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

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EASTWOOD INVESTORS V, LLC,

Index No.: 652864/2012

Plaintiff,

- against-

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

Defendants.

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MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Eastwood Investors V LLC ("Eastwood") in opposition to the motion of the defendants Morrisania Associates ("Morrisania"), Two Trees, Inc. ("Two Trees"), and Two Trees Management Co. LLC, ("Two Trees LLC")(collectively, "Two Trees") seeking pre-answer and pre-discovery dismissal of the Verified Complaint. As established herein, defendants' motion should be dismissed in its entirety, as a matter of law because the Verified Complaint more than sufficiently pleads cognizable causes of action against the defendants.

This action was brought to, among other things, enforce the rights of Eastwood Investors V, LLC ("Eastwood"), as owner and assignee of a 74.28% limited partnership interest in the defendant, Morrisania Associates ("Morrisania"), a New York limited partnership. The Complaint seeks, inter alia, to declare Eastwood's rights as a 74.28% substituted limited partner in Morrisania, or in the alternative and at a minimum, to declare Eastwood's right to receive all the economic benefits and profits from Morrisania. The action also seeks to remove the general partner of Morrisania for cause, to dissolve Morrisania and liquidate the Partnership Property, to compel an accounting, compel the inspection of books and records, and related declaratory, monetary, and injunctive relief.

As set forth in the Verified Complaint, beginning in 2009, Eastwood acquired through arms length, bona-fide Purchase & Sale Agreements with various limited partners of Morrisania Associates, a New York limited partnership, an assignment of 74.28% of the limited partnership interests in Morrisania. In 2012, Eastwood obtained the right to acquire an additional 5.54% limited partnership interest, giving it a potential 79.82% interest in Morrisania. This action was necessitated due to Two Trees' unreasonable and bad faith refusal and failure, as general partner, to recognize

Eastwood's limited partnership interests and the valuable rights obtained thereby. Motivated purely by its own self-interest, Two Trees has refused, without any rational or good faith basis, to recognize these bona-fide, arms-length assignments, even though it consistently allowed other limited partners to assign and transfer their interests over the course of the partnership.

Defendants now move to dismiss the Verified Complaint claiming, *inter alia*, that the assignments are null and void because Two Trees, the General Partner, did not give its prior written consent to same and that therefore, the assignments are void and further, that Eastwood has no legal standing to bring any of its claims. As established hereinbelow, the motion should be denied in its entirety because:

(A) deeming all the allegations of the Verified Complaint to be true as the Court must on a motion to dismiss, including all the allegations concerning the defendants' waiver and course of conduct with regard to assignments of limited partnership interests, the mere existence of an anti-assignment provision in the Partnership Agreement does not conclusively establish a defense as a matter of law. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957)("[i]t is well settled that prohibition against assignments...may be waived or modified by a course of business dealings or by a formal written instrument."; University Mews Associates v. Jeanmarie, 122 Misc.2d 434 (Sup. Ct. N.Y. Cty.1983)(same).

(B) In any event, the issue of whether a waiver has occurred is generally an issue of fact for trial. *See* Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt, L.P., 1 N.Y.3d 96, 104 (2006); Dice v. Inwood Hills Condominium, 237 A.D.2d 403 (2d Dep't 1977).

(C) Defendants' contention that Eastwood was required to allege and obtain the consent of "all the members" of Morrisania as a prerequisite to becoming a limited partner pursuant

to Partnership Law §108(4) is wrong as a matter of law, since the provisions of the Partnership Agreement governing the same subject matter supersede the statutory default provisions as a matter of law, and the provisions of this Partnership Agreement do not require the consent of "all members." *Ederer v. Gursky*, 9 N.Y.3d 514 (2007)(Partnership Law provisions are default provisions that only "come into play in the absence of an agreement."); *Bailey v. Fish & Neave*, 8 N.Y.3d 523 (2007)(same).

(D) At the very least and at a minimum, Eastwood is an assignee of the economic benefits of the partnership interests. Partnership Law §108(3)("An assignee, who does not become a substituted limited partner,. . . is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled."); *see also Rapoport v. 55 Perry Co., et al.*, 50 A.D.2d 54 (1st Dep't 1975)

(E) Eastwood has standing to assert all the other claims because it has been designated as the attorney-in-fact for the Former Limited Partners, which power of attorney is valid and enforceable. *See Zaubler v. Picone*, 100 A.D.2d 620 (2d Dep't 1984); *Rice v. Novello*, 25 A.D.3d 992 (3d Dept. 2006)("To the extent permitted by law and the terms of the Power of Attorney, an attorney-in-fact may act for her principal in all matters that do not require the principal to act for himself.")

Taking all the allegations as true, as the Court must on a motion to dismiss, Eastwood has both the requisite standing and legal right to maintain this action either in its own right, or as attorney in fact and agent for its assignors, and to seek the relief necessary to enforce and protect its rights against a rogue general partner who for its own selfish desires and benefit is endangering the assets of the limited partnership which is scheduled to expire in two years and has a mortgage that is

quickly becoming due, so it can maximize and extend its own profits it realizes as manager of the partnership property, in derogation of the rights of the limited partners.

Accordingly, the defendants' motion to dismiss the Verified Complaint should be denied in its entirety as a matter of law, together with such other, further, and different relief as to the Court may seem just and proper. Additionally, to the extent the Court finds any part of the Verified Complaint to be deficient in any respect, Eastwood respectfully requests leave to replead.

STANDARD OF REVIEW

It is well-settled that "when deciding whether to grant a motion to dismiss pursuant to CPLR 3211, [a court] must take the allegations asserted within a plaintiff's complaint as true and accord plaintiff the benefit of every possible inference." *Assured Guar. (UK) Ltd. v. J.P. Morgan Investment*, 2010 WL 4721590 (1st Dep't 2010). "[A] complaint should not be dismissed on pleadings so long as, giving plaintiff the benefit of every possible favorable inference contained in [his or her] allegations, a cause of action exists." *Donnelly v. Morace*, 162 A.D.2d 247, 247-48 (1st Dep't 1990); *Plaza PH2001 LLC v. Plaza Residential Owners LP*, 2010 WL 5154399 (1st Dep't)(reversing motion court and reinstating complaint after erroneous dismissal); *Gosmile, Inc. v. Levine*, 2010 WL 5156616 (1st Dep't)(same); *CMMF, LLC v. J.P. Morgan Inv. Management Inc.*, 2010 WL 4721383 (1st Dep't)(where "arguments are fact-based" it precludes dismissal of Complaint on a motion to dismiss).

The pleading "is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83 (1994). The court must accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703-4 (2d Dep't 2008);

Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007).

On a motion to dismiss based upon documentary evidence, such as the defendants have made here, "dismissal is only warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" *Klein v. Gutman*, 12 A.D 3d 417, 418 (2d Dep't 2004); *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

"Whether a plaintiff can ultimately establish its allegations "is not part of the calculus in determining a motion to dismiss." *EBCI, Inc. v. Goldman, Sachs & Co.*, 5 N.Y. 3d 11 (2005).

STATEMENT OF RELEVANT FACTS

The applicable facts herein which for the purpose of this motion must be deemed to be true, and are set forth in the Verified Complaint.

Morrisania is a limited partnership formed in 1972. It was originally composed of one general partner, Two Trees, and 14 limited partners (the "Limited Partners") who owned the balance of the interests in the Limited Partnership. The Limited Partnership was formed to own and manage an affordable housing project in South Bronx, New York (the "Partnership Property")(see Verified Complaint annexed as Exhibit "A" to moving papers, para. 8).

On July 10, 1972, Two Trees, as general partner, and the original Limited Partners executed the Limited Partnership Agreement for Morrisania Associates. (Id., para. 9) Pursuant to Section 9.01 of the Limited Partnership Agreement, the term of the Limited Partnership will end on January 1, 2015, unless dissolved earlier – just two years from now. (Id.)

All alleged in the Complaint, since Two Trees began managing the Partnership Property in 1972, it has made no attempt to sell or refinance the property so as to, among other things, enable the Limited Partners to liquidate their investments. As a result, the Limited Partners have

consistently incurred tax liabilities that exceed the amount of their distributions. (Id., para. 11) As a result, the continued ownership of the Partnership Property has been and is unprofitable for the Limited Partners. (Id., para. 12)

As alleged in the Complaint, in and around 2002, Two Trees purported to transfer its entire general partnership interest to Two Trees Management Co. LLC ("Two Trees LLC"). That transfer was not approved in writing by 75% of the Limited Partners as required by Section 7.01 of the Limited Partnership Agreement. (Id., paras. 13, 14) As reflected in the records of the County Clerk for the County of New York, 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 is required by Section 7.07 of the Limited Partnership Agreement. (Id., para. 15)

Notwithstanding the foregoing, Two Trees LLC has wrongfully held itself out as the sole general partner of Morrisania since 2002, in place and instead of Two Trees, indicating its disregard of the terms of its own Partnership Agreement it now seeks to enforce against Eastwood alone. (Id., para. 16)

Section 7.05 of the Partnership Agreement provides that 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." (Exhibit "C" to moving papers) Notwithstanding this provision, Two Trees/Two Trees LLC had previously waived this provision in connection with assignments by other limited partners, and/or has expressly recognized new substituted limited partners. (Id., para. 55) As alleged in the Complaint, original limited partner Howard Goodman transferred his entire limited partnership interest to his son, Steven P. Goodman, in and around 2007. This transfer was recognized by Two Trees/Two Trees LLC, as General Partner, as evidenced by the

issuance of Schedule K-1's to Steven P. Goodman thereafter. (Id., para. 56). Similarly, original limited partner David Keller transferred his entire limited partnership interest to Three Oaks Associates. This transfer was recognized by Two Trees/Two Trees LLC, as General Partner, as evidenced by the issuance of Schedule K-1's to Three Oaks Associates. (Id., para. 57) Original limited partner Dan Lufkin transferred his entire limited partnership interest to Columbia Ribbon and Carbon Manufacturing Co., Inc. This transfer was recognized by Two Trees/Two Trees LLC, as General Partner, as evidenced by the issuance of Schedule K-1's to Columbia Ribbon and Carbon Manufacturing Co., Inc. (Id., para. 58) Further, a currently unknown original limited partner transferred his entire limited partnership interest to The Reginald F. Lewis Trust f/b/o Loida N. Lewis. (the "Trust') This transfer was recognized by Two Trees/Two Trees LLC, as General Partner, as evidenced by the issuance of Schedule K-1's to the Trust. (Id., para. 59)

As alleged in the Complaint, Two Trees did not give written consent to the assignment by those Limited Partners to the assignees as required by Section 7.05, but simply accepted the assignment and recognized the assignees as full substituted limited partners, in disregard of the provisions of the Partnership Agreement, just as it had when it purported to transfer its general partnership interest to Two Trees LLC. (Id., para. 60)

Beginning in April 2009, a number of Morrisania's limited partners (the "Former Limited Partners") began assigning and transferring their partnership interests to Eastwood pursuant to certain Purchase and Sale Agreements (Exhibit "A" to Rosenberg Affirmation) and Assignment Agreements (Exhibit "B" to Rosenberg Affirmation)(Id., para. 17) During this time, Eastwood apprised Two Trees/Two Trees LLC that the Former Limited Partners were transferring their partnership interests to Eastwood. (Id., para. 18)

The following limited partnership interests were acquired by Eastwood. On April 22, 2009, Eastwood acquired a 4.99% limited partnership interest from Bartle Bull. On April 23, 2009, Eastwood acquired a 2.77% limited partnership from Steven P. Goodman. On May 1, 2009, Eastwood acquired a 2.77% limited partnership interest from Sheldon E. Prentice. On May 6, 2009, Eastwood acquired a 5.54% limited partnership interest from Michael M. Thomas. On May 11, 2009, Eastwood acquired a 5.54% limited partnership interest from William R. Acquavella. On May 12, 2009, Eastwood acquired a 2.77% limited partnership interest from the Estate of Peter D. Nelson c/o Michael D. Nelson. On May 27, 2009, Eastwood acquired a 16.63% limited partnership interest from Three Oaks Associates. On July 10, 2009, Eastwood purchased a 33.27% limited partnership interest from Columbia Ribbon and Carbon Manufacturing Co., Inc. (Id., paras. 19-26)

Each of the Former Limited Partners also signed a letter of instruction to Morrisania Associates, directing Morrisania to forward all correspondence concerning Morrisania to Eastwood, and directing that all distributions be made directly payable to Eastwood. ("Letters of Instruction") (Id., para. 28) By reason of the foregoing, by July 2009, Eastwood had acquired an aggregate 74.28% interest in Morrisania. (Id., para.29)

Further, as part of the Purchase & Sale Agreements, Eastwood was designated as attorney-in-fact for each of the Former Limited Partners, with broad authority to represent them in partnership affairs and to assert claims that could be asserted by them in their own right. (See Section 11 of Purchase & Sale Agreements annexed as Exhibit "A" to Rosenberg Aff, and Section 4 of Assignment Agreements annexed as Exhibit "B" to Rosenberg Aff.)

On August 20, 2009, Eastwood wrote to Two Trees/Two Trees LLC to provide it with copies of the Assignments and Letters of Instruction, and asked Two Trees/Two Trees LLC to recognize

and substitute Eastwood as a limited partner of Morrisania. (Id., para. 29; Exhibit "E" to moving papers) By letter dated September 28, 2009, counsel for Two Trees LLC responded to Eastwood and erroneously claimed the Assignments to Eastwood were invalid. (Id., para. 30; Exhibit "F" to moving papers)

Two Trees/Two Trees LLC wrongfully refused to recognize the valid assignment of the Former Limited Partner's interests to Eastwood, refused to change its books and records to reflects Eastwood's interests, refuses to send Schedule K-1's to Eastwood, and wrongfully continues to send Schedule K-1's to the Former Limited Partners. (Id., para. 31)

By letter dated October 5, 2011, Eastwood again requested Two Trees/Two Trees LLC to honor and recognize the assignments of the Former Limited Partners' interests to Eastwood. Two Trees/Two Trees LLC never responded to the October 5, 2011 letter. (Id., paras. 32-33)

On April 2, 2012, Eastwood entered into an Agreement with another Limited Partner of Morrisania, the Reginald F. Lewis Trust f/b/o Loida N. Lewis (the "Trust") wherein the Trust agreed, among other things, to vote its 5.54% limited partnership interest to (i) remove Two Trees/Two Trees LLC as General Partner; and/or (ii) to dissolve Morrisania. Eastwood also obtained an option to acquire the Trust's limited partnership interest. With the additional 5.54% voting power of the Trust, Eastwood can vote a 79.82% limited partnership interest. (Id., paras. 34-35)

To date, Two Trees/Two Trees LLC has continued its bad faith refusal to recognize Eastwood's status as a substituted limited partner. (Id., para. 36) However, by reason of its prior course of dealing, Two Trees/Two Trees LLC knowingly relinquished and waived its right of consent under Section 7.05 of the Limited Partnership Agreement and cannot unreasonably and in bad faith withhold consent to Eastwood or refuse to recognize its rights as an assignee. (Id., para. 61)

POINT I

DEEMING ALL THE ALLEGATIONS OF THE COMPLAINT AS TRUE AS LEGALLY REQUIRED, THE MOTION TO DISMISS SHOULD BE DENIED AS A MATTER OF LAW

Defendants claim that the First and Second Causes of Action in the Verified Complaint, seeking a declaration of Eastwood's rights as a full substitute limited partner or alternatively, as an assignee, should be dismissed based on documentary evidence, i.e. the Limited Partnership Agreement and its' anti-assignment provision. However, the fact that the Agreement contains an anti-assignment provision is not the end of the legal inquiry, nor does it conclusively establish a defense to Eastwood's request for a declaration of its rights.

As a threshold matter, the Court must apply the correct version of Partnership Law. Morrisania was formed in 1972 and therefore is governed by New York's Limited Partnership Law §§90 through 119, known as the Uniform Limited Partnership Act. (the "Uniform Act") In 1991, the Revised Limited Partnership Act was adopted and codified at Limited Partnership Law §§121-101 through 121-1300 (the "Revised Act"). The Revised Act is only applicable to limited partnerships formed after 1991, or to limited partnerships formed prior to 1991 who have amended their Certificate of Limited Partnership to adopt the new Revised Act in place of the Uniform Act. A search of the County Clerk records establishes that Morrisania never adopted the Revised Act and is therefore governed by the Uniform Limited Partnership Act. Thus, all the defendants' citations, references, quotations and arguments relating to the inapplicable Revised Act are erroneous as a matter of law and accordingly, should be ignored.

A. The Partnership Agreement Does Not Conclusively Establish a Defense

Defendants argue that the documentary evidence – i.e. the Morrisania Partnership Agreement

-- conclusively establishes that Eastwood has no rights whatsoever, either as a limited partner, or as an assignee of a limited partner. It is true that Section 7.05 of the Partnership Agreement 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." However, "[i]t is well settled that prohibition against assignments...may be waived or modified by a course of business dealings or by a formal written instrument." *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957); *University Mews Associates v. Jeanmarie*, 122 Misc.2d 434 (Sup. Ct. N.Y. Cty.1983)("a stipulation against assignment may be waived...or modified by a course of business dealings or by a formal written instrument."); *Marvel Entertainment Group, Inc. v. ARP Films, Inc.*, 684 F.Supp. 818 (S.D.N.Y. 1988)(denying summary judgment and recognizing that "a stipulation against assignment may be waived or modified by a course of business dealings.") "[W]aiver requires that the party to be estopped be aware of certain facts and, being aware of them, elect not to take advantage of them." *Sillman, supra.* Waiver is, in other words, "the intentional relinquishment of a known right." *Id.*

Under similar circumstances the 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. *Battista v. Carlo*, 57 Misc.2d 495 (Sup. Ct. Erie Cty. 1968).

As alleged in the Verified Complaint, all of which allegations must be deemed to be true, at various times throughout the existence of the partnership, limited partners have freely transferred their interests without the prior written consent of the general partner, and without compliance with the formalities set forth in Section 7.05, and the General Partner has recognized those assignees as

substitute limited partners throughout the term of the limited partnership. A consistent course of conduct has thus been established by the general partner and the limited partners waiving the requirements and formalities of Article 7 of the Partnership Agreement.

As alleged in the Verified Complaint,[1] original limited partner Howard Goodman assigned and transferred his entire limited partnership interest to his son, Steven P. Goodman, in and around 2007. This transfer was done without the prior written consent of Two Trees, but nonetheless Two Trees, as General Partner, accepted the assignment, and accepted Steven Goodman as a full substitute limited partner, as evidenced by the issuance of Schedule K-1's to Steven P. Goodman thereafter.

Original limited partner David Keller assigned and transferred his entire limited partnership interest to Three Oaks Associates. This transfer was done without the prior written consent of Two Trees, but nonetheless Two Trees, as General Partner, accepted the assignment, and accepted Three Oaks Associates as a full substitute limited partner, as evidenced by the issuance of Schedule K-1's to Three Oaks Associates.

Original limited partner Dan Lufkin assigned and transferred his entire limited partnership interest to Columbia Ribbon and Carbon Manufacturing Co., Inc. This transfer was done without the prior written consent of Two Trees, but nonetheless Two Trees, as General Partner, accepted the assignment, and accepted Columbia Ribbon as a full substitute limited partner, as evidenced by the issuance of Schedule K-1's to Columbia Ribbon and Carbon Manufacturing Co., Inc.

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[1] The allegations concerning the transfer of these limited partnership interests and the waiver by the general partner are conspicuously not refuted by the defendants. However, even if the allegations were refuted improperly in the reply papers, such refutation would still be legally irrelevant, as all the factual allegations of the Complaint must be deemed to be true.

Further, a currently unknown original limited partner transferred his entire limited partnership interest to The Reginald F. Lewis Trust f/b/o Loida N. Lewis. (the "Trust') This transfer was done without the prior written consent of Two Trees, but nonetheless Two Trees, as General Partner, accepted the assignment, and accepted the Trust as a full substitute limited partner, as evidenced by the issuance of Schedule K-1's to the Trust.

As alleged in the Verified Complaint, Two Trees did not give its prior written consent to the assignment by those Limited Partners to the assignees as required by Section 7.05, but waived the anti-assignment provisions of the Partnership Agreement and recognized the assignees as full substituted limited partners. By reason of its prior course of dealing, it is alleged that Two Trees knowingly relinquished and waived its right of "prior written consent" under Section 7.05 of the Limited Partnership Agreement. Indeed, in its memorandum of law, defendants implicitly concede the truth of the allegations and coyly state that "defendants neither admit nor deny the truth of. . .for the time being.")(Def. Mem. Of Law, p. 13)

As such, deeming all the allegations of the Complaint to be true, including all the allegations regarding the defendants' waiver and course of conduct, Section 7.05 of the Partnership Agreement does not "conclusively establish a defense" to the First and Second Causes of Action alleged in the Verified Complaint, mandating denial of defendants' motion to dismiss.

Defendants argue that the no-waiver clause in the Partnership Agreement precludes any finding of waiver. However, the law is equally well established that 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. *See* Rose v. Spa Realty Assocs., 42 N.Y.2d 338, 343 (1977)("a contractual prohibition against oral modification may itself

be waived"); *TSS-Seedman's, Inc. v. Elota Realty Co.*, 72 N.Y.2d 1024, 1027 (1988)(same); *Bank Leumi Trust Co. of N.Y. v. Block 3102 Corp.*, 180 A.D.2d 588, 590 (1st Dep't 1992)("a contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement. Such waiver may be evinced by words or conduct"); *Akins Waste Materials v. May*, 34 N.Y.2d 422 (1974); *Lee v. Wright*, 108 A.D.2d 678 (1st Dept. 1985). Here, there has been "active involvement" of the general partner in the uniform and consistent waiver of the anti-assignment provisions of the limited partnership agreement (see *Simon & Son Upholstery Inc. v. 601 West Associates LLC*, 268 A.D.2d 359 (1st Dept. 2000), and indeed, it ignored the provisions of the Partnership Agreement by transferring its own general partnership interest without the required vote of the limited partners. It also appears from the public records that the Certificate of Limited Partnership of Morrisania was never amended to include any of the new substitute limited partners, or the substitute general partner as required by law. Partnership Law §113.

It is alleged that throughout its' existence, the course of conduct of the general partner and the reasonable expectations of the limited partners resulted in a clear waiver of the formalities of the assignment provisions contained in the Partnership Agreement, thereby validating and authorizing the assignments and transfers to Eastwood made at arm's length and for valuable consideration.

Finally, as the courts have consistently held, the issue of whether a waiver has occurred is generally an issue of fact for trial. *See Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt, L.P.*, 1 N.Y.3d 96, 104 (2006); *Dice v. Inwood Hills Condominium*, 237 A.D.2d 403 (2d Dep't 1977). As such, the pre-answer or pre-discovery dismissal of any of these claims related to the assignment of the limited partnership interest to Eastwood is clearly premature and the defendants' motion should be denied in its entirety as a matter of law.

B. The Partnership Law Provisions Cited by Defendants Do Not Apply

Defendants argue that Eastwood failed to allege that it complied with the requirements of Partnership Law §108(4) which provides that in order for an assignee to become a full substitute limited partner, it must have obtained the consent of "all the members" of the limited Partnership. (Def. Mem. Of Law, pp. 6-7) They also argue that the Certificate of Formation of Limited Partnership also requires that "all members" consent to an assignment. (Id.) Thus, defendants argue, the complaint is deficient and fails to properly allege a claim. This is wrong as a matter of law.

As stated by the New York Court of Appeals, Partnership Law provisions are default provisions that only "come into play in the absence of an agreement." *Ederer v. Gursky*, 9 N.Y.3d 514 (2007); *Bailey v. Fish & Neave*, 8 N.Y.3d 523 (2007)(provisions of Partnership Law "cannot be implied as part of a partnership agreement so as to make a different contract from that which the parties intended nor override the agreement which the parties, in fact, made."); *Lanier v. Bowdoin*, 282 N.Y. 32 (1939)(partnership law provisions "are applicable only in the absence of an agreement between the partners on the same subject matter" and partners of a general or limited partnership are free to include in their partnership agreement any provisions they wish.); *see also Raymond v. Brimberg*, 99 A.D.2d 988 (1st Dep't 1984)(same).

Here, Article VII of the Partnership Agreement governs the subject matter of transfers of general and limited partnership interests, and additions of new limited partners. Section 7.05 specifically governs the subject matter of an assignment of a limited partnership interest, and 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. Upon such consent, the proposed assignee shall be admitted as a Substituted Limited Partner..." (Exhibit "C" to moving

papers)(emphasis added) Thus, the partners agreed in their Partnership Agreement to override the statutory provisions of Partnership Law 108(4) which states that:

> "(4) An assignee shall have the right to become a substituted limited partner if all the members, except the assignor, consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right." (emphasis added)

Because the parties already provided in Section 7.05 of their Partnership Agreement the method by which an assignee could become a substituted limited partner ("prior written consent of the general partner), the provisions of Partnership Law §108(4), requiring the consent of "all members," do not apply as a matter of law.

As to defendants' contention that the Certificate of Formation of Limited Partnership requires that "all members" consent to an assignment (Def. Mem. Of Law, p.7, ftnote 4), this is false and misleading. The Section referred to by defendants concerns *Additional* Limited Partners, not *Substitute* Limited Partners. An *Additional* Limited Partner is a new partner who must contribute new capital to the partnership, and the method by which Additional Limited Partners may be admitted into the Partnership (as differentiated from Substitute Limited Partners who obtain their interest by assignment and transfer and are not required to contribute new capital), is set forth in Section 7.04 of the Partnership Agreement and requires the consent of "all members." However, Eastwood is not looking to be admitted as a new "Additional Limited Partner" as defendants misleadingly argue, but as a Substitute Limited Partner. Accordingly, defendants' contentions concerning the applicability of the Partnership Law provisions are entirely misplaced and misleading.

As to defendants' arguments that Section 121-101 of the Revised Act is fatal to Eastwood's claims, this argument is meritless as a matter of law. The Revised Act does not apply here, because

Morrisania was formed in 1972, is governed by the Uniform Act, and never adopted the provisions of the Revised Act.

In sum, the First and Second Causes of Action of the Verified Complaint state valid causes of action seeking a declaration that (i) Eastwood is a full Substitute Limited Partner; or (ii) alternatively, that Eastwood is an assignee with all the rights attendant thereto, mandating denial of defendants' motion as a matter of law.

POINT II

AT THE VERY LEAST, AND AT A MINIMUM, EASTWOOD'S SECOND CAUSE OF ACTION VALIDLY SEEKS A DECLARATION THAT AS AN ASSIGNEE, IT IS ENTITLED TO THE ECONOMIC BENEFITS OF THE LIMITED PARTNERSHIP

Eastwood has set forth sufficient facts and allegations to support its Second Cause of Action seeking a declaration that it is, at the very least and at a minimum, an assignee of the economic benefits of the partnership interests.

The law is well settled that partnership interests are personal property and are freely transferrable as such. Partnership Law §§107,108. Section 108(3) of the Partnership Law provides that "An assignee, who does not become a substituted limited partner,. . . is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled." (emphasis added); see also Partnership Law §53 (conveyance by assignor "entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.") Appellate courts of this state have similarly recognized that an assignment of a limited partner's interest without the consent of the general partner as required by the partnership agreement, nonetheless entitles an assignee, such as Eastwood, to receive the economic benefits of its assigned interest and receive the distributions and

allocations of profits and losses to which its assignors would otherwise be entitled. *Rapoport v. 55 Perry Co., et al.*, 50 A.D.2d 54 (1st Dep't 1975); *Wilmot v. Sant*, 244 A.D.2d 980 (4th Dep't 1997); *Whalen v. Gerzof*, 154 A.D.2d 843 (3d Dep't 1989), *aff'd*, 76 N.Y.2d 914 (1990). In each of the above cases the court recognized that an assignee to whom interests are transferred without consent of the general partner is nevertheless entitled to receive the profits of the assigning partner. As the First Department held in *Rapoport* above:

> "The effect, therefore, of the various provisions of the Partnership Law, above discussed, is that unless the parties have agreed otherwise, a person cannot become a member of a partnership without consent of all the partners whereas an assignment of a partnership interest may be made without consent but the assignee is entitled only to receive the profits of the assigning partner." *Id.*

Thus, even if the Court were to find that Eastwood did not sufficiently allege that it is a substitute limited partner (which it is, based on the parties' knowing and intentional course of conduct in waiving the consent of the general partner), nevertheless Eastwood is absolutely entitled to receive its share of the profits or the compensation to which its' assignors would have otherwise been entitled, as a matter of law. Section 2.08 of the Partnership Agreement provides that "the profits and losses of the Partnership. . .shall be allocated to the Partners in the proportion which their respective capital contributions bear to the total capital contributions of all Partners as set out in Section 2.02." Eastwood seeks to declare its rights to its proportionate share of such profits and losses, and any other rights of distribution, as assignee of a majority of the limited partnership interests. Accordingly, defendants' motion seeking to dismiss the Second Cause of Action should be denied in its entirety as a matter of law.

Indeed, it would appear that the plaintiff is entitled to judgment thereon as a matter of law

under these circumstances, as even defendants appear to concede. (See, e.g., Def. Mem. Of Law, p. 8, ftnote. 6; pp. 10-11; p. 16) Defendants therein state that if the assignments are found to be valid, Eastwood would be limited to receiving, at most, an assignment of the economic benefits of the limited partnership interests.[2]

POINT III

EASTWOOD HAS SUFFICIENTLY ALLEGED ENTITLEMENT TO RELIEF ON ITS THIRD CAUSE OF ACTION SEEKING A DECLARATION THAT ITS POWER OF ATTORNEY IS VALID AND FULLY ENFORCEABLE

Eastwood's Third Cause of Action seeks a declaration that the provisions of the Purchase & Sale Agreements (and the Assignment Agreements) which designate Eastwood as the attorney-in-fact for the Former Limited Partners are valid and enforceable. As alleged in the Verified Complaint, in Section 11 of each respective Purchase & Sale Agreements (and in Section 4 of each respective Assignment Agreement), each of the transferring limited partners executed and delivered to Eastwood an appointment of Eastwood as its attorney-in-fact to act in its name and on its behalf as follows:

> "Assignor appoints Assignee as Assignor's attorney-in-fact to act in Assignor's name and on Assignor's behalf for the limited purposes of (a) obtaining from the Partnership all information to which Assignor is entitled and voting on all Partnership matters that require Limited Partner vote, (b) taking any and all action necessary at Assignee's cost for Assignee to be recognized and/or substituted as a limited partner in the Partnership and to enforce, perfect, and fully effectuate the assignment contained in paragraph 1 above

[2] Defendants further argue that even if Eastwood's rights as assignee are recognized, it still would not be entitled to vote or exercise any other rights of a substituted limited partner. However, as established in Points III and IV, infra, this is also incorrect, because it ignores the fact that Eastwood is also the designated attorney-in-fact for each of the assignors with full authority to act on their behalf in all respects.

> and (c) taking any action with respect to the Partnership that the Assignor is entitled to. The aforesaid appointment shall be deemed coupled with an interest so as make it irrevocable and will survive Assignor's death or incompetence. Assignor covenants to act in good faith and cooperate with Assignee in becoming recognized and substituted as a limited partner in the Partnership, which cooperation shall include delivering to Assignee copies of any documentation related to the Partnership in the Assignee's possession, including without limitation, the Partnership Agreement and any amendments, any prospectus or confidential memorandum, any subscription agreements, and any notices or correspondence from the Partnership or its general partners." (Exhibit "A" to Rosenberg Aff.)

Additionally, each of the transferring limited partners confirmed the designation and appointment of Eastwood by letter addressed to the limited partnership which stated:

> "This letter is to instruct Morrisania Associates (the "Partnership") to forward all correspondence regarding the Partnership to Eastwood Investors V, LLC, at The Pilot House, Lewis Wharf, Boston Massachusetts, 02110, Attention Anthony A. Nickas. Any and all distributions should be made payable to Eastwood Investors V, LLC and sent to the aforementioned address." (Exhibit "A" to Rosenberg Aff.)

The Partnership Agreement contains no prohibition which prevents a limited partner from appointing an agent and/or attorney-in-fact, or from acting through its agent and/or attorney-in-fact. Accordingly, regardless of whether Eastwood is entitled to be admitted into the partnership as a substitute limited partner, Section 11 of each respective Purchase & Sale Agreement, and the corresponding Section 4 of each Assignment Agreement, is valid and fully enforceable as a matter of law. *See* Rice v. Novello, 25 A.D.3d 992 (3d Dept. 2006)("To the extent permitted by law and the terms of the Power of Attorney, an attorney-in-fact may act for her principal in all matters that do not require the principal to act for himself.")

Significantly, nowhere in the defendants' brief does it refer to, discuss, or address the power of attorney granted to Eastwood. This is because it recognizes that the power-of-attorney gives Eastwood broad powers to act and to assert the rights of the assignors. Indeed because it completely failed to address this cause of action, and cannot remedy its failure for the first time on reply, the Third Cause of Action cannot be dismissed as a matter of law. Accordingly, defendants' motion seeking to dismiss the Third Cause of Action should be denied as a matter of law.

POINT IV

EASTWOOD HAS STANDING TO BRING THIS ACTION AS ATTORNEY-IN-FACT AND/OR AGENT FOR THE TRANSFERRING LIMITED PARTNERS

Defendants argue that if Eastwood has no recognizable rights as a substitute limited partner or as assignee, it therefore has no standing to assert its other causes of action seeking, *inter alia*, declaratory, monetary, and injunctive relief. Even assuming *arguendo* that Eastwood is not a full Substitute Limited Partner (which it is), it nonetheless 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 – a significant if not dispositive term of the Purchase & Sale Agreements which is entirely ignored by the defendants in their moving papers.

"[A]n attorney-in-fact may act for her principal in all matters that do not require the principal to act for himself." *Rice v. Novello*, *supra*. It has been specifically recognized that an attorney-in-fact may act on behalf of its principal to enforce rights under a partnership agreement. *Zaubler v. Picone*, 100 A.D.2d 620 (2d Dep't 1984). There, the Appellate Division affirmed the denial of the defendants' motion to dismiss which was based on a claim that the plaintiff lacked standing to bring an action based on a power of attorney granted by a partner. As the Court held:

> "An attorney in fact is essentially an alter ego of the principal and is authorized to act with respect to any and all matters on behalf of the principal with the exception of those acts which, by their nature, by public policy, or by contract require personal performance. . .Sections 5-1502A through 5-1502L of the General Obligations Law describe and explain the extraordinary scope of the authority of an attorney in fact with respect to the principals various matters, including the principal's business affairs. . .; banking transactions. . .; and real estate transactions. . .Most significantly, section 5-1502H of the General Obligations Law, inter alia, authorizes an attorney in fact to assert and to prosecute any cause of action or claim which the principal may have against any individual or partnerships." (emphasis added)(internal citations omitted)

Thus, a partner's attorney-in-fact is authorized, absent any indication to the contrary in the partnership agreement, to do a broad array of acts, including instituting an action on behalf of his principal. It is apparent that such a result is contemplated by section 63 of the Partnership Law which directs a court to decree a dissolution upon an appropriate application made "by or for" a partner. Partnership Law §63(1).

Here, the power of attorney is very broad, and authorizes Eastwood to act for the purposes of "(a) obtaining from the Partnership all information to which Assignor is entitled and voting on all Partnership matters that require Limited Partner vote, (b) taking any and all action necessary at Assignee's cost for Assignee to be recognized and/or substituted as a limited partner in the Partnership and to enforce, perfect, and fully effectuate the assignment contained in paragraph 1 above and (c) taking any action with respect to the Partnership that the Assignor is entitled to."

The Fifth Cause of Action seeks a declaration that the purported transfer and assignment of the general partnership interest by Two Trees to Two Trees Management LLC is void and invalid

as a matter of law.[3] The Sixth Cause of Action seeks damages for breach of the covenant of good faith and fair dealing.[4] The Seventh Cause of Action seeks the removal of Two Trees as general partner of Morrisania for cause. The Eighth Cause of Action seeks dissolution of the Limited Partnership. The Ninth Cause of Action seeks various injunctive relief. The Tenth Cause of Action seeks to compel the inspection of the books and records of the Limited Partnership. And finally, the Eleventh Cause of Action seeks an accounting.

Because each limited partner would be entitled to seek the relief alleged in the Complaint, Eastwood, as each limited partners's attorney-in-fact, has standing to assert all such claims, including asserting each limited partner's right to seek removal of the General Partner, seek dissolution, and/or sue for a breach of the implied covenant of good faith and fair dealing.

It is anticipated that in reply, defendants will argue that because the assignment of the limited partnership interests are allegedly invalid (even though they are not), then the entirety of the Assignment Agreements and/or Purchase & Sale Agreements entered into between Eastwood and each of the limited partners is void. This is demonstrably false. Section 14 of each Purchase & Sale Agreement ("Miscellaneous") specifically states:

> "If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid, illegal or unenforceable to any extent, the remainder of

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[3] This claim is based on documentary evidence, showing that Two Trees purported to assign its general partnership interest to Two Trees LLC without following the formal requirements of the Partnership Agreement which requires the written consent of 75% of the limited partners.

[4] It is well settled that a general partner owes a fiduciary duty to its limited partners and must act in good faith. AFBT-II, LLC. v. Country Village on Mooney Pond, 305 A.D.2d 340 (2d Dep't 2003)("Within every contract is an implied covenant of good faith and fair dealing . . .Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion. . .Moreover, Mooney Pond, as the general partner, was bound in a fiduciary relationship with the plaintiff, the limited partner, and, thus, obligated to deal fairly with the plaintiff.")(internal citations omitted); *Drucker v. Mige Associates II*, 225 A.D.2d 427 (1st Dep't 1996)

> this Agreement and the application thereof shall not be affected and shall be enforceable to the fullest extent permitted by law. . . .If any provision of this Agreement, or the application of any provision to any persons or circumstances is invalid or unenforceable to any extent, then only that provision or application shall be modified to achieve the closest legal intent of the parties, with the remaining provisions fully valid and in force." (Exhibit "A" to Rosenberg Aff)(emphasis added)

Thus, even if the Court were to ultimately find that the assignments were invalid (which they are not), the provisions of the Purchase & Sale Agreements are severable and only the provisions concerning an assignment of the limited partnership interest would be deemed invalid. However, 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.

Defendants string cite to a number of cases for the proposition that a person who is not a limited partner, additional limited partner, or substituted limited partner has no standing to assert claims against a limited partnership. (Def. Mem. Of Law, p.14) These cases are completely inapplicable for two reasons. First, all of them (with the exception of one) were decided on the basis of Partnership Law §115-a which provides that a *derivative action* against a limited partnership must be brought by a limited partner, additional limited partner, or substituted limited partner. Here, Eastwood is not suing derivatively in the right of Morrisania and thus, the requirements of Section 115-a are completely inapplicable.

Second, not one of these cases involved a case where the partner (whether general, limited, additional, or substituted) had given a power of attorney to a third party with full, broad rights to act on behalf of the principal. Thus, these cases are totally inapplicable. For example, in *Balme v Satterwhite*, 190 A.D.2d 633 (1st Dep't 1993), a decision rendered on a summary judgment motion

and not a motion to dismiss, the Court held that where a general partner had been removed as general partner, he had no standing to file a complaint against the partnership. Similarly, in *Levine v Murray Hill Manor Co.*, 143 A.D.2d 298 (1st Dep't 1988), the Court held at the summary judgment stage that a mere assignee of a limited partners' right to distributions had no standing to assert a derivative claim against the partnership because he was not "a limited partner or an additional limited partner or a substituted limited partner." In *Stark v Goldberg*, 297 A.D.2d 203 (1st Dep't 2002), the plaintiff was both a limited and general partner of the limited partnership and as such, had the powers of general partners, except as to the valuation of their interests as limited partners. However, none of the other limited partners joined in the derivative action, even though the law requires that a derivative action against a limited partnership be brought by at least one person having such status, both at its commencement and at the time of the transaction complained. And finally, in *Sterling v Minskoff*, 226 A.D.2d 125 (1st Dep't 1996), again this was a derivative action and the Court found the plaintiff, who was not a partner, had no standing to sue. Once again, the plaintiff in this case, among other things, did not have a power-of-attorney designating his right to act on behalf of the limited partners, as Eastwood holds here. Accordingly, the defendants' arguments to the effect that Eastwood has "no standing" are meritless and defendants' motion be denied in its entirety as a matter of law.

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court deny defendants' motion in its entirety, as a matter of law, and grant plaintiff such other, further and different relief as to the Court may seem just and proper. Additionally, to the extent the Court finds any part of the Verified Complaint to be deficient in any respect, Eastwood respectfully requests leave to replead.

Dated: Garden City, New York
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Respectfully submitted,

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