral assessment of fees that are not authorized by the  
5 partnership agreement is both a breach of contract and the general partner’s fiduciary duty. In Murphy  
6 v. Seabarge, 868 S.W.2d 929 (1994), the general partner contended -- as do the Crow Defendants -- that  
7 he could pay himself whatever was reasonable for management services provided to the partnership.  
8 But the Court held that the general partner could be found liable for paying himself fees that were either  
9 expressly prohibited or not authorized by the partnership agreement:

10 Murphy did more than exercise management authority; he made purchases and  
11 payments to himself which either were not permitted or were expressly prohibited under  
12 the partnership agreement or memorandum. These violations cannot be said to be  
merely management decisions.

13 Id. at 936. It was therefore irrelevant whether the fees would be deemed “reasonable” or equivalent to  
14 what was “customarily charged” for such services. If not authorized by the partnership agreement, the  
15 general partner was liable.<sup>20</sup> See also, Johnson v. J. Hiram Moore, Ltd., 763 S.W.2d 496, 499 (1988)  
16 (“In furtherance of his own interests and without disclosure to his partners, appellees Moore and Davis,  
17 Johnson tacked a fifteen percent fee onto the cost of their finish-out jobs. This Court has no difficulty  
18 in concluding that the proof supports the finding that Johnson breached the fiduciary duty owed  
19 appellees.”). A finder of fact should similarly determine whether the sales fee charged by Crow was  
20 a violation of fiduciary duty and a breach of contract, taking into account Defendants’ lack of disclosure  
21 and Defendants’ lack of any justification under the LPAs for taking the fee.

22 **E. Defendants’ Failure to Consider the Best Interests of the Limited Partners**

23 As a matter of black-letter law, fiduciaries have an obligation to act in the best interests

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25 <sup>20</sup> Nor did it matter that, in Murphy’s case, he had fully disclosed the fees:

26 Murphy contends that because he reported all payments, expenses, purchases, and  
27 reimbursements, he could not have violated his fiduciary duty. He argues that because  
28 he did not conceal or misrepresent his actions, or falsify his reports, he cannot have been  
in breach. We disagree. We find that there was more than sufficient evidence to support  
the submission of an issue on breach of fiduciary duty and overrule point of error seven.

868 S.W.2d at 936.

1 of their beneficiaries, and cannot take any action that promotes their own interests to the exclusion of  
2 the interests of their beneficiaries. As discussed above, under Texas law a fiduciary should not enter  
3 into a transaction if there exists any possibility that it will result in an incentive for the fiduciary to  
4 conduct himself in a manner inconsistent with the best interests of the beneficiary.

5 In this case, there is overwhelming evidence that Defendants violated these fiduciary  
6 obligations. Opp. SUF 24-35, 41-58, 226. In addition to the affirmative evidence discussed above, the  
7 record is barren of any evidence that Defendants gave consideration to the impact of the transaction on  
8 the limited partners. The Crow Defendants thoroughly analyzed whether the transaction was in their  
9 *own* interests given the tax impact, but made no attempt to consider the same issue with respect to the  
10 limited partners.<sup>21</sup> Defendants negotiated a Subscription Agreement to increase their own options and  
11 opportunities for additional profit, but failed even to *try* to negotiate the same opportunity for the limited  
12 partners.<sup>22</sup> And the Crow Defendants negotiated a Contribution Agreement that provided further tax  
13 advantages to them, without even thinking about how that resulted in a conflict that could prejudice their  
14 judgment as to whether the transaction was in the interests of the limited partners.<sup>23</sup> By elevating their  
15 own interests above those of the limited partners, Defendants violated their fiduciary duties. Crenshaw,  
16 611 S.W.2d at 890 ("Not only is it his duty to administer the partnership affairs solely for the benefit  
17 of the partnership, he is not permitted to place himself in a position where it would be for his own  
18 benefit to violate this duty."). Indeed, Defendants' claim that they were motivated by the specific

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19 <sup>21</sup> Tax considerations were always paramount with respect to these investments, which were  
20 originally sold as tax shelters. The materiality of the tax considerations is further demonstrated both by  
21 Defendants' internal consideration of how the tax impact would affect them, as well as by the steps they  
22 took to structure the SCI Transaction in a manner that would provide tax deferral. They can hardly be  
heard to argue now that such consideration of the tax ramifications of the transaction, while crucial in  
their own evaluation of the deal, could be ignored in the case of their beneficiaries, the limited partners.

23 <sup>22</sup> Szurek has testified that SCI *would* have been willing to consider offering subscription rights  
to the limited partners, but the Crow Defendants never asked that the opportunity be extended to the  
limited partners. Opp. SUF 55.

24 <sup>23</sup> Defendants' only answer is that SCI "refused" to extend the UPREIT to Plaintiffs. First, there  
25 are factual disputes concerning that assumption, because Szurek testified that he never said "absolutely  
26 no." Opp. SUF 56. Second, as fiduciaries, Defendants had an obligation to forego any benefit not  
available to their beneficiaries, or to make full disclosure and obtain approval. They did neither.

27 Defendants attempt, in the Ross Declaration, to bolster their argument that SCI would not extend  
28 the UPREIT to Plaintiffs, by including highly charged allegations about Pollock. At his deposition,  
however, Ross admitted that the declaration was poorly worded and that the concerns did not reflect on  
Pollock's integrity, but his ability to deliver the Plaintiffs' approval, and whether Plaintiffs were  
accredited investors. Ross Depo. 50-82, 88-105. (Hughes Decl. Ex. 4).

1 characteristics of Plaintiffs’ properties is belied by the record showing that they were chasing benefits  
2 for themselves long before they even identified specific properties for the deal. Opp. SUF 18, 19.<sup>24</sup>

3 Ignoring all of the other ways in which they failed to discharge their obligation to act in  
4 the best interests of the limited partners, Defendants argue that they had no duty to inform the Plaintiffs  
5 about the tax impact of the transaction, and that any loss suffered by Plaintiffs was not caused by  
6 Defendants, but by the tax laws. This straw man argument misses the point. Plaintiffs’ assertion -- and  
7 it is just one of several, in any event -- is that Defendants had a duty to consider whether the SCI  
8 Transaction was in the best interests of the limited partners, particularly given the tax impact from  
9 negative capital balances. Defendants cite no authority for the proposition that, even though they were  
10 fiduciaries with control over management of the partnerships, they were somehow excused from  
11 considering this issue, particularly when it played such a major role in their analysis of whether the  
12 transaction was in their own interests.

13 Defendants’ reliance on Carleton v. Tortosa, 14 Cal.App.4th 745 (1993), is misplaced,  
14 because in that case the governing documents *expressly disclaimed* any duty on the part of the real estate  
15 broker to consider tax implications of the transaction, a disclosure required then by Civil Code §2375  
16 (now superseded by §2079.16).<sup>25</sup> The LPAs contain no such limitation upon the fiduciary duty of the  
17 Crow Defendants.<sup>26</sup> Similarly misplaced is the Crow Defendants’ extended discussion of Lama Holding  
18 Company v. Smith Barney, 88 N.Y.2d 413 (1996). In Lama, the court found that there was no breach  
19 of fiduciary duty because *all of the material facts were disclosed* before the proxy vote and plaintiff,  
20 with full knowledge, voted in favor of the transaction. In this case, the Crow Defendants did not make  
21 full disclosure. Nor was there evidence in Lama, as there is here, that a fiduciary negotiated a

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23 <sup>24</sup> That Defendants chose to sell during what they viewed as a real estate recession casts further  
24 doubt on whether they acted in the best interests of the limited partners. Opp. SUF 23, 38, 39.

25 <sup>25</sup> Section 2079.16 now includes the following as a required disclosure in real estate transactions  
26 to which it applies: “The above duties of the agent in a real estate transaction do not relieve a Seller or  
27 Buyer from the responsibility to protect his or her own interests. You should carefully read all  
28 agreements to assure that they adequately express your understanding of the transaction. A real estate  
agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a  
competent professional.”

<sup>26</sup> By contrast, the partnership agreement of the MLP, units of which the Crow Defendants  
received from SCI as part of the consideration for properties other than those owned by Plaintiffs’  
partnerships, expressly disclaimed any responsibility on the part of the general partner to take into  
consideration the tax effect on the limited partners of any transaction. SUF 35.

1 transaction in which it received benefits that were not made available to plaintiff, or that a fiduciary  
2 failed to obtain the best possible consideration for his beneficiary.

3 **F. Plaintiffs are Entitled to Recovery**

4 The Crow Defendants’ final argument in support of their motion for summary judgment  
5 contends that Plaintiffs suffered no damages as a result of “Defendants’ failure to assess and disclose  
6 the tax consequences.” As pointed out above, the Crow Defendants’ argument misconstrues the nature  
7 of Plaintiffs’ claim. It also fails for three additional reasons. First, a summary judgment motion as to  
8 damages is appropriate *only* to claims for punitive damages. See Code of Civil Procedure §437c(f)(1)  
9 (“or that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code”); Weil  
10 & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 1996) §10:41.1 (“‘one or more  
11 claims for damages’ is interpreted to mean only punitive damage claims”). Second, as discussed above,  
12 a beneficiary need not prove any *actual* damages in case of a fiduciary breach: the fiduciary must return  
13 all consideration and profit received in the transaction and all related matters. Third, Plaintiffs have  
14 suffered a loss measured by the present value of the tax deferral that was denied to them.

15 **IV. CONCLUSION**

16 The standard of conduct required of fiduciaries should not be lowered here, any more  
17 than it was by Justice Cardozo in Meinhard. Defendants’ motion for summary judgment should be  
18 denied.

19 Dated: July 23, 1999

JAMES A. HUGHES  
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