SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EASTWOOD INVESTORS V, LLC,

Plaintiff,

-against-

MORRISANIA ASSOCIATES, a New York Limited Partnership, TWO TREES, INC., and TWO TREES MANAGEMENT CO., LLC,

Defendants.

Index No. 652864/2012

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Defendants submit this memorandum of law in response to Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated December 5, 2012 ("Pl. Opp.") and in further support of Defendants' motion to dismiss the complaint.

PRELIMINARY STATEMENT

Defendants seek dismissal of this case based on the very Limited Partnership Agreement that the Plaintiff erroneously relies on to exercise rights it has neither lawfully acquired nor has standing to enforce. A plain reading of the Limited Partnership Agreement flatly contradicts the Plaintiff's allegations that the Assignments that purportedly transferred partnership interests in Morrisania – economic or otherwise – to Eastwood were valid. The critical provisions of the Limited Partnership Agreement bear repeating here. First, section 7.05 of the Limited Partnership Agreement provides, in no uncertain terms:

> The Partnership Interest of a Limited Partner may not be transferred or assigned in whole or in part except with the prior written consent of the General Partner.

Walentas Aff. Ex. A.[1] This clear, definite and unambiguous provision forecloses Plaintiff's claims of receiving valid assignments from limited partners in the Partnership; as even Plaintiff concedes, neither it nor the limited partners received the prior written consent of the general partner for the transfers in issue in this case. *See* Complaint ¶¶ 30, 31, 36. In addition to the unequivocal prohibition against assignments, Defendants and the limited partners who purportedly attempted to assign their rights in violation of the same, agreed to the following provision of the Limited Partnership Agreement found in section 7.09, aptly titled "Attempted Transfer in Violation of this Article Void:"

> Any attempted assignment or transfer in violation of the provisions

[1] References to the "Walentas Aff." are to the moving affidavit of David C. Walentas, sworn to October 9, 2012.

> of this Article VII shall be **void and ineffectual** and shall not bind the Partnership.

Walentas Aff. Ex. A (emphasis added). Once more, the Limited Partnership Agreement is clear and unambiguous and expressly renders any attempted assignment in violation of the anti-assignment provision "**void and ineffectual**."

Finally, section 10.14 of the Limited Partnership Agreement is instructive on the issue of waiver, which is the apparent linchpin of the Plaintiff's failing arguments:

> **No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such or any other covenant, agreement, term or condition**. Any Partner by notice pursuant to Section 10.03 may, but shall be under no obligation to, waive any of its rights or any conditions to its obligations hereunder, or any duty, obligation or covenant of any other Partner. **No waiver shall affect or alter this Agreement but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof**.

Walentas Aff. Ex. A (emphasis added).

Thus, it is self-evident that the Limited Partnership Agreement contains within it three relevant and controlling provisions that dispositively preclude Plaintiff's allegations that (1) Eastwood acquired valid assignments of limited partnership interests, and (2) Two Trees/Two Trees LLC waived their right to consent to the Assignments.

Plaintiff contends that either the anti-assignment provision or the no-waiver clause – or both – were waived by Defendants (*See* Pl. Opp. at 11-14). Despite express and explicit contractual language that provides **exactly the opposite**, and in the absence of any supporting legal authority, Plaintiff would have this Court believe that a previous waiver by Defendants necessarily constitutes an intentional and prospective waiver by them in any and all **future** instances. This is simply wrong. First, we show below that, as a matter of law, waiver is the **intentional** or **volun-**

tary relinquishment of a known right. Even assuming the truth of Plaintiff's factual allegations that Defendants permitted prior assignments without written consent (ignoring – as this Court should – Plaintiff's conclusions of law that, as a result, a waiver of the right to consent to the Assignments actually occurred), the Complaint contains no factual allegations that Defendants waived the anti-assignment provision with respect to the Assignments. Indeed, the Complaint is rife with allegations to the contrary, demonstrating that Defendants in fact exercised their right to consent (or to withhold it) by actively rejecting the Assignments as invalid. *See* Complaint ¶¶ 30, 31, 36, 39, 45. Second, according to Plaintiff, a no-waiver provision may be waived if there was conduct inconsistent with an intent to enforce such a provision. Yet, there are no factual allegations in the Complaint demonstrating Defendants intended not to enforce the no-waiver clause. Nor could there be, given Defendants' active refusal to consent to the Assignments.

Thus, in the final analysis, it is clear that the provisions of the Limited Partnership Agreement dispositively refute the Plaintiff's allegations. Accordingly, this Court should dismiss the case in its entirety.

ARGUMENT

I. THE LIMITED PARTNERSHIP AGREEMENT'S ANTI-ASSIGNMENT PROVISION RENDERED THE PLAINTIFF'S PURPORTED ASSIGNMENTS INVALID AS A MATTER OF LAW

A. The Anti-Assignment Provision Rendered Assignments Without Prior Written Consent of the General Partner Void and Ineffectual

The operative document in this case -- the Limited Partnership Agreement -- quickly dispels any notion advanced by the Plaintiff that it acquired any partnership interests in Morrisania through the Assignments. As noted, section 7.05 of the Limited Partnership Agreement expressly provides that:

> The Partnership Interest of a Limited Partner may not be transferred or assigned in whole or in part except with the prior written consent of the General Partner.

Walentas Aff. Ex. A.

Absent requisite consent, which Plaintiff concedes was not given (*see* Complaint ¶¶ 30, 31, 36, 39, 45), the Limited Partnership Agreement expressly refutes Plaintiff's allegations that it received valid assignments from limited partners in the Partnership.

Moreover, the Limited Partnership Agreement forecloses any possibility that the unauthorized Assignments have any validity or effect on the Partnership. Section 7.09 of the agreement provides that any attempted assignment or transfer in violation of the provisions of the agreement shall be "void and ineffectual."

Thus, the Limited Partnership Agreement establishes beyond dispute that any attempted assignments in violation of the anti-assignment provision – such as the very Assignments that Plaintiff seeks to enforce – are **void and ineffectual**. As unambiguously pleaded by Plaintiff, the general partner did not consent to the purported Assignments. *See* Complaint ¶¶ 30, 31, 36. Consequently, the Assignments violated section 7.05 of the Limited Partnership Agreement, and the void and ineffectual result of such violation is readily apparent from the clear and definite language of section 7.09.

New York case law supports this conclusion. It is well-established that "assignments made in contravention of a prohibition clause in a contract are **void** if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments." *Macklowe v. 42nd Street Dev. Corp.*, 170 A.D.2d 388, 389, 566 N.Y.S.2d 606, 606-07 (1st Dep't 1991) (citing cases) (emphasis added). And the formative case on anti-assignment provisions – which Plaintiff simply ignores in its opposition papers – is once again instructive. In *Allhusen v. Caristo Construction Corporation*, 303 N.Y. 446, 103 N.E.2d 891 (1952), the Court of Appeals held:

> We have now before us a clause embodying **clear, definite and appropriate language**, which may be construed in no other way but that **any attempted assignment of either the contract or any rights created thereunder shall be 'void'** as against the obligor. One would have to do violence to the language here employed to hold that it is merely an agreement by the subcontractor not to assign. The objectivity of the language precludes such a construction. We are therefore compelled to conclude that this prohibitory clause is a valid and effective restriction of the right to assign. Such a holding is not violative of public policy.

Id. at 452 (emphasis added).

Like *Allhusen*, the Limited Partnership Agreement in this case contains clear, definite and appropriate language that expressly renders any attempted assignment **void and ineffectual**. Plaintiff's opposition papers do not dispute this proposition.

B. Plaintiff Acquired No Economic Interests in Morrisania Because the Assignments Were Void and Ineffectual

Plaintiff has acquired no economic interests in Morrisania. Quite obviously, Eastwood's purported entitlement to share the economic benefits in the Partnership assumes a valid assignment of Partnership interests. However, because the Assignments were made in contravention of the Limited Partnership Agreement, without the consent of the general partner, they are void and ineffectual and have no binding effect on the Partnership. As a result, Eastwood is not a valid assignee and has acquired no economic rights in the Partnership.

Plaintiff does not dispute that, as a matter of law, invalid assignments do not confer any rights, let alone a right to receive economic benefits in a partnership. *See, e.g.*, *Allhusen*, 303 N.Y. at 451 (noting that an assignee may not recover where the agreement provides that the claim is nonassignable and would be void); *C.U. Annuity Serv. Corp. v. Young*, 281 A.D.2d 292, 292-93 (1st Dep't 2001) (determining an assignment in violation of a non-assignment clause void and holding that assignor "had no power to assign and [assignee] had no basis upon which to expect it could derive benefits from such a transaction").

Despite this, Plaintiff persists in contending that it is entitled to economic benefits in the Partnership from the Assignments. This contention, however, is rooted in inapposite case law. For example, Plaintiff cites *Rapoport v. 55 Perry Co*., 50 A.D.2d 54, 376 N.Y.S.2d 147 (1st Dep't 1975) (Pl. Opp. at 18), in which the court held that children who were assigned their parents' partnership interests could receive the economic benefits but could not be admitted as partners to the partnership. The court's holding, however, was based on the fact that the partnership agreement authorized the assignment of partnership interests to "members of [a partner's] immediate family" without the consent of any partners required. *Id*. at 56. No analogous provision applies to Plaintiff or its purported assignors in this case.

In *Whalen v. Gerzof*, 154 A.D.2d 843, 546 N.Y.S.2d 705 (3d Dep't 1989) (Pl. Opp. at 18), the court dismissing the plaintiff's complaint to enforce partnership rights acquired by assignment held that the assignments were **invalid** and, even if found valid, "merely gave [the assignee] the right to receive the profits, **as limited by the assignment**." *Id*. at 847 (emphasis added). Thus, the invalid assignment agreement in *Whalen* did not even purport to transfer partnership rights, but – in dicta – expressly limited the transfer to purely economic benefits.

Finally, in *Matter of Wilmot*, 244 A.D.2d 980 (1997) (Pl. Opp. at 18), the court noted that lack of written consent did not render an assignment of partnership rights null and void, but that was because the partnership agreement at issue did not contain clear and definite language that rendered an attempted assignment invalid. *Id*. at 981 (citing *Macklowe*, 170 A.D.2d at 389, which held that "assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments"). Plainly, that is not the case here, where Sections 7.05 and 7.09 could not be clearer or more definite in their preclusion of assignments.

Eastwood cannot dispute that it never received the general partner's prior written consent to the Assignments. Therefore, the Limited Partnership Agreement's anti-assignment provision rendered the Assignments void, and Plaintiff's claim to even the economic benefit of the Assignments is baseless.

II. THERE WAS NO WAIVER OF THE RIGHT TO CONSENT TO THE ASSIGNMENTS

To escape the conclusion required by the express language of the Limited Partnership Agreement, Plaintiff alleges that Defendants waived the non-assignment provisions of that agreement. *See* Complaint ¶ 61 ("By reason of its prior course of dealing, Two Trees/Two Trees LLC knowingly relinquished and waived its right of consent . . . ."). As a threshold matter, however, it is important to note that, with respect to Plaintiff's waiver allegations, this court must accept as true only **factual** allegations in the Complaint, not Plaintiff's conclusions of law. *See JFK Holding Co., LLC v. City of New York*, 68 A.D.3d 477, 891 N.Y.S.2d 32, 33 (1st Dep't 2009) ("[i]t is well settled that bare legal conclusions . . . are not presumed to be true on a motion to dismiss"). Thus, Plaintiff's allegations that a waiver of the right to consent to the Assignments has occurred is a conclusion of law that this Court need not accept as true for purposes of this motion. Indeed, Plaintiff obliquely acknowledges this in its papers. *See* Pl. Opp. at 2 ("the issue of whether a waiver has occurred is generally an issue of fact for trial."). And in any event, based on the controlling authority of the Limited Partnership Agreement and New York case law, no such waiver occurred.

A. Defendants Exercised Their Right to Consent Rather Than Waived It

As a matter of law, waiver is "the **intentional** relinquishment of a known right." Pl. Opp. at 11 (citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 403 (1957) (emphasis added)); *see also Jefpaul Garage Corp. v. Presbyterian Hosp. in City of N.Y.*, 61 N.Y.2d 442,

446 (1984) ("waiver is the **voluntary** abandonment or relinquishment of a known right.") (emphasis added).

Plaintiff has not alleged a single fact purporting to demonstrate Defendants' intentional waiver of their right to consent to the Assignments. Apart from a conclusory allegation in its Fourth Cause of Action that asserts that Defendants waived their right to consent – a conclusion of law not afforded the presumption of veracity for purposes of this motion – the Complaint is replete with allegations demonstrating the **exact opposite**: rather than acquiescing to the Assignments by silence, the Defendants exercised their right to consent by actively **rejecting** the Assignments as invalid. *See e.g.*, Complaint ¶ 30 ("counsel for Two Trees LLC responded to Eastwood and claimed the Assignments to Eastwood were invalid"); ¶ 31 ("Two Trees/Two Trees LLC has wrongfully refused to recognize the valid assignments . . . and wrongfully continues to send Schedule K-1's to the Former Limited Partners"); ¶ 36 ("Two Trees/Two Trees LLC has continued its bad faith refusal to recognize Eastwood's status as a substituted limited partner"); ¶ 39 ("Two Trees/Two Trees LLC has unreasonably refused to recognize Eastwood as a substitute limited partner, [and] wrongfully refused to admit Eastwood as a substituted limited partner . . ."); ¶ 45 ("Two Trees/Two Trees LLC has wrongfully refused to recognize Eastwood's right to receive the economic benefits . . .") ¶ 73 ("Two Trees/Two Trees LLC has breached its duty of good faith and fair dealing by, *inter alia*, unreasonably failing to recognize the sale of the Former Limited Partners' partnership interests to Eastwood and failing to recognize Eastwood as a substituted limited partner . . .").

Thus, given that a waiver requires intentional and voluntary relinquishment of a known right, and in light of the Complaint alleging the exact opposite with respect to the Assignments, Plaintiff's waiver argument fails as a matter of law.

B. The No-Waiver Clause Precludes a Finding of Intentional and Prospective Waiver Based on Prior Waiver

Notwithstanding the foregoing, Plaintiff's papers present a confounding proposition of law upon this court: that a prior waiver may constitute an **intentional** and **prospective** waiver of the right of consent. As shown below, this argument has been routinely rejected by the courts of this State. More importantly, it is foreclosed by section 10.14 of the Limited Partnership Agreement, which provides:

> No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such or any other covenant, agreement, term or condition . . . No waiver shall affect or alter this Agreement but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.

Walentas Aff. Ex. A.

Courts have uniformly upheld no-waiver provisions in New York. *See Jefpaul Garage Corp.*, 61 N.Y.2d at 446 (finding no waiver despite acceptance of rent during ten-year pattern of plaintiff's defaults and lease violations where lease contained a no-waiver clause); *NL Industries, Inc. v. PaineWebber Inc.*, 720 F. Supp. 293 303 (S.D.N.Y. 1989) (applying New York law and noting "[t]he trend of the modern cases is to uphold such a [non-waiver] provision"); *Awards.com, LLC v. Kinko's, Inc.*, 42 A.D.3d 178, 188, 834 N.Y.S.2d 147, 156 (1st Dep't 2007) ("Such [non-waiver] clauses are uniformly enforced."). In upholding the non-waiver clause, the Court of Appeals in *Jefpaul* held that "[i]ts language is clear and unambiguous. The parties having mutually assented to its terms, the clause should be enforced to preclude a finding of waiver." *Jefpaul*, 61 N.Y.2d at 446. It further noted that waiver "may not be inferred, and certainly

not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise." *Id.*

Also fatal to Plaintiff's argument is the fact that, in New York, a prior waiver does not constitute a **prospective** waiver as a matter of law. *See Awards.com, LLC*, 834 N.Y.S.2d at 156 (where agreement contained no-waiver provision such that past defaults shall not constitute a waiver of any future obligation to comply with such provision, the Appellate Court held that "merely to point to a past election by Kinko's not to terminate [the agreement] by accepting a late payment" is not sufficient to show waiver, "otherwise the non-waiver provision would have no effect"); *Town of Hempstead v. Incorporated Village of Freeport*, 15 A.D.3d 567, 569 (2d Dep't 2005) (holding that the defendant failed to establish that the plaintiffs "waived their right **prospectively** to enforce [the agreement]," and noting that the no-waiver clause "specifically provided that the failure of any party to insist upon strict performance of any of the terms of the agreement 'shall not be considered to be a waiver' of such terms").

C. There Has Been No Waiver of the No-Waiver Provision of the Limited Partnership Agreement

Without any supporting factual allegations in the Complaint, Plaintiff, for the first time in its papers, argues that the Defendants waived the no-waiver provision in the Limited Partnership Agreement based on prior conduct. According to Plaintiff, "parties, by their actions and course of conduct, can waive the provisions of a no-waiver clause, and **conduct inconsistent with an intent to enforce a "no waiver" clause can constitute a waiver thereof**." Pl. Opp. at 13 (citing *Rose v. Spa Realty Assocs*., 42 N.Y.2d 338, 343 (1977) and *Atkins Waste Materials v. May*, 34 N.Y.2d 422 (1974) among others) (emphasis added).

Plaintiff's argument proves too much, and by so doing highlights the fatal flaw in its own waiver argument. Plaintiff has not alleged in its Complaint **any** conduct by Defendants that is

"inconsistent with an intent to enforce a 'no waiver' clause." On the contrary, as shown above, Defendants repeatedly exercised their rights under the no-waiver clause by rejecting the purported Assignments to Plaintiff. *See* Complaint ¶¶ 30, 31, 36, 39, 45. Yet, even if Plaintiff had alleged conduct inconsistent with an intent to enforce the no-waiver clause in the Limited Partnership Agreement, Eastwood's proposition that a prior waiver somehow constitutes an intentional and prospective waiver in all future instances, notwithstanding a no-waiver provision to the contrary, is dubious at best.

First and foremost, two of Plaintiff's cited cases, *Spa Realty Assocs*. and *Atkins*, do not even involve a no-waiver provision. And in *Bank Leumi Trust Company of N.Y. v. Block 3102 Corporation*, 180 A.D.2d 588, 590, 580 N.Y.S.2d 299, 299 (1st Dep't 1992), the court enforced a no-waiver clause and held that the agreement "expressly provides that the waiver of any provision on one occasion does not bar its enforcement on a subsequent occasion." The remaining cases Plaintiff cites are highly fact-specific, and their circumstances are extremely attenuated from the issues here; as a result, they are of limited if any precedential value for purposes of this motion.

In sum, the Limited Partnership Agreement contains a clear and unambiguous no-waiver provision that precludes a finding of any waiver of Defendants' right to consent to any attempted assignments of partnership interests. Plaintiff has not alleged any conduct by Defendants inconsistent with an intent to enforce the no-waiver clause. Indeed, Plaintiff's contention that a waiver based on a prior course of dealing could constitute an intentional and prospective waiver would render the no-waiver provision in the Limited Partnership Agreement specious. *See Awards.com*, 42 A.D.3d 178, 188 (noting past waivers were insufficient to show a waiver of a

non-waiver clause). Thus, Plaintiff's argument that Defendants have waived the non-waiver provision must fail as a matter of law.

D. <u>There Has Been No Waiver of the Anti-Assignment Provision</u>

As noted repeatedly in Plaintiff's Complaint, Defendants did not consent to the Assignments. *See* Complaint ¶¶ 30, 31, 36, 39, 45. Indeed, Plaintiff alleges that Defendants actively refuted the validity of the Assignments and withheld consent. *Id*. Nonetheless, Plaintiff relies on several cases to contend that the anti-assignment provision -- and the right of consent therein -- has been waived. Plaintiff's reliance is misplaced.

Plaintiff cites, by way of example, *Sillman v. Twentieth Century-Fox Film Corporation* (Pl. Opp. at 11). There, the Court of Appeals, relying on *Allhusen*, noted that, on summary judgment, an issue of fact was raised as to whether Twentieth Century had intentionally waived its anti-assignment provision. But those facts are in stark contrast to the facts presented here. As to the issue of waiver, the court noted the following:

> [I]t appears from the papers that National's contract with Twentieth Century forbidding assignments was made in 1951, more than two years prior to the assignments in question; that Twentieth Century examined all the contracts here involved prior to accepting the picture from National in 1953, and consequently knew of the assignments to plaintiffs which it now alleges are a breach of its agreement with National; that, having examined these contracts, Twentieth Century was required by its agreement with National to notify National within 60 days if they were to be treated as a breach of the agreement; that Twentieth Century failed to so notify National; that Twentieth Century accepted the picture and exercised the rights created by the very contract which made the assignments to plaintiffs without notifying either plaintiffs or National of any intention to consider them void; that shortly after the picture was released, and after Chemical Bank refused to act as distributing agent, plaintiffs' attorney spoke about the assignments to Twentieth Century's attorney, who not only evinced no objection at the time, but stated that Twentieth Century would withhold distribution of moneys to National. While of course not decisive, these facts have an important bearing on the issue of waiver.

3 N.Y.2d 395, 403-04 (1957).

There are no factual parallels between Twentieth Century's passive conduct of acceptance and Defendants' active refusal to consent to the Assignments or to recognize them as valid. *See* Complaint ¶¶ 30, 31, 36, 39, 45.

Similarly, *University Mews Associates v. Jeanmarie* (Pl. Opp. at 11) is not applicable because the plaintiff in that case chose not to reject the assignments, but instead elected to permit the assignments and later sue for money damages. 122 Misc.2d 434, 438 (N.Y. Sup. Ct. 1983). The court denied the plaintiff's motion for a preliminary injunction and noted that the party "concededly and knowingly opted for damages over equitable, injunctive or attachment, relief in the light of their choice to proceed with the title closings, rather than voiding the subscription agreements." *Id*. at 442. Once again, Plaintiff's own allegations betray its argument. Whereas the plaintiff in *University Mews* permitted the assignments to occur and then later sued for money damages, the Defendants in this case actively rejected the Assignments and continually refused to recognize them as valid. *See* Complaint ¶¶ 30, 31, 36, 39, 45.

Finally, Plaintiff relies on *Battista v. Carlo*, 57 Misc. 2d 495 (N.Y. Sup. Ct. 1968) for the broad proposition that "courts have recognized that the 'modus operandi' of a partnership over its twenty years of existence was to allow transfers of partnership interests without the prior written consent of all the partners, as required by the partnership agreement, thus establishing a consistent and uniform course of conduct such that the consent was not required to permit the transfer." Pl. Opp. at 11. Yet, what Plaintiff omits is that the court in *Battista* (the only case cited by Plaintiff for this broad-brush proposition) carefully distinguished between whether the assignee was an existing partner or a non-partner. The waiver at issue in *Battista* concerned assignments made without consent only when the assignee was a then-existing partner, not a non-partner.

More importantly, there was no indication that the partnership agreement in *Battista* contained a no-waiver provision such as the one here, which would have precluded a finding of any future waiver based on prior assignments. *Battista's* holding actually supports Defendants' position in that prior waivers of the right to consent to assignments to partner-assignees did not constitute future waivers of the right to consent to assignments to non-partner assignees. Put differently, *Battista* agrees with the rule of law that prior waivers do not constitute an intentional and prospective waiver in all future circumstances. And of course, this would be even more apparent in the case where a no-waiver provision exists.

In sum, none of Plaintiff's cases can be read to hold that a prior waiver of an anti-assignment provision constitutes an intentional and prospective waiver in all future occasions despite the existence of a no-waiver provision. Thus, it is clear that there was no waiver of the anti-assignment provision.

III. TWO TREES LLC IS NOT AND HAS NEVER HELD ITSELF OUT AS THE GENERAL PARTNER OF MORRISANIA

In its Fifth Cause of Action, Plaintiff alleges that Two Trees LLC erroneously held itself out as general partner of Morrisania because Two Trees never transferred its general partnership interest to Two Trees LLC in accordance with the terms of the Limited Partnership Agreement. Specifically, the Complaint alleges that "the Certificate of Partnership for Morrisania was never amended to reflect any purported transfer or assignment of the General Partnership's interest from Two Trees to Two Trees LLC, as required by Section 7.07 of the Limited Partnership Agreement." Complaint ¶ 67. This allegation, standing alone, does not demonstrate that "Two Trees purported to transfer its entire general partnership interest" to Two Trees LLC (Complaint ¶ 65). In fact, it just as plausibly illustrates that the opposite occurred, *i.e.*, that no transfer of partnership interests actually took place. Thus, as pled, the Complaint fails to state a cause of

action as a matter of law with respect to seeking declaratory relief that the transfer of partnership interests to Two Trees LLC is void, and should be dismissed pursuant to C.P.L.R. § 3211(a)(7).

IV. TWO TREES/TWO TREES LLC OWED NO DUTY OF GOOD FAITH AND FAIR DEALING TO EASTWOOD

There can be no claim for breach of any agreement between Eastwood and Defendants for the simple reason that there is no "contract" between Eastwood and Defendants that Defendants could have breached. See *Duration Mun. Fund, L.P. v. J.P. Morgan Sec., Inc.*, 77 A.D.3d 474, 475, 908 N.Y.S.2d 684, 685 (1st Dep't 2010) (dismissing claim for breach of covenant of good faith and fair dealing and holding that "[a] cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties").

The Complaint alleges that "Two Trees/Two Trees LLC is obligated to act fairly and in good faith with the Former Limited Partners **and Eastwood** . . . ." Complaint ¶ 72 (emphasis added). But Eastwood does not even allege that a contract exists between it and the Defendants by which the Defendants would owe Eastwood a duty of good faith and fair dealing.[2] Eastwood has failed to state a claim for breach of covenant of good faith and fair dealing and, consequently, its Sixth Cause of Action should be dismissed pursuant to C.P.L.R. § 3211(a)(7).

V. EASTWOOD'S PURPORTED ATTORNEY-IN-FACT IS AN IMPERMISSIBLE END-RUN AROUND TO THE LIMITED PARTNERSHIP AGREEMENT'S ANTI-ASSIGNMENT PROVISION

Plaintiff cites a single case for the proposition that "an attorney-in-fact may act on behalf of its principal to enforce rights under a partnership agreement." Pl. Opp. at 21 (citing *Zaubler v. Picone*, 100 A.D.2d 620, 473 N.Y.S.2d 580 (2d Dep't 1984). However, *Zaubler* was not a case

[2] Plaintiff cites cases asserting that a general partner owes a fiduciary duty to limited partners. *See* Pl. Opp. at 23 n.4. But the duty of good faith and fair dealing is a contractual duty, not a fiduciary duty. Plaintiff has failed to plead a breach of fiduciary duty claim in its Complaint. Nor could it. Defendants owed no fiduciary duties to Eastwood, and there are no allegations relating to any breach of Defendants' fiduciary duties to them or the limited partners.

that dealt with a limited partner granting a power of attorney to a third party where a partnership agreement expressly prohibited assignment of partnership interests. Here, the Limited Partnership Agreement expressly forbade transferring any partnership rights absent the prior written consent of the general partner. In light of this prohibition, the limited partners could not have then circumvented such plain restrictions by assigning their rights through a power of attorney. Permitting this end-run around the Limited Partnership Agreement would defeat the very purpose of the anti-assignment provision in the Limited Partnership Agreement and undercut one of the elemental principles underlying partnership law. "[A]t the heart of the partnership concept is the principle that partners may choose with whom they wish to be associated." *Gelder Med. Group v. Webber*, 41 N.Y.2d 680, 684, 363 N.E.2d 573, 577 (1977). This principle is underscored by the distinctly different legal rights the partnership law affords to a partner as opposed to an assignee. *See e.g.*, N.Y. P'ship Law § 50 (describing the property rights of a partner to include "his right to participate in management"); *but see* N.Y. P'ship Law § 53 (prohibiting an assignee from "interfer[ing] in the management or administration of the partnership business or affairs"); N.Y. P'ship Law § 108 (an assignee "has no right to require any information or account of the partnership transactions or to inspect the partnership books").[3]

It is also important to note that an attorney-in-fact is only authorized to sue in the name of its principal. *Zaubler*, 473 N.Y.S.2d at 580; *Application of Gill*, 192 Misc. 283, 284, 80

[3] Plaintiff expends a lot of ink scolding Defendants for their reference to New York's Revised Limited Partnership Act ("Revised Act"), noting its inapplicability because Morrisania was formed prior to the effective date of the Revised Act. Pl. Opp. at 10. This argument is immaterial because New York Limited Partnership Law section 108(4) – which Plaintiff concedes is applicable (*see* Pl. Opp. at 10) – contains analogous provisions to the two sections of the Revised Act Defendants cited in their papers. Plaintiff also contends that Defendants' statute-based arguments are off base because Morrisania's Limited Partnership Agreement overrode the provisions of section 108(4) and that Defendants failed to note the statutory distinction between substitute limited partners and additional limited partners. Pl. Opp. at 15-16. Those too are irrelevant to the Court's determination of this case: whether a valid assignment required the consent of all partners or just the general partner, or whether they were substitute or additional partner-

(footnote continued on next page)

N.Y.S.2d 400, 402 (N.Y. Sup. Ct. 1948) ("The general rule is that a person who is an attorney-in-fact, but who is without personal interest in the litigation, **may sue only in the name of the principal and not in his own name**; to authorize a suit by the attorney-in-fact, it is essential that the power of attorney be accompanied by an assignment of title") (emphasis added); *Jurnas v. National City Bank of N.Y.*, 190 Misc. 854, 855, 76 N.Y.S.2d 330, 331 (N.Y. Sup. Ct. 1947) (same).

Plaintiff asserts that through the Purchase and Sale Agreements with the various limited partners, it was designated as attorney-in-fact to enforce the rights of those limited partners. Pl. Opp. at 21 (Eastwood "has standing to assert all of the claims herein by virtue of the power of attorney granted to it by its assignors in the Purchase & Sale Agreements"); at 23 ("Because each limited partner would be entitled to seek the relief alleged in the Complaint, Eastwood, as each limited partners's [*sic*] attorney-in-fact, has standing to assert all such claims . . . ."); at 24 ("Paragraph 11, appointing Eastwood as each limited partners' attorney-in-fact, with full and broad powers to act on behalf of each respective principal, is fully enforceable and valid as a matter of law.").

Specifically, with respect to each count upon which Plaintiff seeks standing as attorney-in-fact to assert, Eastwood has pled:

- "Accordingly, **Eastwood** is entitled to a judgment declaring that the purported assignment and transfer of Two Trees Inc.'s general partnership to Two Trees LLC is void and invalid as a matter of law, together with an injunction enjoining and restraining Two Trees LLC from holding itself out as General Partner of Morrisania Associates." Complaint ¶ 69.

(footnote continued from preceding page)
ship interests, is of no moment here because the Limited Partnership Agreement expressly required prior written consent for any assignment by the general partner. It is indisputable that no such consent was given.

- "By virtue of the foregoing breach of its duty of good faith and fair dealing, **Eastwood** is entitled to recover compensatory damages in an amount to be established at trial but believed to be in excess of $2,000,000.00." Complaint ¶ 74.

- "By reason of the foregoing, **Eastwood** is entitled to an order removing Two Trees/Two Trees LLC as general partner of Morrisania Associates, and appointing **Eastwood** as Successor General Partner in its place and stead, upon satisfying the conditions set forth in Section 7.02 of the Limited Partnership Agreement." Complaint ¶ 86.

- "By virtue of the foregoing, **Eastwood** is entitled to an order dissolving the Limited Partnership forthwith." Complaint ¶ 90.

- "By reason of the foregoing, **Eastwood** is entitled to injunctive relief to preserve the status quo, including, but not limited to, restraining and enjoining Two Trees and Two Trees LLC from, *inter alia*, seeking to unilaterally extend the term of the partnership beyond January 1, 2015, and from altering the substantive rights of the limited partners and/or Former Limited Partners." Complaint ¶ 92.

- "Accordingly, **Eastwood** is entitled to an Order compelling production of the books and records of Morrisania as a matter of law." Complaint ¶ 95.

- "**Plaintiff** is entitled to an accounting of the books and records of Morrisania." Complaint ¶ 97.

(Emphasis added.)

However, as Plaintiff's own case acknowledges, the purported power of attorney contained in each Assignment does not confer ownership interests in the rights of the limited partners to Eastwood, but merely allows Eastwood to bring suit on their behalves. The power of attorney does not confer standing upon Eastwood to sue in its own right, which it has clearly attempted to do. Therefore, as pled, counts five through eleven should be dismissed.

CONCLUSION

For all the reasons set forth above, Defendants respectfully request this Court to grant their motion to dismiss the complaint in all respects.

Dated: New York, New York
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BINGHAM MCCUTCHEN LLP

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