UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10348

B.R. GRIFFIN, ET AL.,

Plaintiffs,

B.R. GRIFFIN ET AL.,

Plaintiffs-Appellants,

versus

THOMAS D. BOX and DON D. BOX,
Independent Co-Executors of the
Estate of Cloyce K. Box, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:87-CV-2655-T)

May 2, 1996

Before WISDOM, GARWOOD, and JONES Circuit Judges.

EDITH H. JONES, Circuit Judge:*

In this lengthy, bitter fight for corporate control, a group of dissatisfied investors eventually succeeded in trying claims for breach of the partnership agreement, breach of an implied covenant of good faith and fair dealing, and breach of fiduciary duty against general partner Cloyce Box (now deceased)

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

and several of his related entities. The jury found defendants liable for breach of fiduciary duty, breach of an implied covenant of good faith and fair dealing, and punitive damages based on the partnership's assignment of its potentially lucrative oil pipeline contract to one of the Box-related entities, CKB Petroleum. Not only were the past damages high -- over $20 million actual plus $2 million punitive damages -- but the court also imposed a "constructive trust" on future operations of the pipeline. Both sides have appealed. We are compelled to reverse and remand for a new trial because of the jury's inconsistent answers to the liability issues. We also disapprove of the imaginative, but unauthorized award of a constructive trust and dispose of several issues that will necessarily arise on remand.

I. FACTS AND PROCEEDINGS BELOW

OKC Limited Partnership (OKC-LP) was created on May 11, 1981 under the laws of Texas in connection with the liquidation and dissolution of OKC Corporation (OKC Corp.). Under the plan of liquidation, Cloyce Box and a corporation controlled by him, CKB & Associates, became the general partners of OKC-LP, and the stockholders of record of OKC Corp. as of May 1, 1981 became the limited partners. In exchange for their shares of OKC Corp. common stock, the stockholders of OKC Corp. received depository receipts from Mercantile National Bank of Dallas evidencing ownership of units of interest in OKC-LP. The depository receipts were then traded in the over-the-counter stock market beginning in June 1981.

On September 18, 1981, the general partners filed a proxy statement with the Securities and Exchange Commission regarding a partnership meeting to be held on October 19, 1981 in Dallas. The purpose of the meeting was to obtain depository receipt holder approval of Cloyce Box and CKB & Associates as general partners. The proxy materials provided that depository receipt holders of record as of August 31, 1981 would be entitled to one vote for each unit of interest represented by a depository receipt. At the meeting, the receipt holders approved the selection of Cloyce Box and CKB & Associates as general partners.

Attached to the proxy materials was a copy of the OKC-LP Partnership Agreement (partnership agreement). The partnership agreement provided that "all authority to act on behalf of the Partnership is vested in the General Partners," and that with limited exceptions, the general partners "have complete and exclusive discretion in the management and control of the business of the Partnership," including the right to "complain and defend in the name of the Partnership." *OKC Limited Partnership Agreement* §§ 3.02, 4.03 (*Partnership Agreement*). The agreement additionally provided that limited partners had certain voting, dissolution, inspection, and removal rights, and that limited partners may transfer all or part of their partnership units, but that

> such Transfer shall not confer upon the transferee any right to become a substituted limited partner.

Id. at §§ 4.01, 4.02, 9.02. According to the partnership agreement, a transferee may become a substituted limited partner

> only if the transferee has received the permission of the General Partners, which permission may be withheld in the sole discretion of the General Partners.

Id. The plaintiffs in this lawsuit -- B.R. Griffin, David H. Hawk, James A. Lyle, Hayden McIlroy and J.R. Simplot -- are either transferees of partnership units or original limited partners.[1]

At the time OKC Corp. was liquidated, OKC-LP received an undivided 25 percent interest in an oil and gas lease covering South Pass Block 89 off the coast of Louisiana. In 1981, Marathon Oil Company (Marathon), which also owned a 25 percent interest in South Pass Block 89, and others, built and operated a pipeline to

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[1] From the Pretrial Order and other evidence in the record, the ownership interests of the plaintiffs in OKC-LP are as follows: James Lyle was an original limited partner in OKC-LP and received 27,500 units of interest in connection with the liquidation of OKC Corp. As of August 1, 1992, Lyle held 2,607 shares of Class B stock in Box Energy Corporation (Box Energy). (As will be discussed in greater detail, Box Energy is a corporation into which OKC-LP's assets were transferred in April 1992.). David Hawk first purchased partnership units in December 1986. As of August 1, 1992, Hawk held 60 shares of Class B stock in Box Energy. J.R. Simplot first purchased partnership units in June 1985. As of August 1, 1992, Simplot held 2,575,100 shares of Class B stock in Box Energy. B.R. Griffin, according to the Pretrial Order, first purchased partnership units in July 1985. However, at trial Griffin testified that he held 22,000 shares in OKC Corp. and that he received 110,000 units in OKC-LP at the time of its creation. As of August 1, 1992, Griffin held 100 shares of Class B stock in Box Energy. According to the Pretrial Order, Hayden McIlroy first purchased partnership units in August 1985. However, at trial McIlroy testified that he was a stockholder in OKC Corp., and that he received about 25,000 units in the partnership at the time of its creation. As of August 1, 1992, McIlroy held 5,100 shares of Class B stock in Box Energy.

a receiving station in Louisiana. From 1982 until March 1, 1985, OKC-LP paid Marathon a tariff of $2.75 per barrel for use of the pipeline.[2]

In order to secure capacity in the line, on August 30, 1984, OKC-LP made a written offer to Marathon to purchase an interest in the pipeline for $4,757,000.00. A week later, Marathon accepted OKC-LP's offer to purchase the interest. After OKC-LP advised Marathon that the interest would be purchased not by OKC-LP, but by CKB Petroleum, an OKC-LP affiliate controlled by Cloyce Box, Marathon imposed as an express condition to continuing with sale negotiations that OKC-LP be the purchaser. When the pipeline transaction closed on February 28, 1995, CKB Petroleum tendered the purchase price of $4,757,000.00.

The next day, OKC-LP assigned its rights under the purchase agreement to CKB Petroleum. OKC-LP and CKB Petroleum then executed a transportation agreement in which CKB Petroleum agreed to make available to OKC-LP all of its capacity in the pipeline for a 20-year period, and OKC-LP agreed to ship all of its oil produced in South Pass Block 89 through the pipeline. The parties also agreed to a fixed tariff rate of $2.75 per barrel for all oil transported throughout the 20-year term of the agreement.

By newsletter dated March 1, 1985, OKC-LP reported the pipeline transaction to the partnership. The letter informed

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[2] $2.75 per barrel was the rate publicly filed with the Federal Energy Regulatory Commission.

investors about the negotiations with Marathon and the partnership's acquisition of an interest in the pipeline in the name of CKB Petroleum. The letter further informed them that CKB Petroleum obtained its ownership through an assignment from the partnership.

The last transaction pertinent to this lawsuit occurred seven years later, when, effective April 15, 1992, OKC-LP was dissolved and its assets and liabilities were transferred to Box Energy Corporation (Box Energy), a newly formed Delaware corporation controlled by Cloyce Box. As a result of the conversion, limited partners of OKC-LP who had voting rights received “Class A” voting stock in Box Energy, and transferees holding depository receipts who lacked voting rights received “Class B” non-voting stock in Box Energy.

In 1990, the first, of what has become three, lawsuits between the general partners and the plaintiffs reached this court. *Box I* began in 1988 as a result of efforts by plaintiffs to replace the general partners with a corporation they controlled. *Griffin v. Box*, 910 F.2d 255 (5th Cir. 1990)(*Box I*). In response the general partners sought a preliminary injunction restraining plaintiffs from interfering with the management of OKC-LP. Plaintiffs counterclaimed for an injunction to elect new general partners following a voting contest, or, in the alternative, a determination of who was eligible to vote as a limited partner. *Box I*, 910 F.2d at 257-58.

In *Box I*, this court upheld the district court's injunction preventing plaintiffs from interfering in the partnership's day-to-day operations and from unilaterally attempting to amend the partnership agreement. *Id*. at 263. In so holding, the court found that while all the parties agreed that former OKC Corp. shareholders were limited partners of OKC-LP, the partnership agreement and depository agreement clearly did not allow transferees to become substituted limited partners unless admitted by the general partners. *Id*. at 259-60. The court, however, did not foreclose the possibility that certain transferees might have become substituted limited partners by waiver, estoppel or the permission of the general partners. *Id*. at 263.

Box II resulted from the efforts of the general partners to return OKC-LP to corporate form by transferring the assets of OKC-LP to Box Energy. *Griffin v. Box*, 956 F.2d 89 (5th Cir. 1992)(*Box II*). Following the approval of the plan by the limited partners, the plaintiffs moved for a temporary restraining order and a preliminary injunction preventing the transfer of assets. *Id.* at 91.

The district court awarded the requested relief. This court, however, vacated the district court’s preliminary injunction and rejected the argument, accepted by the district court, that transferees could gain voting rights by waiver without general partner approval. Additionally, the court found that while an estoppel theory was "legally coherent," it was "factually unsupported by the record." *Id*. at 93.

This lawsuit was commenced in November 1987 when plaintiffs brought suit against Cloyce Box, CKB & Associates, OKC-LP, CKB Petroleum, and Box Brothers Holding Company.[3] Plaintiffs asserted eleven causes of action, namely: (1) securities fraud under section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5; (2) common law fraud; (3) negligent misrepresentation; (4) breach of fiduciary duty; (5) breach of the partnership agreement; (6) breach of the duty to render information; (7) a declaratory judgment that plaintiffs possess voting rights as limited partners of OKC-LP; (8) tort breach of duty of good faith and fair dealing; (9) contract breach of covenant of good faith and fair dealing; (10) federal racketeering; and (11) derivative claims for breach of fiduciary duty, breach of contract, breach of duty to render information, tort of breach of good faith and fair dealing, contract breach of duty of good faith and fair dealing, and federal racketeering.

Claims 1 through 10 were individual claims asserted against all defendants generally relating to five subjects: the

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[3] Box Brothers Holding Company (Box Brothers) has record and beneficial ownership of 94% of CKB & Associates. Box Brothers owns 94.4% of CKB Petroleum. Cloyce Box owned all the voting stock of Box Brothers and 51% of all classes of securities of Box Brothers.

voting rights of transferee unitholders; the Marathon pipeline transaction; the level of the partnership's general and administrative expenses;[4] a 1986 loan between the partnership and real estate developer Trammell Crow; and the partnership's unrelated litigation with an oil and gas company.[5] The derivative claim was brought on behalf of the partnership against the other four defendants and was based on many of the same allegations and legal theories asserted by plaintiffs in support of their individual claims.

The two-month jury trial began in early September 1992. After plaintiffs had presented their evidence, defendants moved for judgment as a matter of law on all claims. The court granted the motion in part by dismissing with prejudice all the individual claims presented by plaintiffs and the derivative claims relating to the duty to render information and the tort duty of good faith and fair dealing. The court did not dismiss the remaining aspects of the derivative claim.

The court submitted to the jury special interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. In Question 1, the jury was asked if Cloyce Box or CKB & Associates

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[4] On appeal, the focus of both parties is on the pipeline transaction and there is little discussion concerning the issue of general and administrative expenses. This issue, however, concerns expenses allocated by the general partners to OKC-LP, which expenses, the plaintiffs claim, should have been allocated to CKB & Associates or other Box affiliates.

[5] All claims relating to this litigation were abandoned at trial.

had breached the express provisions of the partnership agreement with respect to (a) the pipeline transaction, (b) general and administrative expenses, and (c) the Trammell Crow loan transaction. In regard to the pipeline transaction and the general and administrative expenses, the jury answered "no."[6]

In Question 2, the jury was asked if Cloyce Box or CKB & Associates had breached an implied covenant of good faith and fair dealing arising from the partnership agreement with OKC-LP with respect to the same three issues in Question 1. In regard to the pipeline transaction, the jury answered "yes," and found joint liability for past damages of $20,021,000.00, and future damages of $6,200,000.00. As to the general and administrative expenses, the jury answered "yes," and found joint liability for $112,500.00.

In Question 3, the jury was asked if Cloyce Box or CKB & Associates had breached any fiduciary duties owed to the partnership with respect to the same three issues in Questions 1 and 2. The jury answered Question 3 identically to Question 2.

In Question 4, the jury was asked if, as a result of an award of damages in Question 3, OKC-LP was entitled to recover punitive damages from Cloyce Box or CKB & Associates. The jury found the partnership was entitled to recover $2,179,000.00 from Cloyce Box as a result of his breach of fiduciary duties.

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[6] On each of the issues, the jury found that the Trammell Crow loan created liability but caused no damages to the partnership; that result is not appealed, and that transaction will not be discussed further.

Additionally, the jury was asked whether the two-year statute of limitations applicable to the breach of fiduciary duty claim barred the claim. The jury concluded that the claim was not barred by the statute of limitations.[7]

After considering post-trial motions, on October 5, 1994, the district court issued an Amended Final Judgment awarding damages against the Box Estate and CKB & Associates, jointly, for $20,021,000.00 for past damages, plus pre-judgment interest from March 1, 1985, until the date of the judgment; and $142,500.00 for past damages, plus pre-judgment interest at the rate of 10% from September 1, 1992, until the date of judgment; and post-judgment interest on the sums until paid. The Amended Final Judgment included the punitive damages award and the imposition of a constructive trust on the operation of the pipeline, which the court had found "a more appropriate remedy" than the award of future damages. Finally, the judgment awarded costs and attorneys' fees to plaintiffs pursuant to Rule 54(d) of the Federal Rules of Civil Procedure. Both parties have appealed, raising numerous issues as to the proceedings below.

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[7] The jury also rejected the federal racketeering claims.

II. ISSUES RAISED BY DEFENDANTS

A. Standing

Defendants' threshold argument is that Texas law did not afford a derivative claim to the unit holders; but if it did, defendants assert, these plaintiffs lack standing to pursue derivative claims on behalf of the partnership. In denying defendants' motion to dismiss the derivative claims, the district court stated that although Texas law was "unclear [as to] whether Plaintiffs have standing to maintain the derivative claims," the court "is of the opinion that the interests of justice are better served by allowing Plaintiffs to continue this action." *District Court Order*, July 6, 1990. Instead of "the interests of justice," this court considers whether the partnership agreement or Texas law supported plaintiffs' maintenance of a derivative suit.

The partnership agreement provides that the rights and obligations of partnership unit holders "shall be construed by the laws of the State of Texas including the Texas Uniform Limited Partnership Act [TULPA]." *OKC Limited Partnership Agreement* § 11.04.[8] Texas law and TULPA, however, provide little guidance regarding limited partner derivative suits. TULPA does not

[8] TULPA, TEX. REV. CIV. STAT. art. 6132(a)(West 1970)(repealed 1992), was superseded by the Texas Revised Limited Partnership Act (TRULPA) effective September 1, 1987. TEX. REV. CIV. STAT. art. 6132a-1 (West 1995). TRULPA, however, does not apply to OKC-LP. TRULPA applies to partnerships formed after the effective date and all partnerships doing business in Texas after August 31, 1992. *Id.* § 13.02. OKC-LP was formed in 1981 and completed its conversion to Box Energy in April 1992.

recognize a derivative right of limited partners to sue on a partnership cause of action, and, prior to the passage of the Texas Revised Uniform Limited Partnership Act (TRULPA) which specifically authorizes a derivative right of action for limited partners,[9] no Texas court had considered whether partners might sue derivatively on behalf of the partnership.[10] This court is constrained to make an *Erie* guess on a fairly barren landscape of authority. Fortunately, because of the change in law, the consequences of error are small. What authority there is suggests that the limited partners of OKC-LP were entitled to assert derivative claims on the partnership's behalf.

TULPA is modeled after the Uniform Limited Partnership Act (ULPA) applicable in a number of jurisdictions. The majority of courts that have considered this question under ULPA allowed derivative suits by limited partners when general partners either would not sue or were unlikely to sue because of a conflict of interest. *See Alright Missouri, Inc. v. Billeter*, 829 F.2d 631, 637 (8th Cir. 1987); *Klebanow v. New York Produce Exchange*, 344 F.2d 294, 298-99 (2d Cir. 1965); *Engl v. Berg*, 511 F. Supp. 1146, 1152-54 (E.D. Pa. 1981); *Jaffee v. Harris*, 312 N.W.2d 381, 383 (Mich. Ct. App. 1981); *see generally* 4 Alan R. Bromberg & Larry E.

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[9] TEX. REV. CIV. STAT. art. 6132a-1 § 10.01.

[10] See the Source and Comment Notes of the Bar Committee pertaining to article 10 of TRULPA. TEX. REV. CIV. STAT. art. 6132(a)-1

Ribstein, Bromberg & Ribstein on Partnership § 15.05(c) (1994); Debra E. Wax, Annotation, *Right of Limited Partner to Maintain Derivative Action on Behalf of Partnership*, 26 A.L.R.4th 264 (1983). *But see Yale II Mining Assoc. V. Gilliam*, 586 F. Supp. 893, 895 (W.D. Va. 1984).

Additionally, in *Cates v. International Tel.& Tel. Corp.*, 756 F.2d 1161 (5th Cir. 1985), this court discussed the remedies available under Texas law to a minority partner of a general partnership, or an owner of a partnership interest therein, who claimed to have been wronged by the other general partners. The court found no Texas decisions on point concerning shareholder derivative suits, but stated:

> [I]n a proper case--one where the controlling partners, for improper, ulterior motives and not because of what they in good faith believe to be the best interests of the partnership, decline to sue on a valid, valuable partnership cause of action which it is advantageous to the partnership to pursue--Texas law would afford some remedy to the minority partner or partnership interest owner other than merely a damage or accounting suit against the controlling partners, at least where the latter would not be reasonably effective to protect the substantial rights of the minority.

Cates, 756 F.2d at 1178. The court then suggested that appropriate remedies might include a derivative suit for the appointment of a receiver, or a suit by a minority partner or interest owner for his fraction of the partnership cause of action. *Id*. at 1178-79.[11]

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[11] *Cates* involved a general partnership to which the Texas Uniform Partnership Act (TUPA) applied. As with TULPA, TUPA is silent as to derivative actions.

Further, viewing *Cates* in hindsight, the Texas State Bar Committee comments associated with TRULPA's section permitting derivative suits by limited partners cites *Cates* and cases from other jurisdictions in support of that remedy. The comments provide:

> Texas courts have not previously considered whether partners have a right to sue derivatively, although a federal court has suggested that they would have that or a similar right. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1176-81 (5th Cir. 1985)(Texas law). And courts in other jurisdictions have recognized a non-statutory derivative right based on equity principles and trust or corporate analogies. E.g., *Klebanow v. New York Produce Exchange*, 344 F.2d 294 (2d Cir. 1965)(New York law); *Riveria Congress Assoc. v. Yassky*, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966).

TEX. REV. CIV. STAT. art 6132a-1, *Source and Comment-Bar Committee*, art. 10.

Although none of the Bar Committee comments, nor *Cates*, nor caselaw from other jurisdictions is controlling as to derivative suits by limited partners under TULPA, we are persuaded that in situations in which the managing partners are unlikely to sue because of a conflict of interest, Texas law would permit the limited partners to maintain a derivative action on behalf of the partnership. Therefore, because of the apparent conflict of interest between the limited partners and Box, CKB Petroleum and other Box affiliates, the limited partners of OKC-LP are entitled to bring a derivative suit on behalf of the partnership.

But, defendants contend, even if the OKC-LP limited partners are permitted to bring derivative claims, none of the plaintiffs in this case have standing. The parties properly focus this issue on the ownership interest of James Lyle, for only one limited partner with standing is necessary.

Lyle was an original limited partner in OKC-LP. In May 1990, however, Lyle pledged his partnership units to Southwest Securities to facilitate a margin loan, and executed an "Irrevocable Stock or Bond Power," delivering the depository receipt evidencing his ownership interest in OKC-LP to the pledgee. Lyle continued to receive dividends from OKC-LP on the pledged units.

Defendants, citing cases relating to stockholder derivative suits, argue that limited partners must maintain their investor status "throughout the pendency of the suit." *Lewis v. Knutson*, 699 F.2d 230, 238 (5th Cir. 1983). When Lyle pledged his stock in 1990, they assert, the transfer divested him of his limited partner status and his derivative standing. This is plainly incorrect under the partnership agreement. The partnership agreement defines a "transfer" to mean "a sale, exchange, assignment, gift or any other disposition whether voluntary or involuntary, during life or upon death, testate or intestate." *OKC Limited Partnership Agreement* Art. I - *Definitions*. Pledging or encumbering one's interest in publicly held securities for a margin loan is simply a security device, unlike the absolute "transfer" contemplated by the defined terms. It would have been a simple task to expand the definition of “transfer” to include a “pledge” as a security for a loan, but the partnership agreement did not do that. Lyle continued to be a limited partner after the pledge and as a result satisfies all standing requirements.[12]

B. Issues Regarding the Verdict

As noted, the jury predicated derivative liability on plaintiffs’ claims of breach of fiduciary duty and breach of an implied covenant of good faith and fair dealing, but it found no breach of express contractual provisions. Defendants contend that under the circumstances before us, the fiduciary duty and express contract findings are irreconcilably inconsistent, mandating a new trial. Defendants also challenge the fiduciary duty finding for a number of reasons and continue to assert that the theory of an implied covenant of good faith is not legally sustainable here. Each of these contentions requires discussion.

1. Inconsistent Verdict

The Seventh Amendment requires that courts make a concerted effort to reconcile apparent inconsistencies in a jury’s response to special interrogatories. *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 66 (5th Cir. 1982). When jury answers appear to be in conflict, “the reviewing court’s duty is to reconcile the

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[12] Plaintiffs also contend that the court should look to TRULPA for guidance in determining the standing requirements. TRULPA requires only that the plaintiff be a limited partner at the time of bringing the action and be a limited partner at the time of the transaction that is the subject of the action. TEX. REV. CIV. STAT. Art. 6132a-1 § 10.01. TRULPA does not apply to this pre-TRULPA limited partnership.

conflicts if possible in order to validate the jury's verdict." *FDIC v. Munn*, 804 F.2d 860, 866 (5th Cir. 1986). The touchstone inquiry for reconciliation is whether "the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted." *Griffin v. Matherne*, 471 F.2d 911, 915 (5th Cir. 1973). If the answers cannot be reconciled, the court must grant a new trial. *Munn*, 804 F.2d at 866.

In Question 1, the jury was asked whether the defendants breached the express provisions of the partnership agreement. Jurors were instructed that plaintiffs contended that the general partners had breached certain sections of the partnership agreement, including sections 3.03(a) and 3.05. Section 3.03(a) precludes transactions between the general partners and their affiliates that are not "fair and reasonable" to the partnership. Section 3.05 bars the general partners from breaching their fiduciary duties.

The jury rejected the contract breach claims with respect to the pipeline transaction and the allocation of general and administrative expenses. This response entailed a finding that the general partners had not breached sections 3.03(a) or 3.05. In response to Question 3, however, the jury found that the pipeline transaction was unfair and that the general partners did breach their fiduciary duties, both of which findings constitute express breaches of sections 3.03(a) and 3.05 of the partnership agreement.

Answering Question 4, the jury imposed punitive damages against Cloyce Box for malicious, willful breach of fiduciary duties.

After careful examination of the record, we cannot conclude that these answers “may fairly be said to represent a logical and probable decision on the relevant issues as submitted,” *Matherne*, 471 F.2d at 915, nor have plaintiffs offered a satisfactory interpretation that reconciles these answers. The pipeline transaction (and allocation of partnership expenses) cannot have simultaneously been permitted by the partnership agreement while violating the general partners' fiduciary duties. Nor, on the facts before us, can the jury's rejection of a breach of contract be squared with the finding of malicious conduct underlying the punitive damages award. Consequently, defendants are entitled to a new trial on these theories.

2. Implied Covenant of Good Faith and Fair Dealing

The verdict finding no contract breach would also be inconsistent with the jury's finding that defendants breached an implied covenant of good faith were it not for a more fundamental problem -- these theories are legally irreconcilable. We agree with defendants' contention that Texas does not recognize a claim for breach of an implied covenant of good faith and fair dealing under these circumstances.

In *Exxon Corp. v. Atlantic Richfield*, 678 S.W.2d 944 (Tex. 1984), the Texas Supreme Court stated that “[t]here can be no implied covenant as to a matter specifically covered by the written terms of the contract. The agreement made by the parties and embodied in the contract itself cannot be varied by an implied good-faith-and-fair-dealing covenant." *Id*. at 947.

In this case, the partnership agreement provides:

> No General Partner . . . shall be liable to the Partnership or to the Partners for losses sustained or liabilities incurred as a result of an act or omission which such General Partner in good faith reasonably believed to be in, or not opposed to, the best interests of the Partnership, unless such act or omission constituted negligence, willful or wanton misconduct or breach of such General Partner's fiduciary obligations to the Limited Partners.

Section 3.05. Concerning affiliate transactions, the partnership agreement in section 3.03(a) provides:

> An Affiliate may enter into contracts with the Partnership as operator, seller or purchaser of properties or services, or in other capacities, so long as the transactions are fair and reasonable to the Partnership and the terms of the contract or conveyance are no less favorable to the Partnership than those which could be obtained from Unrelated Persons.

The import of these sections is plain. General partners are not liable for conducting the partnership business in good faith except for negligence, willful or wanton misconduct or breach of fiduciary duties. Additionally, an affiliate may contract for services with the partnership on terms that are fair and reasonable and for arms-length value. An implied covenant of good faith and fair dealing could have only two possible effects on these carefully drawn provisions: it would either be surplusage, redundant of the express contractual limits on general partner/affiliate actions; or it would add to those limits by condemning as "unfair" or in "bad faith" transactions not otherwise prohibited. Neither of these effects justified a separate claim for relief, stated in a separate special interrogatory to the jury. A contractually-founded obligation would be redundant of the breach of contract issues. Moreover, an amendatory implied covenant furnishes no basis for relief to plaintiffs because Texas does not permit such a variance of the contract. *Exxon Corp.*, 678 S.W.2d at 947.

Plaintiffs assert that the jury was properly instructed on the implied covenant of good faith and fair dealing pursuant to Tex. Bus. & Comm. Code § 1.203 and because the implied covenant is integral to the partnership's fiduciary relationships. Neither of these arguments is persuasive in the present context. If it applies at all to a partnership contract, the duty of good faith expressed in the Texas Business & Commerce Code must "relate to some aspect of performance" under the parties' agreement. *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 482 (Tex. App. -- Corpus Christi 1989, writ denied). This standard is not inconsistent with the *Exxon Corp.* principle that implied covenants may not vary the terms of a written agreement.

The other argument, that an implied covenant of good faith and fair dealing creates a separately actionable claim because of the parties' fiduciary relationship, has it backwards. As the Texas Supreme Court explained:

> Although a fiduciary duty encompasses at the very minimum a duty of good faith and fair dealing, the converse is not true. The duty of good faith and fair dealing merely requires the parties to "deal fairly" with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty.

Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591 (Tex. 1992). As general partners of a limited partnership, the defendants owed fiduciary duties to the limited partners, codified in part by § 3.05 of the OKC-LP agreement. But unlike many fiduciary arrangements, the agreement specifically permitted affiliate transactions by the general partners. No less in contractually-regulated fiduciary relationships than in other contractual arrangements should the terms selected by the parties by usurped by *post hoc* judicial implication of different terms. We decline to accept plaintiffs' invitation to condemn by means of an implied covenant an action arguably condoned by the express terms of the partnership agreement. The claim based on an implied covenant of good faith and fair dealing was erroneously submitted to the jury.

3. Fiduciary Duty

Defendants contend that the district court erred in submitting the claim for breach of fiduciary duty to the jury because the claim, as it relates to the pipeline transaction, is barred by the statute of limitations. Alternatively, they assert, there was insufficient evidence to support the verdict, and the jury instructions were flawed. As might have been inferred from our discussion of the inconsistent verdict, we find none of those arguments compelling.

Texas law provides a two-year statute of limitations for breach of fiduciary duty. *Kansa Reinsurance Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1374 (5th Cir. 1994). The limitations period “commences when the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof.” *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988) (citations and internal quotations omitted). Defendants have the burden of proof as to the running of the statute of limitations. *Security Indus. Ins. Co. v. United States*, 702 F.2d 1234, 1251 (5th Cir. 1983). This court views all evidence in a light most favorable to the jury’s verdict and “the verdict must be affirmed unless the evidence points so strongly and overwhelmingly in favor of one party the court believes that reasonable persons could not arrive at a contrary conclusion.” *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 208 (5th Cir. 1992).

Defendants contend that the newsletter dated March 1, 1985 from OKC-LP to its investors detailing the pipeline transaction put the limited partners on notice of any purported breach of fiduciary duties, and that their suit, which was filed in November 1987, is therefore barred by the two-year statute of limitations. The partnership agreement, however, expressly permits the partnership to enter into transactions with affiliates. Additionally, the newsletter failed to disclose that the partnership would continue to pay the same tariff to CKB-Petroleum that it had paid to Marathon. Viewed in a light most favorable to the jury verdict, the evidence supports the jury's verdict. *See Brown v. Bryan County*, 67 F.3d 1174, 1179 (5th Cir. 1995)("[T]his Court will not impose its own opinion in contravention to the jury's.").

Defendants next contend that the district court erred in submitting the fiduciary duty claim to the jury because the pipeline transaction was not a partnership opportunity. Defendants argue that the partnership was not financially and legally capable of undertaking the transaction, which was fair and reasonable to the partnership. As to the partnership's financial and legal inability to purchase the pipeline, defendants contend that the terms of a loan agreement between OKC-LP and Manufacturers Hanover Trust Company (Loan Agreement) prevented the partnership from purchasing the pipeline. Further, the pipeline transaction was fair based on the environmental risks that were avoided and the tariff price paid to CKB Petroleum, as well as the fact that the partnership did not have to pledge its oil and gas reserves to Marathon as security for the partnership’s obligations.

At trial, conflicting evidence was produced regarding defendants’ claims of fairness and financial and legal inability. Plaintiffs' evidence showed that the partnership had sufficient funds to purchase the pipeline interest and that the partnership had suffered $21,357,000.00 in damages as a result of the transfer of the pipeline interest to CKB Petroleum. Plaintiffs further demonstrated that CKB Petroleum was able to obtain insurance coverage for the pipeline and that no documents could be produced establishing that Marathon requested a pledge of OKC-LP’s oil reserves as security incidental to the pipeline transaction. The Loan Agreement had previously been amended to allow for cash distributions, and no evidence established whether the partnership had ever asked Manufacturers Hanover Trust Company for a waiver of restrictions in the Loan Agreement in order to purchase the pipeline. Viewed in a light most favorable to the jury verdict, the evidence supports the jury verdict. *See Brown*, 67 F.3d at 1179.[13]

Defendants' final argument is that the district court improperly instructed the jury on their affirmative defenses

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[13] Defendants’ argument that the partnership was not financially or legally able to acquire the pipeline interest is somewhat shallow considering that both the March 1, 1985 partnership newsletter and the 1985 OKC-LP Annual Report provide that CKB Petroleum acquired its interest in the pipeline “through and assignment from the Partnership.”

against the fiduciary duty claim, i.e., the defenses of financial and legal inability, and reliance on advice of counsel. To succeed in this challenge defendants must satisfy the test reiterated in *FDIC v. Mijalis*, 15 F.3d 1314 (5th Cir. 1995):

> First, the challenges must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. If a party wishes to complain on appeal of the district court's refusal to give a proffered instruction, that party must show as a threshold matter that the proposed instruction correctly stated the law.

Id. at 1318 (internal citations omitted).

Under Texas law, advice of counsel is a factor to be considered in determining whether a breach of fiduciary duty has occurred. *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 722-23 (5th Cir. 1984). In this case, the jury charge instructed that a "fiduciary is entitled to rely on the advice of experts, such as lawyers and accountants, in making business decisions so long as the fiduciary is acting reasonably and in good faith." This charge properly guided the jury in its deliberation.

The jury was instructed that it "may also consider whether the Limited Partnership was financially unable to acquire an interest in the pipeline." Financial inability to take advantage of a corporate or partnership opportunity is a defense under Texas law in a suit involving breach of fiduciary duties. *See*

Canion v. Texas Cycle Supply, Inc., 537 S.W.2d 510, 513 (Tex. Civ. App.-Austin 1976, writ ref'd n.r.e.); *see also In re Safety Int'l Inc.*, 775 F.2d 660, 662 (5th Cir. 1985); *Huffington v. Upchurch*, 532 S.W.2d 576, 578 (Tex. 1976). The jury instruction, therefore, failed to properly guide the jury in that it merely instructed them to "consider" the finances of the partnership in the context of the pipeline transaction, rather than to treat financial inability as a defense. But based on the record read in the light most favorable to the verdict, there is sufficient evidence to support a determination that the partnership had the financial ability to acquire the pipeline. This fact, coupled with the instruction actually given, which at a minimum drew the jury's attention to the financial ability of the partnership to acquire the pipeline, leads us to conclude that the erroneous instruction did not affect the outcome of the case.

Defendants also assert that the jury should have been instructed that legal incapacity to undertake the pipeline transaction was a defense. Without supporting Texas law citations for their position, defendants have failed to demonstrate that the instruction correctly stated the law. *Mijalis*, 15 F.3d at 1318. But, additionally, although it is probable that legal incapacity would be a defense in Texas, defendants did not show that the loan agreements with their banks, or any other agreements to which OKC-LP was a party, posed legal barriers to the pipeline transaction.

The limited partnership in fact signed the original agreement to purchase the pipeline. Because of the factual insufficiency to support defendants' position, the district court did not err in refusing this instruction.

III. ISSUES RAISED BY PLAINTIFFS

On cross-appeal, plaintiffs contend that the district court erred in granting defendants’ motion for judgment as a matter of law on their individual and derivative claims for limited partner status and voting rights, and on their individual claims for securities fraud, common law fraud, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. Plaintiffs seek entry of judgment in their favor on these claims or a new trial. We must consider each of their claims separately.[14]

Under Rule 50(a) of the Federal Rules of Civil Procedure, a party is entitled to judgment as a matter of law if the opposing party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party on that issue. Fed. R. Civ. P. 50(a). A grant of judgment as a matter of law is subject to *de novo* review. *Lloyd v. John Deere Co.*, 922 F.2d 1192, 1194 (5th Cir. 1991).

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[14] The parties raise contentions that various issues and arguments were waived because they were not preserved in the trial court. We have considered the waiver claims and discuss in text those issues and arguments which we concluded have been preserved for appellate review.

A. Breach of Fiduciary Duty and Implied Covenant of Good Faith and Fair Dealing

State law determines whether a cause of action against the general partners of a limited partnership is direct or derivative. *7547 Corporation v. Parker & Parsley Dev. Partners*, 38 F.3d 211, 221 (5th Cir. 1994). Plaintiffs cite no Texas cases, and we have found none, holding that an investor or limited partner in a limited partnership may sue directly for a breach of fiduciary duty which injured the partnership. Following the guidance of this court in *Parker & Parsley*, we believe that a Texas court would likely consider the fiduciary duty claim in this case to be derivative. *See Parker & Parsley*, 38 F.3d at 221 (unitholders and limited partners may not sue directly under Texas law for wrongs suffered by the partnership). The district court, therefore, properly adjudged against plaintiffs their claim for breach of fiduciary duty. And inasmuch as there is not even a derivative claim for breach of an implied duty of good faith and fair dealing, it stands to reason that such a claim is not cognizable on behalf of individual limited partners for damage to the partnership.

B. Limited Partner Status and the Right to Vote

The decisions of this court in *Box I* and *Box II* make clear that under the terms of the partnership agreement transferees may only become substituted limited partners as permitted by the general partners. *Box I*, 910 F.2d at 260-61; *Box II*, 956 F.2d at 91. Plaintiffs contend that the district court erred in granting defendants' motion for judgment as a matter of law on their claims for limited partner status and voting rights because the general partners either consented to the admission of all depository receipt holders as substituted limited partners with the right to vote, or the general partners are now estopped from denying plaintiffs' limited partner status with voting rights. Additionally, certain of the investor-plaintiffs contend that they are entitled to receive Class A stock in Box Energy because of their status as original limited partners in OKC-LP at the time of the partnership's conversion to Box Energy. Each of these contentions requires discussion.

1. Consent

Plaintiffs argue that several documents distributed by either the partnership or the general partners granted voting rights to all transferees of partnership units and establish that the general partners consented to the admission of all depository receipt holders as substituted limited partners. In support of their argument, plaintiffs cite several documents. First, a newsletter dated August 20, 1981 from OKC-LP to depository receipt holders stated that depository receipt holders own a "partnership interest." Second, proxy materials relating to the October 1981 meeting in Dallas provided in part that "[a] transferee of a Limited Partnership interest that does not become a Substituted Limited Partner may not demand to inspect the books and records of the Limited Partnership, nor demand dissolution of the partnership but otherwise has all the rights and powers of a Limited Partner." Third, a newsletter dated September 30, 1983 from OKC-LP to partnership unitholders states that "[a] unitholder is a limited partner and, accordingly, owns a direct interest in proven oil and gas reserves." Fourth, a partnership 10-K Form dated December 31, 1985 contains language concerning the rights of transferees identical to that quoted from the 1981 proxy materials. Fifth, proxy materials sent by OKC-LP to partnership unitholders regarding a meeting to be held in December 1986 provided that depository receipt holders as of November 10, 1986 would be permitted to vote at the meeting. Sixth, in a November 24, 1986 letter written by Cloyce Box to J.R. Simplot, Box referred to Simplot as a "limited partner" and characterized all other investors as limited partners. Finally, a Schedule 13D for OKC-LP dated January 7, 1987 was filed by Cloyce Box with a representation that his purpose in acquiring additional partnership units was to increase his voting power.

Numerous though these documents are, they fail to sustain plaintiffs' contention. Each reference is seriously flawed. In quoting from the 1981 proxy materials and the 10-K Form concerning the rights of transferees, plaintiffs omitted language directly preceding and within the same paragraph, which expressly provides that transferees may be admitted to the partnership only by the general partners. The cover page of the 1986 proxy materials states that only depository receipt holders who are limited partners as of November 10, 1986 would be permitted to vote, and the November 24, 1986 letter from Cloyce Box to Simplot simply does not establish consent to limited partner status for transferees. The Schedule 13D says nothing about Box's ability to vote the additional units he had acquired, and the language cited by plaintiffs in the two newsletters is taken from general discussions of the tax benefits of the general partnership and says nothing about voting rights.

At most, the documents and evidence at trial show that some depository receipt holders who were not original limited partners in OKC-LP were permitted to vote in October 1981. Nothing in the documents or testimony, however, establishes that the general partners consented to admit depository receipt holders as substituted limited partners with voting rights. Considering the clear disclaimer in the partnership agreement, plaintiffs have failed to establish a genuine issue of material fact as to whether the general partners granted voting rights to transferees or consented to the admission of depository receipt holders as limited partners.

2. Estoppel

Plaintiffs next invoke the doctrine of equitable estoppel in support of their alleged entitlement to limited partner status and voting rights. To establish equitable estoppel, plaintiffs must prove (1) a false representation or concealment of material facts made with the intention that it should be acted on, (2) to a party without knowledge, or the means of knowledge of those facts, and (3) who reasonably and detrimentally relied upon the misrepresentation. *Box II*, 956 F.2d at 93; *Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). Concerning equitable estoppel, the Texas Supreme Court stated in *Gulbenkian v. Penn*, 252 S.W.2d 929 (Tex. 1952) that "the facts alleged to constitute [estoppel] are not to be taken by argument or inference, . . . and [i]f an act or admission is susceptible to two constructions, one of which is consistent with a right asserted by the party sought to be estopped, it forms no estoppel." *Id*. at 932 (internal quotations and citations omitted).

In granting defendants' Rule 50(a) motion as to plaintiffs' estoppel argument, the district court found that they had failed to show that they purchased partnership units in reasonable reliance on purported misrepresentations made by the general partners concerning transferee voting rights. The focus of plaintiffs' argument on appeal is that the estoppel claim should have been submitted to the jury because the evidence demonstrates triable fact issues, particularly on the element of reliance. In support of their argument, plaintiffs point to evidence of reliance by each individual plaintiff, a brief summary of which follows.

<u>B.R. Griffin</u>

Griffin testified that when OKC Corp. was converted into OKC-LP in 1981, he owned shares of stock in OKC Corp. which were exchanged for OKC-LP partnership units. He attended the 1981 meeting in Dallas, and he voted at that meeting. Griffin felt that he had voting rights in OKC-LP because of certain documents that he had received from the partnership, and this belief influenced his decision to buy additional partnership units. The documents cited by Griffin include the following: the 1981 proxy materials; the September 30, 1983 partnership newsletter; the 1986 proxy materials; and a 1985 OKC-LP Annual Report which contains language identical to that previously quoted from the 1981 proxy materials concerning the rights of transferees. Additionally, Griffin felt that he had a right to vote because he voted at the 1981 meeting in Dallas.

<u>Hayden McIlroy</u>

McIlroy testified that when OKC Corp. was converted into OKC-LP in 1981, he owned shares of stock in OKC Corp. which were exchanged for OKC-LP partnership units. McIlroy attended the 1981 meeting in Dallas.

<u>James Lyle</u>

As discussed previously, Lyle was an original limited partner in OKC-LP and attended the 1981 meeting in Dallas. As to the issue of reliance, Lyle testified that when an investment partnership in which he belonged disbanded in 1984, he elected to receive OKC-LP partnership units instead of cash because he felt that OKC-LP was a good investment and that he had the ability to vote the shares he received. In making this determination, Lyle relied upon partnership newsletters, quarterly reports and annual reports. Additionally, Lyle claimed to have relied on language in the depository receipt representing his ownership interest in the partnership, which provided, in part, that a transferee has the "right to become a Limited Partner in OKC[-LP] subject to the applicable provisions of the Partnership Agreement."

J.R. Simplot

Simplot first invested in OKC-LP in June 1985. He testified that he relied on the November 24, 1986 letter from Cloyce Box in making additional purchases of partnership units.

David Hawk

Hawk first invested in OKC-LP in December 1986. Hawk presented no evidence of reliance at trial.

After a thorough review of the record, we agree with the district court that there is no legally sufficient evidentiary basis for a reasonable jury to find that plaintiffs reasonably and detrimentally relied upon purported misrepresentations by the general partners concerning limited partner status and voting rights in purchasing or acquiring additional partnership units. Despite plaintiffs' self-serving testimony concerning reliance, the evidence shows that each of them is a sophisticated investor with experience in the purchase and sale of securities. The most that can be said concerning the documents and events upon which plaintiffs purportedly relied is that they are ambiguous at best as to limited partner status and voting rights. Reliance on ambiguous acts or admissions is not enough to establish estoppel. *Gulbenkian*, 252 S.W.2d at 932.[15]

Simplot failed to establish reliance for a different reason. He could not have put much faith in Box's letter for purposes of estoppel because after receiving it, he transferred all of his partnership units to Hydrocarbons Management Inc., and then reacquired those units after the district court's February 22, 1988 injunction order that was affirmed in *Box I*. In other words, all of Simplot's partnership units were obtained with knowledge that his partnership units carried no voting rights. And shortly after Simplot received the letter from Box, Simplot's attorneys explained to him that there was some doubt as to whether the partnership agreement permitted transferees to vote. The evidence further shows that Simplot's investment in OKC-LP was motivated by his belief that the partnership had the potential for future financial success.

Plaintiffs thus failed to establish a genuine fact issue concerning the element of reasonable reliance essential to their

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[15] Plaintiffs claimed reliance on their attendance and voting at the 1981 meeting in Dallas is questionable considering that the materials provided to depository receipt holders concerning the meeting state that "[t]here is no statutory or other legal requirement for holding this meeting, other than the desire of the general partners to obtain the ratification and support of the Depository Receipt holders."

claim of estoppel. *Box II*, 956 F.2d at 93. We affirm the district court's grant of judgment as a matter of law.

3. Estoppel by Silence

Texas law recognizes estoppel by silence. *Williams v. Stansbury*, 649 S.W.2d 293, 296 (Tex. 1983). This doctrine applies "where a person, who by force of circumstances has a duty to speak, refrains from doing so thereby causing another party to believe in the existence of a state of facts, and that other party relies thereon to its prejudice." *A.B.F. Freight Systems, Inc. v. Austrian Import Service, Inc.*, 798 S.W.2d 606, 610 (Tex. App.-Dallas 1990, writ denied). Plaintiffs contend that the district court erred in refusing to permit evidence of certain omissions of the general partners. We disagree. Plaintiffs are all sophisticated investors who had access to the partnership agreement. The partnership agreement contained a "clear and unequivocal" statement of the rights of transferees. *Box I*, 910 F.2d at 260. Plaintiffs had at least constructive knowledge of the limited rights of transferees, and as a result cannot establish an estoppel by silence. *See A.R. Clark Investment Co. v. Green*, 375 S.W.2d 425, 435 (Tex. 1964)(no estoppel by silence because the purchaser had constructive knowledge of acceleration right).

4. Original Limited Partners

Plaintiffs Lyle, Griffin and McIlroy also contend that they are entitled to Class A voting stock in Box Energy because of their status as original limited partners in OKC-LP. The status of Lyle as an original limited partner is not disputed, and we have found that his pledge of partnership units did not affect his status as a limited partner. Lyle, therefore, is entitled to Class A voting stock in Box Energy in accordance with his ownership of original partnership units held at the time of the partnership's conversion to Box Energy.

The status of McIlroy and Griffin as original limited partners, however, is disputed by the parties. On remand, the district court should determine the amount of Class A voting stock to which Lyle is entitled and ascertain whether Griffin and McIlroy were original limited partners and the amount, if any, of Class A stock in Box Energy to which they are entitled based upon ownership of original partnership units held at the time of the partnership's conversion to Box Energy.

C. Securities Fraud and Common Law Fraud

An essential element of plaintiffs claim for securities fraud and common law fraud is the establishment of reliance.[16] As with the estoppel claim, plaintiffs failed to make the necessary

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[16] Plaintiffs fail to specify the source of law under which they seek recovery for securities fraud. However, under both section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5, reliance is required. *See Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 832 n. 13 (5th Cir. 1990). Additionally, reliance is required to establish a claim for common law fraud under Texas law. *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1120 (5th Cir. 1984).

showing of reliance.[17] The district court's grant of judgment as a matter of law was proper.

D. Other Issues

For the benefit of the district court on remand, we note that the imposition of the constructive trust was improper in this case. While Texas law recognizes the equitable remedy of a constructive trust, the plaintiffs sought, and the jury granted a money award for future damages. Plaintiffs received what they requested of the jury; in so doing they conceded that a monetary remedy suffices, negating the need for equity to intervene. *See Fuqua v. Taylor*, 683 S.W.2d 735, 739 (Tex. App.-Dallas 1984, writ ref'd n.r.e.)(constructive trust is equitable remedy).

Additionally, plaintiffs argue that the district court's award of attorneys' fees was proper under the common fund doctrine. They conceded at oral argument, however, that an award under the common fund doctrine requires that the fee be taken out of the

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[17] Plaintiffs contend that the necessary showing of reliance is established by the "fraud on the market theory" and "Ute presumption." *Basic v. Levinson*, 485 U.S. 224, 108 S. Ct. 978 (1988)(fraud on the market theory); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S. Ct. 1456 (1972)(Ute presumption). Neither theory, however, helps plaintiffs establish reliance. This case is based generally upon purported misrepresentations by the general partners. "Ute presumption" applies only to "rule 10b-5 actions based primarily upon omissions rather than misrepresentations." *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1119 (5th Cir. 1988), *vacated on other grounds*, *Fryar v. Abell*, 492 U.S. 914, 109 S. Ct. 3236 (1989); *see Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 359-60 (5th Cir. 1987), *cert. denied*, 485 U.S. 959, 108 S. Ct. 1220 (1988). Additionally, any presumption of reliance afforded by the fraud on the market theory is overcome by the defendants' evidence that the OKC-LP Partnership Agreement was available to the public, and therefore, the market price of partnership units would not have been affected by any purported misrepresentations. *Basic*, 485 U.S. at 248-49, 108 S. Ct. at 992.

common fund and not be levied in addition to the damage award received. *See Knebel v. Capital National Bank*, 518 S.W.2d 795, 799 (Tex. 1974); *Crouch v. Tenneco, Inc.*, 853 S.W.2d 643, 647 (Tex. App.-Waco 1993, writ denied); *City of Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.-Dallas 1988, writ denied). The district court, therefore, erred in granting plaintiffs' attorneys' fees in addition to the damage award.

Because questions about prejudgment interest are fact-dependent, we need not speculate at this time on the availability of prejudgment interest after a new trial.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court’s grant of judgment as a matter of law as to plaintiffs' individual and derivative claims for limited partner status and voting rights based on theories of estoppel and consent, and on their individual claims for securities fraud, common law fraud, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing. We REMAND for further proceedings to determine (1) the amount of Class A stock in Box Energy to which Lyle is entitled, and (2) whether Griffin and McIlroy were original limited partners, and the amount, if any, of Class A stock in Box Energy to which those two are entitled. Additionally, we REVERSE and REMAND for a new trial, subject to the limitations described above, the judgment in favor of plaintiffs for actual and punitive damages.

AFFIRMED in **PART, REVERSED** and **REMANDED** in **PART.**