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JASON H. BERLAND, ESQ.
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

APPELLATE NO.: 2023-05964

KAROLINE MOLBERG as Executor of the ESTATE OF ERIK MOLBERG, individually and derivatively on behalf of PHOENIX HOLDCO LP, and BLUE BEAR LTD.,

Plaintiffs-Respondents,

—against—

PHOENIX CAYMAN LTD. and VISHAL GARG,

Defendants-Appellants,

BRIEF FOR DEFENDANTS-APPELLANTS

Jason H. Berland
Nathan Schwartzberg
1/0 CAPITAL, LLC
1 World Trade Center, 85th Floor
New York, New York 10007
jason@onezerocapital.com
nathan@onezerocapital.com

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Attorneys for Defendants-Appellants

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Defendants-Appellants Phoenix Cayman Ltd. ("Phoenix Cayman") and Vishal Garg (together, "Defendants") respectfully submit this memorandum of law in support of their appeal of the trial court's October 18, 2023 order denying Defendants' motion to dismiss Plaintiffs-Respondents Blue Bear Ltd. ("Blue Bear") and Karoline Molberg's (together, "Plaintiffs") Complaint pursuant to CPLR §§ 3211(a)(1) and (a)(7).

PRELIMINARY STATEMENT

The underlying action is the latest attempt by Ms. Molberg[1] and other limited partners ("LPs") in Phoenix Holdco Ltd. (the "Partnership") to try to obtain additional money from Mr. Garg beyond the substantial returns they already have received, and beyond that to which they could conceivably be entitled as investors in the Partnership. It is, in essence, an attempt to collaterally attack another litigation that is not going well for an overlapping group of plaintiffs.

Since 2020, Ms. Molberg and three other LPs have been using a separate action, *Black, et al. v. Phoenix Cayman Ltd., et al.*, Index No. 652460/2020 ("*Black*"), to try to extract money from Mr. Garg to which they have no conceivable right—using burdensome discovery requests, manufactured discovery disputes, baseless assertions of discovery misconduct, and repeated applications to extend discovery as weapons

[1] Karoline Molberg is the executor of the estate of Erik Molberg, who was a Limited Partner ("LP") in Phoenix Holdco Ltd. A-30 at ¶ 14. For ease of reference, she is referred to herein as a LP.

to try to achieve their unjust ends. After years of litigation, the LPs' efforts to expand discovery in *Black* reached a dead end. The *Black* court commented at a March 1, 2023 conference that "the plaintiff[s] [are] needlessly protracting the discovery process in this 2020 case." A-811-12[2]; *see also* A-803; A-808 ("the Court is satisfied that some or most of the discovery issues . . . are occasioned by the plaintiff[s'] lack of diligence"). Thereafter, the LPs were forced to abandon their strategy and file the Note of Issue. The record in *Black* supports what Mr. Garg has said all along: the plaintiff LPs have received the Partnership money to which they are entitled and more—two times their initial investment plus an 8% preferred return. Now, after years of scorched-earth litigation, all the plaintiff LPs have to show for it is a material dispute over whether they are entitled to an allocation of an additional $36,364 collectively (less than $10,000 each). A-842 at ¶ 70–72.

With the LPs' prospect of being able to use *Black* to achieve an undeserved windfall extinguished, the LPs devised a new scheme: (i) manufacture a contrived claim that Phoenix Cayman (the Partnership's "General Partner") breached its obligation under the Partnership's governing agreement (the "LP Agreement") to provide the LPs with certain recent financial statements (which, under the circumstances, any reasonable investor would find immaterial), and (ii) use the manufactured claim to try to force Phoenix Cayman's removal as the General Partner

[2] Citations to "A-" refer to Defendants' Appendix filed with this brief.

in favor of a new general partner, Blue Bear, controlled by the LPs.

The LPs seek to do this as a means to stop Mr. Garg from causing the General Partner to pay incurred expenses and other fees that are due to him, as well as individuals or entities associated with him, for the money they invested and the work they performed in furtherance of the Partnership—which enabled the Partnership to obtain substantial returns. That work has included the General Partner operating the Partnership since 2018 without receiving any of the remuneration, in the form of distributions or otherwise, to which it is entitled. The LPs want to replace the General Partner so that, instead, they can direct Blue Bear to pay the money to themselves. *See* A-762 (seeking an order, simultaneous with the filing of the Complaint, preliminarily enjoining Mr. Garg from causing the General Partner to pay any "expenses to any vendors that are [] related parties to the Defendants").

But the new scheme suffers from a fatal legal defect: in seeking to effectuate the removal of Phoenix Cayman based on a purported "knowing, willful and material breach" of the LP Agreement, the LPs failed to comply with the express requirement of the LP Agreement that they provide Phoenix Cayman with "a notice from the Partnership with respect to such breach" sufficient to trigger the LP Agreement's 30-day "cure[]" period. A-177 (LP Agreement, § 6.1(d)) A-214 (LP Agreement, "Cause" definition). Instead, Ms. Molberg intentionally sent a letter to Phoenix Cayman, dated April 28, 2023, that did everything it could to avoid suggesting that it was meant to be

"a notice from the Partnership with respect to such [a] breach" (the "Molberg Letter"). *See* A-225.

On September 22, 2023, Defendants moved to dismiss the Complaint on these very grounds (the "Motion"). During an October 18, 2023 hearing—at which the trial court did not hear argument from either party on the Motion, A-16-25—and in a written order issued on October 20, 2023 (the "Order"), A-12-14, the trial court summarily denied the Motion. Defendants respectfully submit that the trial court erred for several reasons.

First, the trial court disregarded well-settled law that parties to a contract must adhere strictly to that contract's notice provisions. In failing to apply that law, the trial court improperly discredited (and, indeed, failed to address completely) Defendants' contention that the Molberg Letter was not "from the Partnership," as required by the LP Agreement, and therefore deficient. The trial court erred when it disregarded, among other things, that the Molberg Letter contains *none* of the contractually necessary language to suggest it was "from the Partnership" (it begins "I write," is signed "Karoline Molberg, Executor of the Estate of Erik Molberg," and contains no suggestion that it was sent on behalf of anyone other than Ms. Molberg in her capacity as executor of the estate of her father). Instead, the trial court—applying inapposite case law—considered "attendant circumstances" to conclude broadly that the Molberg Letter provided adequate notice. Even considering those "attendant circumstances,"

however, the trial court had no plausible basis to conclude that the Molberg Letter was, as required, "from the Partnership."

Second, also in the face of controlling case law compelling strict adherence to the terms of the LP Agreement, the trial court summarily concluded that the Molberg Letter "sufficiently identified the existence of a breach of the LP [Agreement]." However, there was likewise no plausible basis to reach that conclusion because the Molberg Letter does not contain *any* language suggesting that it was alleging a "knowing, willful and material breach" of the LP Agreement that would trigger the "cure[]" period, and from which drastic consequences (*i.e.*, a "Cause" removal) could flow. Indeed, the Molberg Letter was bereft of even a single term to suggest that it was intended to be a "notice" of a supposed "knowing, willful and material breach" of the LP Agreement (such as "notice," "breach," "knowing," "willful" or "material"). The Molberg Letter was, at most, a document demand. The trial court's consideration of "attendant circumstances," which was in any event improper, cannot reasonably compel a different finding.

Under these circumstances, when a communication fails to comply strictly with the requirements of a contractual notice provision—particularly when, as here, the notice provision includes an opportunity to cure and the consequences of a failure to cure would be the loss of valuable contractual right—courts find the notice requirement not met. Because the Molberg Letter does not come close to satisfying

the notice requirements under the LP Agreement, the trial court should have concluded that Ms. Molberg's and the other LPs' effort to remove the General Partner and replace it with Blue Bear was invalid, and that Plaintiffs therefore have no viable claims. Accordingly, this Court should reverse the trial court's Order and dismiss the Complaint.

QUESTIONS PRESENTED

1. Whether the Complaint should be dismissed because the Molberg Letter was not "from the Partnership" pursuant to the LP Agreement's notice provision, and therefore was a defective notice that failed to trigger the cure period.

Answer: It is respectfully submitted that the Court answer this question in the affirmative.

2. Whether the Complaint should be dismissed for the additional reason that the Molberg Letter did not identify a supposed "knowing, willful and material breach" pursuant to the LP Agreement's notice provision, and therefore was a defective notice that failed to trigger the cure period.

Answer: It is respectfully submitted that the Court answer this question in the affirmative.

STATEMENT OF FACTS[3]

The Partnership is a Cayman Islands limited partnership whose General Partner is Phoenix Cayman. A-26 at ¶ 1. Mr. Garg is a director of both the Partnership and the General Partner, and controls both entities. A-31 at ¶ 17. Ms. Molberg and other LPs invested in the Partnership pursuant to the LP Agreement. A-32 at ¶ 20, A-35 at ¶ 30. The LPs collectively have only a 25% interest in the Partnership, and thus the interest of Ms. Molberg and the other subset of LPs seeking to remove the General Partner is even less than that. *See* A-174-75 (LP Agreement at § 5.1). The General Partner, by contrast, has a 75% interest. *Id.*

As relevant here, under the LP Agreement, the General Partner is required to distribute certain financials to the LPs unless it would be "commercially [un]reasonable" for it to do so. *See* A-181-82 (LP Agreement at § 8.2). The LP Agreement provides in relevant part: "The General Partner shall *use commercially reasonable efforts* to distribute to the Partners (i) Within 60 days after the end of each Fiscal Year of the Partnership, a written annual report containing the financial statements of the Partnership for such Fiscal Year audited by KPMG LLP or such other accounting firm of similar national recognition [and] (ii) Within a reasonable time after the end of each quarter of a Fiscal Year of the Partnership, a report containing

[3] The factual allegations set forth herein are drawn from the Complaint, A-26-50, and the documents attached thereto or expressly referenced therein. Although many factual allegations are disputed, they are presumed true for purposes of this appeal.

information regarding the quarterly income, expenses and financial position of the Partnership." *Id.* (emphasis added).

The LP Agreement further provides that the General Partner can be removed only for "Cause." A-177 (LP Agreement at § 6.1(d)(i)(B)). As relevant here, a "Cause" removal can occur only if the General Partner "has committed a knowing, willful and material breach of this Agreement that is not cured within 30 days after the General Partner's receipt of a notice from the Partnership with respect to such breach." A-177, A-214 (LP Agreement at § 6.1(d), Schedule 1-3).

On April 28, 2023, Ms. Molberg sent to the General Partner the letter that she and the other LPs seeking to remove the General Partner now claim constituted "a notice from the Partnership with respect to [a knowing, willful and material] breach" that was sufficient to trigger the duty to "cure[,]" *i.e.*, the Molberg Letter. A-225-26. Nowhere does the Molberg Letter, however, assert that a "knowing, willful and material breach" had occurred, much less give the General Partner "notice" of such a supposed breach or that Ms. Molberg (or other LPs) would take the position that the "cure[]" period had been initiated. Indeed, none of the key terms that objectively would signal an intent to give such a notice appears anywhere in the Molberg Letter: "notice," "breach," "knowing," "willful," "material," or "cure." *See id.* Nor does the Molberg Letter suggest that it was sent "from the Partnership." On its face, it states that it was sent by a single individual, Ms. Molberg, in her capacity as "Executor of

the Estate of Erik Molberg," in order to make a "demand" for certain documents—not to give notice of a breach sufficient to trigger the contractual cure period. *See id.*

Accordingly, the stated and apparent purpose of the Molberg Letter was to make a demand on behalf of a single LP: that the General Partner provide Ms. Molberg, in her capacity as the executor of the estate of her father, with the specific financials identified in the Molberg Letter (*i.e.*, audited financials and a Schedule K-1 for fiscal year 2021, as well as quarterly financials for 2022 and the first quarter of 2023). A-226. That reading is consistent with the Molberg Letter's title ("Demand for Audited Financials"), introductory sentence ("I write . . ."), and signature block ("Karoline Molberg, Executor of the Estate of Erik Molberg"). A-225-26. The reading also is consistent with the absence in the Molberg Letter of any assertion that the prior non-provision of the requested financials constituted a "breach" of the LP Agreement, much less "a knowing, willful and material breach" that was sufficient to trigger the "cure[]" period. *See* A-214 (LP Agreement at Schedule 1-3). Indeed, the Molberg Letter failed even to address the standard that governs whether a breach of the requirement to provide financials has occurred (*i.e.*, the "commercially reasonable efforts" standard).

Within days of receiving the Molberg Letter, the General Partner also received an email from Mr. Garg's former (but now estranged) business partner, Raza Khan, on which he copied all LPs and in which he made various false assertions about the

Partnership and Mr. Garg (as he has done many times in the past). A-229. Despite the fact that the Molberg Letter fell short of the contractual notice requirements, the General Partner responded to both communications at the same time, and as to the Molberg Letter, explained that the external auditor that had prepared the Partnership's audited financials for fiscal year 2020 had resigned (after having been acquired by another firm) and that the General Partner was working to retain a new firm. A-228-29. The General Partner concluded by stating that as soon as a new firm had been engaged, it would provide an update for when the audited financials for 2021 and 2022 would be available. *Id*.

Notwithstanding the General Partner's response, on June 5, 2023, a subset of the LPs executed a "Removal Resolution" that purported to remove Phoenix Cayman as General Partner and replace it with an entity that they control, Blue Bear. A-47-48 at ¶¶ 68–70. As the basis for removal, the Removal Resolution (i) claimed that the General Partner had violated its obligation to distribute to the LPs annual audited financials for 2021, and quarterly financials for 2020-22, and the first quarter of 2023, and (ii) cited the Molberg Letter as the required "notice from the Partnership with respect to [the supposed] breach." *See* A-246 at 1(i).

Upon receipt of the Removal Resolution, by emails dated June 6 and June 14, 2023, the General Partner promptly advised Blue Bear that the Removal Resolution was null and void, including because (i) under the circumstances, the General Partner

had not violated its obligation to "use commercially reasonable efforts to distribute" the requested financials, and (ii) the cited notice was defective. A-48 at ¶ 72; A-235-41.

With respect to the requested financials, the General Partner explained that the delay in distributing such financials was not "commercially [un]reasonable" or a "knowing, willful and material breach" for a variety of reasons, including because since 2020, no external money has come into the Partnership, the Partnership therefore has relied entirely on cash infusions from the directors of the General Partner (primarily Mr. Garg) to continue to operate, and rather than spending the Partnership's scarce funds on preparing financials that would not have been material to any reasonable investor (because such financials would not have reflected information materially different from that which was reflected in the 2020 financials), such funds were used for more important purposes, including to continue to pursue recovery for the potential benefit of the Partnership in *U.S. Bank National Association, et al. v. Triaxx Asset Management LLC*, *et al.*, 18-cv-4044 (S.D.N.Y.). *See* A-239-40.

With respect to the notice requirement, the General Partner cited the same defects discussed herein: that it did not purport to be a "notice from the Partnership with respect to [a knowing, willful and material] breach," and instead constituted a demand on behalf of a single LP for certain financials that (for valid reasons) had not yet been provided. *See* A-235-36.

In addition to addressing the defects in the purported Removal Resolution—and as a stand-in for the commercially unreasonable financials that the LPs were seeking—the General Partner also responded to the Removal Resolution by providing monthly bank statements and balance sheets for the Partnership and its two subsidiaries for 2021, 2022, and the first quarter of 2023—beyond the period covered by the Molberg Letter. *See* A-45 at ¶ 61; A-294 (Email to LP's Dated June 7, 2023, Attaching Partnership's 2021-22 Bank Statements); A-3692 (Email to LPs Dated June 9, 2023, Attaching 2020 Bank Statements); A-409 (Email to LPs Dated June 27, 2023, Attaching 2023 Bank Statements and Balance Sheets for 2020-23).[4]

On September 22, 2023, Defendants moved to dismiss the Complaint on the grounds that the Molberg Letter did not comply with the express requirements of the LP Agreement, and thus did not trigger the cure period, because it (i) was not "from the Partnership" (ii) did not identify a purported "knowing, willful and material breach." A-274. After the Motion was fully briefed, the trial court scheduled an October 18, 2023 oral argument on the Motion and Plaintiffs' then-pending motion for a preliminary injunction (the "Hearing"). At the outset of the Hearing, the trial court

[4] These emails, from an authorized representative for Phoenix Cayman to the LPs attaching bank statements and balance sheets, properly were before the trial court, and now this Court, because Plaintiffs reference the correspondence in the Complaint. Specifically, Plaintiffs allege that Phoenix Cayman sent bank statements to the LPs. *See* A-45 at ¶ 61. Thus, because the emails are "documents referenced in [the] complaint" the Court may consider them. *See Alliance Network, LLC v. Sidley Austin LLP*, 987 N.Y.S.2d 794, 798 n.1 (Sup. Ct. N.Y. Cnty. 2014).

stated, "[t]here's a motion to dismiss which won't be heard, if at all, until next month." A-18:14-15. After the parties argued their positions as to Plaintiffs' preliminary injunction motion, but before either party could address the Motion, the trial court ruled on the Motion as follows: "[t]he motion to dismiss is denied because there are disputed issues of fact." A-24:21-22. On October 20, 2023, two days after the Hearing, the trial court issued a two-and-a-half page written order denying the Motion (the "Order"), summarily concluding that the Molberg Letter "sufficiently notified defendants that the contractual cure period was being triggered." A-13. The Order pointed to a disputed issue of fact only as to "whether the purported breach identified in the [Molberg Letter] was 'knowing, willful, or material,'" A-14, but did not identify what the alleged breach was. The Order did not address in any manner Defendants' other principal contention that the Molberg Letter was deficient because it was not "from the Partnership."

ARGUMENT

The purported Removal Resolution—and the LPs' attempt to force the removal of Phoenix Cayman as the General Partner in an admitted effort to stop Mr. Garg from causing the General Partner to pay incurred expenses and other fees that are due to him and individuals or entities associated with him for money they invested and work they performed in furtherance of the Partnership—fails for a variety of reasons, which the trial court overlooked in the face of controlling case law and documentary evidence

compelling dismissal. The trial court should have dismissed this action at the pleadings stage for the straightforward reason that the Molberg Letter does not qualify as a "notice from the Partnership with respect to [a knowing, willful and material] breach" of the LP Agreement that was sufficient to trigger the LP Agreement's contractual "cure[]" period.

I. Standard of Review

This Court conducts *de novo* review of decisions on a motion to dismiss, permitting it to make an independent judgment without giving any deference to conclusions made by the Supreme Court. CPLR § 5501(c); *see, e.g.*, *N. Westchester Prof'l Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983) (noting appellate review "is as broad as that of the trial court" on a motion to dismiss)*; Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 81 (1st Dep't 2022). Under CPLR § 3211(a)(7), dismissal is appropriate where the court determines that the pleading fails to state a cause of action. N.Y. CPLR § 3211(a)(7); *Jason v. Chusid*, 172 A.D.2d 172, 173 (1st Dep't 1991). Further, it is well-settled courts must discount bare legal conclusions and factual claims. *RTW Retailwinds, Inc. v. Colucci & Umans*, 213 A.D.3d 509, 510 (1st Dep't 2023); *JFK Holding Co., LLC v. City of New York*, 68 A.D.3d 477, 477 (1st Dep't 2009). Under CPLR § 3211(a)(1), dismissal is appropriate where the "documentary evidence utterly refutes" plaintiff's factual allegations, establishing a defense as a matter of law. *Offshore Expl. & Prod., LLC v. De Jong*

Cap., LLC, 225 A.D.3d 427, 428 (1st Dep't 2024).

II. The Trial Court Erred in Disregarding That Notice Requirements Are Strictly Enforced and Any Violation, However Trivial, Will Result in a Finding of Inadequate Notice

The LP Agreement states that Phoenix Cayman can be removed as General Partner only upon "a knowing, willful and material breach of [the] Agreement *that is not cured within 30 days after [Phoenix Cayman's] receipt of a notice from the Partnership with respect to such breach*." A-214 (LP Agreement at Schedule 1-3) (emphasis added); *see also* A-177 (LP Agreement at § 6.1(d)).

A contract must be "enforced according to its terms." *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990); *Mod. Art Servs., LLC v. Fin. Guar. Ins. Co.*, 161 A.D.3d 618, 620 (1st Dep't 2018) (affirming trial court's grant of motion to dismiss and finding that the parties' contract must be "enforced according to its terms").[5] In the context of provisions like the above-quoted termination provision here (*i.e.*, provisions through which contractual rights can be lost), when "contracting parties agree on a termination procedure, the procedure will be enforced as written." *E. Empire Constr. Inc. v. Borough Constr. Grp. LLC*, 200 A.D.3d 1, 5 (1st Dep't 2021). Moreover, when, as here, the notice provision provides an opportunity to cure, "in order for a notice of [an alleged] breach to be effective, it must 'objectively' put the

[5] The LP Agreement provides that it is to be construed pursuant to Cayman Islands law, A-192 (LP Agreement at § 12.8), which is not meaningfully different from New York law. *See Wilson v. Dantas*, 173 A.D.3d 460, 460 n.* (1st Dep't 2019).

allegedly breaching party on 'notice that a cure period [is] being triggered' and that 'drastic legal repercussions' will result from a failure to cure." *In re 4Kids Entmn't, Inc.*, 463 B.R. 610, 685 (Bankr. S.D.N.Y. 2011) (quoting *Gil Enters., Inc. v. Delvy*, 79 F.3d 241, 246 (2d Cir. 1996)); *see Filmtrucks, Inc. v. Express Indus. & Terminal Corp.*, 127 A.D.2d 509, 510-11 (1st Dep't 1987) (holding that letter provided insufficient notice where it did not refer to the termination provision of the contract or advise of 60-day cure period). Notices are closely scrutinized when, as here, failure to cure results in forfeiture, "and any inadequacy—be it trivial or material—will defeat such party's claim." *In re 4Kids Entmn't, Inc.*, 463 B.R. at 684.

III. The Molberg Letter Failed to Provide Adequate Notice of the Supposed Breach, and the Trial Court Erred in Concluding Otherwise

Here, the trial court failed to enforce the LP Agreement according to its terms. The Molberg Letter fails to satisfy the LP Agreement's notice provision both because (i) it does not purport to be (and cannot plausibly be read as) a notice "from the Partnership," and (ii) it does not purport to provide "notice" to Phoenix Cayman of anything, let alone that it supposedly committed "a knowing, willful and material breach" of the LP Agreement that, if "not cured within 30 days" would provide a basis for a "Cause" removal.

A. The Molberg Letter is Not "From the Partnership"

The Molberg Letter cannot serve as proper notice under the LP Agreement because it does not purport to be "from the Partnership," but instead from the

representative of a single LP and sent on behalf of that single LP. As Defendants contended in their Motion papers before the trial court, no other LP was a signatory, copied, or even referenced. Nor does the Molberg Letter contain any language that could plausibly be read as signaling that it was "from the Partnership." It begins "I write," is signed "Karoline Molberg, Executor of the Estate of Erik Molberg," and in between, lacks language suggesting that it was from anyone other than Ms. Molberg acting in her capacity as executor of her father's estate. A-225-26. Had Ms. Molberg wanted, she could have sent a letter "from the Partnership," including by beginning the letter "I write on behalf of Phoenix Holdco" or signing the letter "Karoline Molberg, Executor of the Estate of Erik Molberg, on behalf of Phoenix Holdco." Ms. Molberg chose not to do so, presumably to try to hide the letter's true purpose and manufacture a purported uncured breach of the LP Agreement.

When, as here, the requirements of a notice provision are not strictly followed, the supposed "notice" is invalid. *See, e.g.*, *Siegel v. Kentucky Fried Chicken of Long Island*, 67 N.Y.2d 792, 792–94 (1986) (notice invalid where it was not signed by the contractually-required individual); *E. Empire*, 200 A.D.3d at 7 (notice invalid where defendant failed to strictly follow procedure specified in contract); *Luxoticca Grp. S.p.A. v. Bausch & Lomb Inc.*, 160 F. Supp. 2d 545, 551 (S.D.N.Y. 2001) (same).

The trial court's Order did not address this dispositive defect. Instead, it appeared to look to "attendant circumstances"—*i.e.*, "the multiple correspondences

from limited partners requesting the financials at issue, the ongoing [*Black*] lawsuit . . . , and the fact that the April 28, 2023 correspondence was imperative in its demand for the documents and the cited basis for these documents," A-13—to arrive at the broad conclusion that the Molberg Letter provided adequate notice.

Preliminarily, in support of its decision to look to "attendant circumstances" to "determine whether a preliminary notice is sufficient," the trial court cited only this Court's decision in *D.K. Property, Inc. v. Mekong Restaurant Corp.*, 187 Misc.2d 610 (1st Dep't 2001). A-13. Importantly, *D.K. Property*, the relevant decision to which *D.K. Property* cites (*Hughes v. Lenox Hill Hosp.*, 226 A.D.2d 4, 17 (1st Dep't 1996)), and virtually all the subsequent decisions citing to *D.K. Property* are limited to the context of lease-related notices in landlord-tenant disputes. Neither Plaintiffs nor Defendants cited to *D.K. Property* in their Motion papers or referenced the "attendant circumstances" standard for which it stands. The trial court fundamentally erred in applying that factually inapposite standard here.

Even if the trial court could have properly looked to "attendant circumstances" to assess the adequacy of the Molberg Letter, such circumstances do not abolish the error that compels dismissal: the Molberg Letter is not "from the Partnership." First, the correspondences to which the Order refers were, like the Molberg Letter, communications from certain LPs in their *individual capacities*, also merely requesting the financials at issue. A-464-65. None were, as required under the LP Agreement,

"from the Partnership." Even if it were proper to consider these emails in tandem with the Molberg Letter for purposes of assessing whether the Molberg Letter was "from the Partnership," the two emails and the Molberg Letter are, collectively, only from three of the fifteen total LPs. They do not, as they cannot, aggregate to a single notice "from the Partnership." Second, the mere existence of the *Black* case—an action that, notably, was commenced by only four of the fifteen total LPs, and whose allegations pre-date the Molberg Letter—or that the Molberg Letter demanded documents and the basis therefor, likewise cannot plausibly render the Molberg Letter as being "from the Partnership."

Plaintiffs' unsupported, post-hoc assertion that the Molberg Letter was "for the benefit of the Partnership," A-29 at ¶ 7, cannot magically convert the Molberg Letter into something that, from the face of the document, it plainly was not: a "notice from the Partnership." Even if it were sufficient (which it is not, pursuant to the clear terms of the LP Agreement) for the Molberg Letter to be for the "benefit of"—instead of "from"—the Partnership, the Molberg Letter does not include language indicating such. That the Molberg Letter's re: line states, "Phoenix Holdco LP – Demand for Audited Financials from Phoenix Cayman," and that its first paragraph states, "I [*i.e.*, Ms. Molberg] write regarding the books, records, financial statements and other reports of Phoenix Holdco LP," does not suggest that Ms. Molberg was writing for the benefit of the Partnership, as opposed to for the benefit of her father's estate. A-225.

Both uses of "Phoenix Holdco" simply identify the entity whose records the Molberg Letter was requesting, not for whose benefit the letter was being sent.

For the foregoing reasons, even setting aside the trial court's failure to address that the Molberg Letter was not "from the Partnership," none of its reasoning in the Order plausibly supports that Plaintiffs complied with this key notice requirement. The purported notice was not "from the Partnership," the purported Removal Resolution is thus defective and invalid, and—for this reason alone—this Court should reverse the trial court's Order and dismiss the Complaint.

B. The Molberg Letter Is a Document Demand, Not a Notification of a Supposed "Knowing, Willful, and Material Breach"

In addition to being from a single individual, nothing about the Molberg Letter plausibly can be read as suggesting that it was meant to provide "notice" of a "knowing, willful and material breach" that if "not cured within 30 days" would provide a basis for a "Cause" removal. *See* A-214 (LP Agreement at Schedule 1-3). The trial court's conclusory, erroneous ruling that the Molberg Letter "sufficiently identified the existence of a breach of the LP [Agreement]" does not change that. A-14.

The Molberg Letter does not contain any language suggesting that it was alleging a "knowing, willful and material breach" of the LP Agreement that would trigger the "cure[]" period and from which drastic consequences (*i.e.*, a "Cause" removal) could flow—such as the words "notice," "breach," "knowing," "willful,"

"material," "cure," "cause" or "removal." *See In re 4Kids Entmn't*, 463 B.R. at 685–88 (holding breach notices were invalid because they failed to provide objective notice that a cure period was triggered). The Molberg Letter does not contain any of the foregoing terms, much less any language to suggest that its purpose was to give the General Partner (i) notice of a supposed breach of the "commercially reasonable" standard and (ii) an opportunity to cure the supposed breach. Instead, the Molberg Letter reasonably is read as a demand for the records referenced therein. That is, of course, exactly how Ms. Molberg wanted the Molberg Letter to read, so that she and the other LPs could then use the Letter for a hidden purpose: as part of a contrived and unjust effort to trigger the "cure[]" period and try to replace the General Partner.

The above reading of the Molberg Letter (*i.e.*, as a document demand) is consistent with the General Partner's response: the General Partner explained that (i) the Partnership's prior external auditor—which had provided the Partnership's audited financial statements for fiscal years 2014-20, *see* A-410—had resigned, (ii) the General Partner was working to retain a new auditor, and (iii) the General Partner would provide an update when it had a better sense of when the requested financials would be available. *See* A-228-29. Had the Molberg Letter been a legitimate notice of a supposed knowing, willful, and material breach meant to trigger the cure period, the General Partner would have responded as it did to the putative Removal Resolution—that is, with an explanation regarding why no such breach had occurred

and by taking commercially reasonable steps to provide promptly a substitute for the requested financials, namely, monthly bank statements and balance sheets for the time period covered by the request. *See* A-235-37, A-239-41.

These clear and fatal deficiencies notwithstanding, the trial court concluded—without identifying what the purported breach was—that the Molberg Letter "sufficiently identified the existence of a breach of the" LP Agreement. A-14. Even in view of the "attendant circumstances" the court referenced earlier in its Order, A-13—which it should not have considered for the reasons described above, *see supra* Section III.A.—there is no plausible basis to construe the Molberg Letter as has having identified any supposed "knowing, willful, and material breach." Like the Molberg Letter itself, the earlier emails from other LPs referenced in the Order, A-13, also are merely document demands. Plaintiffs' characterization of them as having provided "notice that [the General Partner] had breached its obligations under the LP Agreement," A-444, does not make them so.

The first email, from Dr. Henry Balboa (a plaintiff in *Black*), dated January 23, 2023 states, "Dear [Mr. Garg], Can you please confirm to me (and the other LP's cc'ed) when the Phoenix accounts for FY2020 and FY2021, audited by a reputable firm of accounts (per the [LP Agreement]), will be completed and sent to LP's. I hope Phoenix is continuing to generate the significant returns for the GP and LP's that it now appears to have done." A-465. Like the Molberg Letter, the email from Dr. Balboa does not

(i) suggest that the prior non-provision of the financials constituted a "knowing, willful and material breach" of the LP Agreement, (ii) reference the "commercially reasonable efforts" standard, (iii) mention the cure period,[6] or (iv) suggest that failure to provide the financials could result in a Cause removal of Phoenix Cayman as the General Partner. In light of Dr. Balboa's status as a plaintiff in *Black*, Mr. Garg responded appropriately by telling Dr. Balboa to direct his inquiry through counsel. The other email was more of the same. Therein, Celestino Amore, another plaintiff in *Black*, wrote in relevant part on January 28, 2023, "Dear [Mr. Garg], The pending lawsuit does not stop the GP from carrying out its duties and fiduciary obligations to distribute annual financials to the Partnership. The last financials we received were for FY 2019 . . . . Please advise when, per the terms of the [LP Agreement], we will receive validly audited accounts for 2020 and 2021." A-464-65. Like Dr. Balboa's email and the

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[6] The trial court appeared to misconstrue Defendants' grounds for dismissal when it asserted in the Order that Defendants had contended "that failure to specifically reference the 30-day cure period or the cure period provision in the LPA, on its own, is sufficient to invalidate a notice." A-13. Nowhere did Defendants argue that the absence of a reference to the cure period or to the related provision in the LP Agreement, in and of itself, renders the Molberg Letter an inadequate notice. Rather, Defendants noted on reply that the lack of such reference in the Molberg Letter and in the documents it incorporates by reference—*taken together with* the fact that the Molberg Letter is not "from the Partnership" and fails to identify a "knowing, willful, or material" breach—collectively render the notice invalid. A-749.

Notably, the trial court went on to cite a decision *supporting* that this very totality of circumstances renders a notice invalid: "*See, e.g.*, *Filmtrucks, Inc. v. Express Industries and Terminal Corporation*, 127 A.D.2d 509 (1st Dept. 1987) (finding that the correspondence at issue did not constitute proper notice to cure because it ***included ambiguous and non-imperative language, it was not sent by the proper party pursuant to the terms of the contract, and it failed to advise of the cure period and/or relevant provision in the contract***)." A-13 (emphasis added).

Molberg Letter, Mr. Amore's email did not suggest that Phoenix Cayman had committed a "knowing, willful and material breach" of the LP Agreement, reference the "commercially reasonable efforts" standard, or use language to suggest that the cure period had been triggered and that a failure to cure could lead to the loss of a contractual right (Phoenix Cayman's removal as the General Partner). Instead, the email merely reiterated Dr. Balboa's request for documents. Mr. Garg again responded appropriately by telling Mr. Amore to "pls communicate via your counsel." *Id.*[7]

Thus, nothing in the Molberg Letter, or the emails referenced therein, provides notice of an alleged "knowing, willful and material breach" of the LP Agreement sufficient to trigger the cure period.

Moreover, with respect to the other "attendant circumstances" referenced in the Order—(i) the existence of the related *Black* action and (ii) that the Molberg Letter demanded documents and cited the basis therefor, Order at 2—they likewise do not plausibly support that the Molberg Letter identified an alleged "knowing, willful and material breach." First, the *Black* action does not involve Plaintiffs' contrived claim here that the General Partner breached its obligation under the LP Agreement to

[7] To the extent the trial court relied on a February 2023 email from Ms. Molberg, A-463-64—which is notably *not* referenced in the Molberg Letter and thus is wholly irrelevant to whether the Molberg Letter satisfies the notice provision—that email also is irrelevant because it does not relate to the financial statements referenced in the Molberg Letter. Rather, it relates solely to 2020 financial statements, which, as Plaintiffs acknowledge, previously had been produced in *Black*, and already were in Ms. Molberg, Dr. Balboa, and Mr. Amore's possession when they wrote their January and February 2023 emails. *See* A-787 at ¶ 26.

provide the LPs with certain recent financial statements. The LPs devised—but failed to provide proper notice of—that claim leading up to the commencement of this litigation, after realizing that their strategy in *Black* was ill-fated. Furthermore, looking to *another* litigation to identify the purported breach underlying *this* action only reinforces that the Molberg Letter is bereft of the contractual language necessary to trigger the cure period. Second, regarding the "attendant circumstance" that the Molberg Letter demanded documents and cited the basis therefor, that only serves to underscore that the Molberg Letter is, as discussed *supra*, a document demand—not a notice containing an allegation of a "knowing, willful and material breach" of the LP Agreement that would trigger the "cure[]" period and from which a "Cause" removal could flow.

* * *

Because the Molberg Letter does not satisfy the notice requirements under the LP Agreement, the Removal Resolution is invalid and the Court should reverse the trial court's Order and dismiss the Complaint.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's Order denying Defendants' motion to dismiss and dismiss the Complaint in its entirety.

Dated: New York, New York
August 15, 2024

1/0 CAPITAL, LLC

By: */s/Jason H. Berland*

Jason H. Berland
Nathan Schwartzberg
1 World Trade Center
85th Floor
New York, New York 10007
jason@onezerocapital.com
nathan@onezerocapital.com

Attorneys for Defendants-Appellants